



Vulnerable Veterans Left in the Lurch: The Continued Harm of “Don’t Ask, Don’t Tell”

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I. Introduction

The U.S. military has historically had, at best, a weak relationship with the concept of equality. One of the clearest examples from modern history is the military's implementation and repeal of "Don't Ask, Don't Tell." Despite the military's current, more progressive, stance on this issue, elder veterans are still fighting to receive well-deserved benefits denied to them as a result of "Don't Ask, Don't Tell."

This article will begin by introducing "Don't Ask, Don't Tell" and examining its historical origins. Part II will explore the history of "Don't Ask, Don't Tell" and examine the history of discrimination against the LGBT community in the American military. Part III will look at the legal challenges waged against "Don't Ask, Don't Tell" and its eventual repeal. Part IV will talk about legislation that has been introduced, both in New York and federally, to restore benefits to those who may have been stripped of them due to dismissal from the military under the "Don't Ask, Don't Tell" regime, and will describe the particularly deleterious impact these policies have on older veterans. Finally, Part V will sum up this article and explain how more still needs to be done to correct our prior mistakes.

II. Clinton and the History of "Don't Ask, Don't Tell"

Seven months into his first term as President of the United States, Bill Clinton ascended the stage at Washington D.C.'s National Defense University. He stood on the stage and began a speech extolling the service of the United States Armed Forces, commending the military as one of the country's "finest accomplishments and greatest assets."¹

He described the plan he was announcing as a "sensible balance between the rights of the individual and the needs of our military to remain the world's number one fighting force."² He reminded the public of alleged reports that the Department of Defense spent \$500 million in the 1980s to separate and replace an approximated 17,000 homosexual people from military service. He invoked studies that showed that homosexual service members performed no less admirably or honorably than their heterosexual peers.³

Yet minutes after President Clinton's apparent condemnation of the military's policy of discrimination against homosexuals, he announced his new policy of how to best address the issue of homosexual individuals in the military:

One, servicemen and women will be judged based on their conduct, not their sexual orientation.

Two, therefore, the practice, now six months old, of not asking about sexual orientation in the enlistment procedure will continue.

Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service.

And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And, thanks to the policy provisions agreed by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.⁴

And with that speech, the policy that would become known as "Don't Ask, Don't Tell, Don't Pursue" – the policy termed a "compromise" by *The New York Times*⁵ – became the official policy of the United States government. Being openly homosexual now carried a presumption that you were a rule-breaker – that you were less admirable than your peers. It carried the presumption that, in spite of the oath that a soldier swears when he or she first enlisted with the army to defend the Constitution and to obey the President, the immutable characteristic of his or her sexual orientation allows the government to presume him or her guilty of misconduct.

It was a "federal law that required the entire military establishment to discriminate," according to Aaron Tax, the Director of Federal Government Relations for the Services & Advocacy for Gay, Lesbian, Bisexual & Transgender Elders (SAGE).⁶ SAGE has spent a significant amount of time assisting older veterans and their

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families who were deprived of military benefits due to the destructive “Don’t Ask, Don’t Tell” policy.⁷ Mr. Tax has also spent a large part of his career fighting against “Don’t Ask, Don’t Tell,” in part by providing counsel to those who were impacted by the policy.⁸

Perhaps at the time, some progressives felt this policy was a good stopgap measure—a way to reverse over two centuries of outright refusal to tolerate homosexuality in the military that began with the dishonorable discharge of Lt. Frederick Gotthold Enslin in 1778.⁹

And perhaps this was a step forward. It had been 43 years since President Truman signed the Uniform Code of Military Justice, which set up discharge rules for homosexual service members, and only 11 years since President Reagan made his now famous defense directive that “homosexuality is incompatible with military service.”¹⁰

Many Americans may have shared President Reagan’s sentiments. Many may have shared the sentiment of President Clinton, who claimed to disagree with the policy he put forward, but, nonetheless, put it forward as a compromise. Yet many Americans – some say as many as 13,000 – found themselves at the mercy of this program. An estimated 114,000 United States service members have been discharged less than honorably due to their sexual orientation since 1942.¹¹

According to Mr. Tax:

“Don’t Ask, Don’t Tell” targeted three types of things that were considered “homosexual conduct.” The first one is touching, so touching anybody of the same sex for sexual gratification, which can include dancing, handholding, kissing, or everything else. Number two would be saying to anybody in your life, ever, that you’re gay, or words to that effect. So that can be coming out to your parents when you’re ten years old, coming out to your boyfriend or girlfriend, coming out on Facebook. If any of those people told the military, or the military found out about it, or if anyone showed the information...that could mean they could kick you out. And [three], marriage, or attempted marriage to the same sex.¹²

The first prong, according to Mr. Tax, could result in expulsion from the military for anybody who may have romantically experimented with somebody of the same sex in college. A soldier could also deny having a consensual sexual tryst with a member of the same sex, accusing the other person of sexually assaulting him or her in order to avoid expulsion from the military.¹³

While people were under no duty to report homosexual activities, homosexual soldiers faced the constant threat of being exposed by their peers or their commanding officers. At any point in a long military career, someone from the past, such as a previous commanding officer, could emerge to report a soldier’s prior actions. This could lead to an investigation and, ultimately, a discharge because of “Don’t Ask, Don’t Tell.”

III. Challenges to “Don’t Ask, Don’t Tell,” Its Consequences, and Repeal

The policy faced numerous court challenges, and, on September 9, 2010, Judge Virginia Phillips of the Ninth Circuit Court of Appeals gave opponents of “Don’t Ask, Don’t Tell” a huge victory. In *Log Cabin Republicans v. United States*¹⁴ she issued a decision permanently enjoining the United States “from enforcing or applying the ‘Don’t Ask, Don’t Tell’ Act and implementing regulations against any person under their jurisdiction or command.”¹⁵

The nonprofit group of Republicans who support gay rights had mounted an attack on the “Don’t Ask, Don’t Tell” policy as facially unconstitutional by violating the Due Process and Equal Protection Clauses of the Fifth Amendment and the First Amendment right to freedom of speech. At the heart of their petition was a simple argument: “Don’t Ask, Don’t Tell” caused 13,000 service members to be deprived of benefits that had been guaranteed to them by the U.S. government.

Many of those veterans received “Other Than Honorable” discharges, prohibiting them from receiving federal military benefits. The paperwork of some gay veterans who were discharged honorably still may include narrative notes such as “homosexual conduct,” which could affect the veterans’ chance for obtaining benefits. Additionally, they may receive a negative reenlistment code, which could bar them from being able to re-enlist. In New York alone, this meant that there was a possible deprivation of “over 50 state programs, benefits, and tax breaks for military veterans that are directly contingent upon the veteran’s discharge status.”¹⁶

Judge Phillips’ ruling tracked the shifting political views at the time. In 1993, only 44 percent of Americans approved of service by openly homosexual service members; by 2008, the percentage had risen to 75 percent. Conversely, support for “Don’t Ask, Don’t Tell” fell from nearly 40 percent approval in 1993, to 22 percent by 2008.¹⁷

Furthermore, according to a Gallup poll taken in early December 2010, the repeal of “Don’t Ask, Don’t Tell” had bipartisan support from most average Americans. Americans who identified as Liberal Democrats (86% for repeal, 11% against); Conservative/Moderate Democrats (79% for repeal, 11% against); and Moderate/Liberal Republicans (69% for repeal, 11% against) all favored repeal. The only group not in favor of repeal were Conservative Republicans (39% for repeal, 57% against).¹⁸

Decades of public support combined with a negative court ruling is sometimes the perfect formula to spur Congress into action, and shortly after Judge Phillips’ ruling, Congress committed to the “‘Don’t Ask, Don’t Tell’ Repeal of 2010,” which was fully implemented by 2011. Unfortunately, this implementation did little to address the status of service members who had previ-

ously been discharged – they needed to individually apply to the Department of Defense if they wanted to attempt to have their discharge status changed to “honorable.”

Unfortunately for these veterans, the government continues to address the status of such wronged service members via a gradual piecemeal process, partly because “Don’t Ask, Don’t Tell” was just part of the larger conservative legislative effort of the day to promote

“On Memorial Day this year, I released a report titled *Restoration of Honor: Expanding LGBT Veterans’ Access to State Veterans’ Benefits*. The report identified at least 53 New York State benefits for veterans that are directly contingent upon the discharge status of the veteran,” Sen. Hoylman explained.²³

Some of the 53 benefits that Senator Hoylman spoke about are: general eligibility for local programs and services offered by state and local veterans agencies;

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“family values.” Shortly after “Don’t Ask, Don’t Tell” was implemented, service members were prevented from receiving certain benefits under a different law, the Defense of Marriage Act (DOMA), which was passed one Congressional session after “Don’t Ask, Don’t Tell.”¹⁹

Among other things, DOMA limited the definition marriage to the union of one man and one woman for purposes of federal law and for federal benefits. This affected certain dependent-related benefits for same-sex service members including, but not limited to, Basic Allowance for Housing (BAH), medical benefits through the Military Health Care System (TRICARE), and family separation allowances.²⁰

DOMA came before the Supreme Court in 2013. Writing for a 5-4 majority, Justice Anthony Kennedy described the section legitimizing only heterosexual marriage in the eyes of the law as an unconstitutional deprivation of the liberties guaranteed by the Fifth Amendment, and that it served no compelling state interest.²¹

For the moment, the Supreme Court appears to have adopted the view of lower courts and of the public, that the benefits granted to a veteran service member or his or her family should not be conditioned on his or her conformity to a specific sexual orientation. It appears that such restrictions would simply not survive a Supreme Court challenge on due process grounds.

IV. Legislation to Revive Benefits for Those Stripped of Them Through “Don’t Ask, Don’t Tell” Discharges

Even with the repeal of these federal laws, many states have laws that condition the receipt of state benefits on the discharge status of a retired service member, and getting that discharge status changed can be difficult. “Dozens of state benefits are directly related to discharge status, and aside from petitioning the U.S. Department of Defense to change a discharge status – there’s not much else to be done,” explains New York State Senator Brad Hoylman (D-NY).²²

health screening services for those veterans who may be experiencing health problems; eligibility to gain status as a service-disabled veteran-owned business; lower barriers to obtaining street vending licenses; eligibility to benefit from provisions of the Veterans Employment Act; additional points on civil service exams; job protections if their civil service position is abolished; access to SUNY scholarships; the ability to get a high school diploma, if they do not already have one; pension and retirement benefits; eligibility for \$2,500 toward burial costs reimbursed through New York State Veteran Burial Fund; eligibility for burial in a veterans cemetery or in the veterans section of a regular cemetery; identification of veteran status on driver’s licenses; distinctive license plates commemorating service in war; eligibility for various tax exemptions; various appointment opportunities; entitlement to an annuity paid to veterans; eligibility to apply for the issuance or renewal of a gun license; exemption from age restriction for the issuance of a gun license; eligibility to receive the Conspicuous Service Cross award from the Governor; paid leave for public employees on holidays commemorating their service.²⁴

“The laws we identified touch virtually every aspect of veterans’ lives, from scholarships to job opportunities to health screenings to reimbursement for burial costs,” the Senator said.²⁵

When the amount of all of these various benefits is combined, individuals who were discharged as a result of “Don’t Ask, Don’t Tell” could easily be stripped of benefits totaling hundreds of thousands of dollars, and the older the veteran, the greater the chance that he or she has benefited from one of these programs or relies on one of them.

However, organizations such as SAGE note that some people were discharged from the military because they were not good soldiers, not because of their sexual orientation. “You can be kicked out, despite ‘Don’t Ask, Don’t Tell,’ legitimately,” noted Mr. Tax, “not because of ‘Don’t

Ask, Don't Tell,' but because you are a lousy service member. Step A is that they are discharging you. Step B is what discharge characterization are they giving you."²⁶

That's why Senator Hoyer introduced the Restoration of Honor Act on Veterans Day in 2011. He lamented the fact that the 2010 repeal of "Don't Ask, Don't Tell" did not include language to retroactively support the 14,000 service members who lost benefits under the law. Senator Hoyer's Act would

make clear that LGBT veterans are not to be considered ineligible to access state programs, services, or benefits due to a less than honorable discharge based solely on their sexual orientation or gender identity. It would establish a streamlined certification process within the State Division of Veterans' Affairs for LGBT veterans to clarify their discharge status for the purposes of accessing state programs, services, or benefits. Finally, it would place the burden on the state to prove that a veteran who has been discharged from the military because of their sexual orientation or gender identity is not otherwise eligible to receive state programs, services, or benefits The experience of

remain available to gay, lesbian and bisexual veterans seeking corrective action.

Our bill . . . would simplify the paperwork requirement necessary for service members to initiate a review, making it clear that the lack of documentation cannot be used as the basis for denying a review. Finally, it would require the historians of each military service to review cases where service members were discharged for their sexual orientation before the repeal of "Don't Ask, Don't Tell." This would improve the historical record that the Defense Department can use to help gay, lesbian and bisexual veterans correct their records.²⁸

The Restore Honor to Service Members Act is crucial for the many former servicemen and women living in poverty. It is estimated that 1.4 million veterans live below the poverty line and that over 57,000 veterans are homeless on any given night. Elder veterans have higher poverty rates compared to any class of veterans younger than them.²⁹ Furthermore, over 900,000 veterans live in

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LGBT service members in the United States military was one of repression, deception, and fear for over two centuries. For the vast majority of our nation's history, men and women willing to risk their lives in service of their country faced unceremonious discharges or even criminal penalties solely due to their sexual orientation or gender identity.²⁷

Senator Hoyer's legislation tracks the federal "Restore Honor to Service Members Act," introduced in the United States House of Representatives in July 2013 by Charles Rangel of New York and Mark Pocan of Wisconsin, and in the Senate by Kirsten Gillibrand of New York and Brian Schatz of Hawaii.

The four Congresspeople wrote in an op-ed published in November 2015:

The Department of Defense has already begun working to give service members who were discharged solely because of their sexual orientation the chance to restore their records to reflect their honorable military service. However, that process remains onerous for many service members, often requiring them to retain legal counsel to navigate red tape and produce paperwork that they may not have. Moreover, there is no legal requirement that the appeals process always

households that receive food stamps and another 3.5 million veterans receive disability benefits. Additionally, more than 350,000 survivors of veterans receive death benefits.³⁰

However, veterans who were discharged less than honorably could potentially have trouble receiving these benefits, which could total up to about \$17,000 per year based on a multitude of eligibility factors such as: income, marital status, spouse's veteran status, whether the veteran has any children, and number of children, among many other factors.³¹

Furthermore, many of these policies will have a particularly acute effect on older veterans. Furthermore, as these veterans age, and are less likely to be able to work, this potential income becomes more and more critical.

Across the country, many municipalities allow veterans to apply the time they spent in the military toward their pension, to varying degrees. However, an "Other Than Honorable" discharge mandated by "Don't Ask, Don't Tell" prevents many veterans from being able to apply their service time toward their pensions. While this would affect anybody who received "Other Than Honorable" discharges, it would disproportionately

affect older veterans who are nearing retirement age. It would especially affect those who may be suffering the long-term physical effects which commonly manifest themselves in older veterans who served tours of duty.

Furthermore, these restoration laws are also necessary for older veterans who were discharged because of “Don’t Ask, Don’t Tell” because they may not receive the same death benefits that many of the heterosexual people they served alongside will surely receive, such as burial cost reimbursement.³² Given the prevalence of poverty in the veteran community, especially the older adult veteran community, this category of benefit goes a long way toward ensuring that people received the honorable burial they have earned by putting their life on the line for the United States of America.³³

While the passage of the Restore Honor to Service Members Act is far from guaranteed, it does not appear that current service members who identify as part of the LGBT community will be effectively pushed back into the closet due to any new federal enactments prohibiting them from serving in the military. Mr. Tax agrees that

it would be hard to put the genie back into the bottle. Even logistically, if you think about how hard it would be if they wanted to go back to “Don’t Ask, Don’t Tell” . . . what would you do with everybody who came out? Would you kick every gay person out? And then in Congress, if they thought that they could get them to pass a law like that, administratively, they would be hard pressed to come up with the regime that would pass constitutional law...could they try? Well yeah. But I don’t think that it would get very far.³⁴

V. Conclusion

The political landscape has shifted significantly for LGBT service members over the last 20 years. While the big victories in Congress and the courts are hugely significant, there are still many obstacles facing LGBT veterans. New York is in the minority of states with this type of legislation pending, and federal legislation has stalled in Congress.

While Congress and the courts have announced that veterans discharged under “Don’t Ask, Don’t Tell” will have their records restored, the process is slow. The Uniform Code of Military Justice still prohibits and criminalizes sodomy.

Younger veterans are more easily able to supplement their income with other work as they wait for their “Other Than Honorable” discharges to be reversed, but many older veterans do not have the same options or the same time frame. These people who struggled on the battlefield in service to their country are still struggling to convince their government that they deserve equal veteran benefits. ■

2. *Id.*
3. *Id.*
4. *Id.*
5. Paul F. Horvitz, ‘Don’t Ask, Don’t Tell, Don’t Pursue’ Is White House’s *Compromise Solution: New U.S. Military Policy Tolerates Homosexuals*, N.Y. Times (July 20, 1993), www.nytimes.com/1993/07/20/news/20iht-gay_1.html.
6. Telephone Interview with Aaron Tax, Director of Federal Governmental Relations, SAGE USA (Mar. 4, 2016).
7. *What We Do*, SAGE USA, www.sageusa.org/about/what.cfm.
8. See Aaron Tax, SAGE USA, www.sageusa.org/about/staffbio.cfm?ID=42.
9. Maureen Renee Zieber, *Frederick Gotthold Enslin: An Obscure Military Life*, The Gay History Project, <http://gayhistoryproject.epgn.com/historical-profiles/frederick-gotthold-enslin-an-obscure-military-life/>.
10. Staff Reports, *A History of ‘Don’t Ask, Don’t Tell’*, Washington Post (Nov. 30, 2010), www.washingtonpost.com/wp-srv/special/politics/dont-ask-dont-tell-timeline/.
11. Press Release, Mark Pocan, Pocan & Rangel Announce Legislation to Correct Records of 114,000 Gay Veterans Discharged because of Their Sexual Orientation (Jun 19, 2013), <https://pocan.house.gov/media-center/press-releases/pocan-rangel-announce-legislation-to-correct-records-of-114000-gay>.
12. Interview with Aaron Tax, *supra* note 6.
13. *Id.*
14. 658 F.3d 1162 (9th Cir. 2011).
15. <http://graphics8.nytimes.com/packages/pdf/13military/031111036449.pdf>.
16. Brad Hoylman, Restoration of Honor: Expanding LGBT Veterans’ Access to State Veterans’ Benefits 3, https://www.nysenate.gov/sites/default/files/bh_-_2015.05.25_-_restoration_of_honor_report.pdf.
17. Brian J. McCabe, *Public Opinion on “Don’t Ask, Don’t Tell,”* FiveThirtyEight (Nov. 30, 2010, 3:56 PM), http://fivethirtyeight.blogs.nytimes.com/2010/11/30/public-opinion-on-dont-ask-dont-tell/?_r=0.
18. Lymari Morales, *In U.S. 67% Support Repealing “Don’t Ask, Don’t Tell,”* Gallup (Dec. 9, 2010), www.gallup.com/poll/145130/support-repealing-dont-ask-dont-tell.aspx.
19. <https://www.govtrack.us/congress/bills/104/hr3396/text/rh>.
20. *After DOMA: Military Spousal Benefits*, Lambda Legal, www.lambdalegal.org/publications/after-doma-military-spouses.
21. *United States v. Windsor* 133 S.Ct. 2675, 2680 (2013).
22. Email Interview with Brad Hoylman, New York State Senator (Mar. 3, 2016).
23. *Id.*
24. Hoylman, *supra* note 16.
25. Interview with Brad Hoylman, *supra* note 22.
26. Interview with Aaron Tax, *supra* note 6.
27. Hoylman, *supra* note 16.
28. Brian Schatz, Kirsten Gillibrand, Mark Pocan and Charles Rangel, *Restoring Honor to Gay, Lesbian and Bisexual Veterans: Column*, USA Today (Nov. 11, 2015), www.usatoday.com/story/opinion/2015/11/11/restoring-honor-gay-lesbian-bisexual-veterans-military-record-column/75522706/.
29. Profile of Veterans in Poverty: 2014, U.S. Department of Veteran Affairs, www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_In_Poverty_2014.pdf.
30. Bill Quigley, *Millions of Soldiers and Veterans in Trouble*, Common Dreams (July 7, 2014), www.commondreams.org/views/2014/07/07/millions-soldiers-and-veterans-trouble.
31. Veterans Affairs Aid And Attendance Benefits, www.canhr.org/fact-sheets/misc_fs/html/fs_aid_and_attendance.htm (last visited Mar. 8, 2016).
32. Hoylman, *supra* note 16.
33. Profile of Veterans in Poverty, *supra* note 29.
34. Interview with Aaron Tax, *supra* note 6.

1. Press Release from the Office of the Press Sec’y for Remarks by the President at National Defense University (July 19, 1993), <http://clinton6.nara.gov/1993/07/1993-07-19-presidents-remarks-on-changes-to-the-gay-ban.html>.