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## Negotiating Social Change: Backstory Behind the Repeal of Don't Ask, Don't Tell

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# NEGOTIATING SOCIAL CHANGE: BACKSTORY BEHIND THE REPEAL OF DON'T ASK, DON'T TELL

*Linell A. Letendre*  
and *Hal Abramson\**

## Abstract

This Article is about negotiating social change in the largest U.S. institution, the Military and its five Services. Inducing social change in any institution and society is notoriously difficult when change requires overcoming clashing personal values among stakeholders. And, in this negotiation over the repeal of Don't Ask, Don't Tell (DADT), clashing values over open service by gays and lesbians were central to the conflict.

In response to President Obama's call to repeal DADT, the Secretary of Defense selected a Working Group to undertake studies, surveys and focus groups to inform the debate. During the nine-month process of gathering a massive amount of information, the Working Group did much more than inform. Its process cultivated buy-in by resistant Service members to the largest shift in social values in the military since racial integration in 1948.

This study examines how the Pentagon's Working Group process contributed to the change and prepared stakeholders for implementation in an Article jointly written by Brigadier General Letendre, Dean of the Faculty at U.S. Air Force Academy, who served as the legal advisor to the Co-Chair of the Working Group, and Professor Hal Abramson, an academic and practitioner in the field of dispute resolution who is an award-winning author.

The authors use theoretical negotiation benchmarks to explain and examine choices made by the Working Group while assessing the process against the same benchmarks. While this Article is joint, it is enriched by

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\* Brig. Gen. Linell A. Letendre is the Dean of the Faculty, United States Air Force Academy and former Permanent Professor of the Department of Law, United States Air Force Academy. She served on the Pentagon's 2010 DADT Working Group as legal advisor to Co-Chair General Ham. The views in this Article are those of the author and do not necessarily reflect official policy or position of the U.S. Department of Defense. Professor Hal Abramson, Touro College, Jacob. D. Fuchsberg Law Center, has published extensively in the fields of negotiations, mediation, and international conflict resolution and visited at the U.S. Air Force Academy for eleven months to help build its program on negotiations.

We want to thank Associate Dean for Research and Scholarship and Professor of Law Rodger Citron and Professor of Law Andrea Schneider and Director of Marquette's Law School Dispute Resolution Program for their valuable comments and feedback on late drafts of this Article.

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short commentaries by each author, in which Brigadier General Letendre offers an insider's view at key points while Professor Abramson offers his observations on key choices. Ultimately this Article is a case study of a complex multiparty process with lessons on negotiating social change.

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## INTRODUCTION

The proposal to repeal Don't Ask, Don't Tell (DADT) was a quixotic initiative to open military service to gays and lesbians. It seemed destined for failure. The repeal was advanced by a newly elected and young Democratic president, Barack Obama, who had no military experience. He was opposed by the Joint Chiefs of Staff and one of the most esteemed defenders of the military, Senator John McCain, among other formidable opponents.<sup>4</sup> The repeal also involved more than weighing the pros and cons of changing a law; it required parties to confront a momentous social change. In less than a year from the time the President called for repeal in his State of the Union address in January 2010,<sup>5</sup> DADT was repealed, and gays and lesbians could serve openly in the military.<sup>6</sup> How did this happen against these odds? What are the lessons for future social reform efforts?

This Article explores how multiparty engagement through focus groups and surveys can accelerate social change ahead of wide public acceptance. The repeal implicated a value-based choice that triggered deeply held conflicting views regarding the impact of gay and lesbian service on military effectiveness, a central military decision-making standard. No one disputed the qualifications of gays and lesbians.<sup>7</sup> This dispute was fueled by conflicting beliefs on how people ought to behave and what is right and wrong.<sup>8</sup> This value-based conflict distressed

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4. *See infra* Part V (listing resisters to repeal).

5. Press Release, White House Off. of the Press Sec'y, Remarks by the President in State of the Union Address (Jan. 27, 2010), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-state-union-address> [<https://perma.cc/9LRP-XGTQ>] [hereinafter 2010 State of the Union].

6. The repeal statute was adopted by Congress in December 2011 and became effective in September 2012. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

7. *See infra* Part II (describing the origins of DADT).

8. *See* Kimberly A. Wade-Benzoni et al., *Barriers to Resolution in Ideologically Based Negotiations: The Role of Values and Institutions*, 27 ACAD. OF MGMT. REV. 41, 43 (2002) ("In contrast to other negotiation domains, such as simple economic exchanges like commodity purchases, the issues in ideologically based conflicts are very closely associated with negotiators'

Military leaders who feared that repeal would negatively affect military effectiveness.

Value-based conflicts are among the most difficult ones to resolve.<sup>9</sup> Professor Lawrence Susskind, an eminent MIT scholar and practitioner, describes the dynamics of value conflicts as fractious with intransigent parties:

When values and identities are at stake, parties are less willing to soften their demands, even if doing so could lead to trades that would satisfy other interests they might have. Such situations tend to heighten defensiveness, distrust, and alienation. Feelings of anger or hurt may intensify, prompting parties to be more judgmental and certain that the other party acted inappropriately. Such situations may lead to personal attacks as well. Parties may feel there's a great deal at stake, causing them to harden their commitment to particular principles or to worry that any agreement they reach might set a bad precedent. Overall, there may be a greater sense that such disputes are intractable, since values often appear to be incompatible and mutually exclusive . . . .<sup>10</sup>

This story of social reform that required overcoming value differences is conveyed through the lens of a negotiation process and uses negotiation theory to explain what happened and what was effective. This successful process, however, was structured and implemented by leaders who were not formally trained as negotiators. They did not consider the techniques championed in the literature and taught in schools and training programs. They did what made sense to them given their considerable experiences

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identities. Individuals' positions in ideologically based-negotiation typically emerge from beliefs at the core of why they are—what they believe about the reality of world, how the world behaves, and what fundamental rights people have; their notions of justice, and what they think is right and wrong.”).

9. See LAWRENCE SUSSKIND AND JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 204 (1987) (encouraging parties to reframe disputes to not focus on sacrosanct values if possible because value conflicts, like negotiations over handgun regulations for example, are not amenable to consensus building); CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 110–11, 159 (4th ed. 2014) (presenting the Circle of Conflict that covers five causes of conflict, including intractable value conflicts); HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER* 160, 254–55 (3d ed. 2013) (discussing the challenge of overcoming value conflicts).

10. Lawrence Susskind & Adam Z. Rose, *How to Negotiate When Values are at Stake*, NEGOT. (Oct. 1, 2010), <https://cbi.org/article/2010/how-to-negotiate-when-values-are-at-stake/> [<https://perma.cc/XK77-SCU7>] (exploring this daunting challenge in an article published the same year as the proposal for repeal was advanced and posing the same value conflict raised by DADT repeal in a workplace conflict over a diversity campaign that included a positive poster about a gay employee and another employee posted bible verses condemning homosexuality).

and mission. This is not a case study of how theory leads practice; instead, the theory explains the practice choices.

This story emerged by happenstance when the co-authors met at the U.S. Air Force Academy (USAFA). Air Force Brigadier General Letendre, when serving as Colonel and head of the department that taught law at USAFA, selected Professor Abramson to visit for eleven months to help build USAFA's negotiation program. During monthly lunches and breakfasts, Professor Abramson learned the backstory of the repeal from someone who was directly involved as part of the Pentagon's DADT Working Group. Brigadier General Letendre learned that the backstory was a multiparty negotiation process. Together, the co-authors present this story of one of the largest and most successful organization-wide reforms in the history of the United States military.

It was easy to miss this multiparty negotiation process, given the directive of the Secretary of Defense, Robert Gates. He set up a high-level working group at the Pentagon for the limited purpose of studying the risks of repeal and developed an implementation plan if there were a repeal.<sup>11</sup> The Working Group was instructed to not take a position for or against repeal.<sup>12</sup> Its role was limited to informing the discussion.<sup>13</sup> The formal negotiations, although to be informed by the Working Group's studies, would take place in Congress, where multiparty negotiations are part of its daily business.

Even though the Working Group was instructed to only inform the discussions, it functioned as a *de facto* facilitator of a negotiation process.<sup>14</sup> In addition to generating a mountainous amount of information, the Working Group identified stakeholders and their interests as well as engaged stakeholders for and against repeal in multiple ways. Moreover, it facilitated discussions that produced a weighty and persuasive result, a robust report and a repeal implementation plan by the Co-Chairs that met many of the stakeholders' interests. This result was affected by looming judicial decisions that were positioned to swiftly supersede the negotiation process.

This successful multiparty negotiation process, which contributed to a historic cultural change in one of the most vital and complex institutions in the U.S., offers lessons on negotiating social change that this Article examines and highlights.

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11. U.S. DEP'T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF "DON'T ASK, DON'T TELL" 153–56 (2010) [hereinafter DADT REPORT].

12. *Id.*

13. *Id.*

14. See *infra* Part 3 (discussing the DoD Working Group Mandate and the ways in which the Working Group served as a *de facto* facilitator).

In order to take advantage of the different perspectives of each of the co-authors, we added separate commentary throughout this Article under the initials LAL or HA. Brigadier General Letendre brings the insider perspective and experience of a uniformed member of the military, accrued over twenty-nine years, and a member of the Pentagon's working group on the DADT repeal and legal advisor to the Co-Chair. Professor Abramson brings the perspective and experiences of a dispute resolution scholar and practitioner for about the same number of years. We hope that the occasional departure from "we" to individual commentary enriches this Article.

### I. HISTORICAL CONTEXT (ORIGINS OF DADT)

From today's perspective, the adoption of the DADT policy in 1994 as a monumental advancement for gays and lesbians in the military may be a surprising view. DADT permitted gays and lesbians to serve only if they did not tell anyone.<sup>15</sup> This glowing characterization may seem unfounded if not offensive, but it is only with a historical perspective in mind that the significance of DADT repeal, as a landmark social reform, can be understood and appreciated.

The story of DADT adoption begins with a campaign promise by then-candidate Bill Clinton in 1992 to open up military service for gays and lesbians.<sup>16</sup> Within days of assuming office, President Clinton learned the challenges of doing so from the vigorous opposition of the Joint Chiefs of Staff and then-Chairman, General Colin Powell.<sup>17</sup>

In an Oval Office meeting only five days after becoming President, the Joint Chiefs expressed the military's "solid wall of opposition to lifting the ban."<sup>18</sup> Powell, the President's chief military advisor at the time, argued that the prohibition should remain in place as it aligned with the Uniform Military Code of Justice statute that forbade "sodomy."<sup>19</sup> Powell also argued that lifting the ban would be unrealistic to implement, as there was no "absolute right to privacy" in the military, where Service

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15. 10 U.S.C. § 654 (1993) (repealed 2010).

16. See Jeffrey Schmalz, *Gay Politics Goes Mainstream*, N.Y. TIMES MAG., Oct. 1992, at 320; Eric Schmitt, *Challenging the Military: In Promising to End Ban on Homosexuals, Clinton Is Confronting a Wall of Tradition*, N.Y. TIMES, Nov. 12, 1992, at A1.

17. See Josh Gerstein, *Clinton, Powell Talked Gays in Military*, POLITICO (Oct. 10, 2014), <https://www.politico.com/story/2014/10/clinton-documents-gays-in-the-military-111784> [<https://perma.cc/WMM9-FU2L>]; RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY 40 (2010), <https://www.rand.org/pubs/monographs/MG1056.html> [<https://perma.cc/4YAW-QAJB>] [hereinafter 1993 RAND Update].

18. See 1993 RAND UPDATE, *supra* note 17, at 42. President Clinton was inaugurated on January 20, 1993.

19. Powell: *Military 'Struggling' over Gays*, WASH. POST, <https://www.washingtonpost.com/archive/politics/1992/12/01/powell-military-struggling-over-gays/1e92238a-c117-4203-acd7-fad60bf96ea8/> [<https://perma.cc/4QU5-KDU3>] (last visited May 1, 2022).

members often shared close quarters.<sup>20</sup> He was concerned whether the military would be able to force straight members to room or be in close quarters with their homosexual counterparts.<sup>21</sup>

While Powell's views may be antiquated and repugnant to many today, the political and social climate of the eighties and early nineties was one fraught with apprehension of openly gay Service members, fueled by the emergence of HIV/AIDS.<sup>22</sup> The issue was controversial, with public opinion almost evenly divided: 43% of Americans approved of lifting the ban, 50% disapproved, and 7% had no opinion.<sup>23</sup> This division and these fears had to be confronted by Clinton when trying to open the military for all people, regardless of sexual orientation.<sup>24</sup> Indeed, *New York Times* columnist Thomas Friedman noted at the time that lifting the ban "would involve the most radical change to the social fabric of the American military since President Harry S. Truman ordered the army integrated in 1948."<sup>25</sup>

Even though President Clinton did not leave this first meeting with the support he wanted, he struck a deal for going the next step with Joint Chiefs and the Senate leadership that opposed lifting the ban. Clinton issued a directive to Secretary of Defense Les Aspin, dated January 29, 1993, to draft an executive order by July 15th that would end discrimination based on sexual orientation in the military while applying rigorous sexual conduct standards to maintain unit cohesion (military effectiveness).<sup>26</sup> The executive order was accompanied with an order to conduct a six-month in-depth study by a comprehensive military working group.<sup>27</sup> The working group was obliged to address any potential issues

20. Russell Berman, *The Awkward Clinton-Era Debate Over 'Don't Ask, Don't Tell,'* ATLANTIC (Oct. 2014), <https://www.theatlantic.com/politics/archive/2014/10/the-awkward-clinton-era-debate-over-dont-ask-dont-tell/381374/> [<https://perma.cc/CA7K-SYJF>].

21. *See id.*

22. Lindsay Mahowald, *LGBTQ+ Military Members and Veterans Face Economic, Housing, and Health Insecurities*, AMERICANPRESS.ORG (Apr. 28, 2022), <https://www.americanprogress.org/article/lgbtq-military-members-and-veterans-face-economic-housing-and-health-insecurities/> [<https://perma.cc/KW2N-B7LH>].

23. Lydia Saad, *Gallup Vault: Issue of Gays in Military Split Americans in 1993*, GALLUP (July 28, 2017), <https://news.gallup.com/vault/214745/gallup-vault-issue-gays-military-split-americans-1993.aspx> [<https://perma.cc/4XRX-B5CS>].

24. RAND, *SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT* 242–71 (1993), [https://rand.org/pubs/monograph\\_reports/MR323.html](https://rand.org/pubs/monograph_reports/MR323.html) [<https://perma.cc/NCQ6-2MDY>].

25. 1993 RAND UPDATE, *supra* note 17, at 42 (citing Thomas L. Friedman, *To the Mat; Now Clinton Decides Which Promises Came First*, N.Y. TIMES (Nov. 15, 1992), <https://www.nytimes.com/1992/11/15/weekinreview/to-the-mat-now-clinton-decides-which-promises-came-first.html> [<https://perma.cc/7B6P-C9TX>]).

26. Press Conference, President Bill Clinton, Press Conference on "Gays in the Military" (Jan. 29, 1993), <https://millercenter.org/the-presidency/presidential-speeches/january-29-1993-press-conference-gays-military> [<https://perma.cc/C3AW-FCKY>].

27. *Id.*

with implementing a plan and to include an interim measure that would remove from enlistment applications the question about sexual orientation.<sup>28</sup>

The opposition that Clinton faced during his first meeting with the Joint Chiefs mirrored the opposition he encountered with key members of Congress. The pushback endured for the full six months during which the study was conducted and continued through later Congressional hearings on DADT.<sup>29</sup> Reports afterwards highlighted the level of military resistance to repealing the ban. A later 1993 Working Group Report “concluded that homosexuality remained inconsistent with military service, and that the presence in the military of individuals identified as homosexuals would have a significantly adverse effect on both the readiness of the force and unit cohesion.”<sup>30</sup> A Department of Defense (DoD) commissioned report by RAND later found that “the prevailing attitudes of both the leadership and many military personnel are hostile to any change” and “that hostile opinion toward homosexuals is prevalent in the American military . . . .”<sup>31</sup>

Due to the strongly divided public opinion and resistance within the military, Secretary of Defense Aspin contracted with RAND’s National Defense Research Institute to undertake a study that would offer policy options.<sup>32</sup> After studying prior DoD racial integration experiences as well as how foreign militaries and domestic fire and police departments handled integration of gays and lesbians,<sup>33</sup> RAND’s study explored different solutions.<sup>34</sup> Ultimately, RAND recommended a policy that it concluded would offer a realistic and consistent approach towards lifting the restriction while maintaining the high level of standards and conduct necessary for combat effectiveness and unit cohesion.<sup>35</sup> The RAND Report concluded that

Only one policy option was found to be consistent with our research, within the directive, and within itself. That policy would consider sexual orientation, by itself, as “not germane” to determining who may serve in the military and

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28. *Id.*

29. Thomas L. Friedman, *Gay Rights in the Military: Chiefs Back Clinton on Gay-Troop Plan; President Admits Revised Policy Isn’t Perfect*, N.Y. TIMES, July 20, 1993, at A16 [hereinafter *Gay Rights in the Military*]; 1993 RAND UPDATE, *supra* note 17, at 43.

30. DADT REPORT, *supra* note 11, at 21.

31. RAND, *supra* note 24, at 3, 32.

32. *Id.* at iii.

33. *Id.* §§ 3–5.

34. *Id.* §§ 12, 13.

35. *Id.* at iii.

would establish clear, strictly enforced standards of conduct for all military personnel.<sup>36</sup>

The proposed “not germane” policy focused on a conduct-based approach for opening service to gays and lesbians.<sup>37</sup> The approach concentrated on professional conduct and rules and neutralized sexual orientation as a consideration.<sup>38</sup> So long as people followed the code of conduct, sexual orientation should not matter.<sup>39</sup>

The RAND proposal rejected the option of treating homosexuals as a protected class (an affirmative action-type status) and attempting to change majority attitudes.<sup>40</sup> Instead, it favored a policy that treated homosexuals under existing regulations.<sup>41</sup> It viewed this approach as one

36. *Id.* at 333.

37. RAND, *supra* note 24, at 32–36.

38. *See id.* at 34–35.

39. When reaching this “not germane” approach as the best policy, RAND’s focus groups, as well as a LA Times survey and other research on this subject, did not consider the capabilities of homosexuals. *Id.* at 213, 333. The RAND study found that most people did not think that sexual orientation affected a person’s ability to do their job, nor would it affect unit effectiveness. *Id.* at 333. As explained in the 1993 RAND report:

That policy would consider sexual orientation, by itself, as “not germane” to determining who may serve in the military and would establish clear, strictly enforced standards of conduct for all military personnel. This single standard of conduct would be neutral regarding gender and sexual orientation. Decisions on military accession and retention would be based on individual qualifications and behavior, not on a person’s category. Homosexuals would not be treated as a separate class under this option.

....

... Military experience with blacks and women argues for a simple policy under which homosexuals are treated no differently in terms of work assignments, living situations, or promotability. Indeed, the documented capabilities of homosexuals to perform all military tasks enable the policy to be simple.

....

... Of the 74 percent who disapproved [of repealing DADT], 63 percent opposed sharing quarters and facilities with homosexuals, 40 percent said homosexuality was immoral, 28 percent cited contribution to the spread of AIDS, and 21 percent said it was against their religious views. Fifteen percent felt that homosexuals were less reliable in a combat situation, and a total of 9 percent of respondents chose all other reasons, such as morale, causing conflict, cost of facilities, threats of violence, and wanting equal rights as married persons (Item G-19).

*Id.* at 213, 333, 380. In contrast, when the military considered whether women could serve, there was still “continuing strong doubts about capability.” RAND, *supra* note 24, at 32.

40. *Id.* at 33.

41. RAND, *supra* note 24, at 33.

“likely to be more successful for the American military.”<sup>42</sup> This option would formally end discrimination on the basis of sexual orientation while assuring military order and discipline. It would not endorse a “gay lifestyle” nor require any special accommodation because homosexuals would be considered as individuals, not a special class.<sup>43</sup> If sexual orientation would not be a factor for eligibility, then emphasis could be placed on conduct and implementing uniform standards that applied to all military personnel.<sup>44</sup>

One of the benefits of this approach would be that it would require no significant changes in military policies or law, including the law central to military service, the Uniform Code of Military Justice.<sup>45</sup> The essential elements for the policy would include strict enforcement of existing rules that govern professional conduct and sexual harassment and would eliminate DoD directives regulating private sexual behavior among adults.<sup>46</sup> Prosecutorial policy also would be revised to apply only to non-consensual sexual acts.<sup>47</sup> The overall approach would avoid the larger issues of whether to recognize homosexual marriages or provide various benefits to homosexual partners.<sup>48</sup>

The RAND approach offered Clinton a compromise between his promise to outright eliminate the service ban and the forceful opposition from Congress, especially the House of Representatives.<sup>49</sup> Rationalizing that some progress was better than none, Clinton moved forward with the DADT policy. No one would be allowed to openly ask recruits or active personnel about their sexual orientation (Don’t Ask), and any gay recruits or lesbian recruits or personnel would be required to keep their sexual orientation private (Don’t Tell). Additionally, the ‘Don’t Pursue’ part of the policy would prohibit investigations into a person’s sexual orientation without just cause from higher-ranking officials.<sup>50</sup>

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42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at xviii.

46. *Id.* at 34.

47. RAND, *supra* note 24, at 34.

48. *Id.* at 35–38.

49. The House had already voted down two previous amendments to lift the ban, with one being more lenient and the other more restrictive than what the compromise would offer. See Jeffrey T. Spoeri, *The Pennsylvania Avenue Tug-of-War: The President Versus Congress Over the Ban on Homosexuals in the Military*, 45 WASH. U. J. URB. & CONTEMP. L. 175, 176 (1994). Clinton could allow Congress to vote on his original unconditional proposal to end the fifty-year ban, though it would most likely be voted down, again. Or, he could endorse a compromise that would align with his goals and had a good chance for approval. This second option would eventually become known as the Don’t Ask, Don’t Tell, Don’t Pursue directive. See RAND, *supra* note 24, at 43.

50. RAND, *supra* note 24, at 43–45.

While this compromise was not the outright repeal that Clinton had sought, it did represent progress. It was better than the old policy that prohibited any gay or lesbian person from enlisting or serving, that allowed officers to inquire about sexual orientation during the recruitment process, and that authorized investigations into alleged misconduct for violating the ban. In contrast, the new policy granted relatively greater protections. It permitted gay and lesbian persons to serve in the armed forces under one onerous condition, so long as they did not reveal their sexual orientation. Of course, they also had to follow the strict guidelines that applied to personal and professional conduct for maintaining unit cohesion and combat effectiveness.

The compromise garnered the unanimous support of the Joint Chiefs of Staff, with Powell supporting it.<sup>51</sup> He thought it would enhance military effectiveness by removing recent uncertainties and friction.<sup>52</sup> However, the compromise, even with support from the Joint Chiefs of Staff, was still met with disapproval by leaders of both political parties.<sup>53</sup>

Both sides were ultimately left frustrated. Conservatives were unhappy about altering existing policy; progressives were unhappy that Clinton reneged on his campaign promise.<sup>54</sup> Clinton himself recognized that this was “not a perfect solution” or “identical with some of my own goals.”<sup>55</sup> He added that “It certainly will not please everyone—perhaps not anyone—and clearly not those who hold the most adamant opinions on either side of the issue.”<sup>56</sup> He viewed it, however, as “a substantial advance” over the half century ban and concluded it struck “a sensible balance between the rights of the individuals and the needs of the military.”<sup>57</sup>

With the support of the Joint Chiefs and after a grueling and tumultuous six months of studies and debate, President Clinton officially put forth the DADT statute.<sup>58</sup> It was adopted on October 1, 1993<sup>59</sup> and included a statutory finding that offers a stark reminder of the level of resistances that had to be overcome before DADT could be repealed in 2011. When adopting DADT, Congress found that: “The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high

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51. John Lancaster, *Senators Find Clinton Policy on Gays in Military Confusing*, WASH. POST, July 21, 1993, at A12.

52. *Id.*

53. *Gay Rights in the Military*, *supra* note 29, at A1.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Don't Ask, Don't Tell*, BRITANNICA, <https://www.britannica.com/event/Dont-Ask-Dont-Tell> [<https://perma.cc/X4NB-YKSY>] (last visited May 3, 2022).

standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”<sup>60</sup>

Following the DADT enactment, it was immediately attacked in the Courts that heard cases from Service members who claimed to be wronged by the new law.<sup>61</sup> Civil rights groups including the American Civil Liberties Union (ACLU) and the Lambda Legal Defense and Education Fund led the legal challenges.<sup>62</sup> In *Able v. United States*,<sup>63</sup> one of the first cases to be tried, DADT was challenged as unconstitutional under the Equal Protection Clause.<sup>64</sup> This argument prevailed in the trial court, as a landmark and short-lived victory, until reversed by an appeals court.<sup>65</sup> *Able* was the first of multiple DADT legal challenges as will be further considered in the Part on the Best Alternatives to a Negotiated Agreement (BATNA) (alternatives to negotiated resolutions).<sup>66</sup>

In the years following DADT passage, over thirteen thousand Service members were discharged under the policy.<sup>67</sup> These administrative discharges occurred despite continued studies attacking the 1993 Congressional findings. One such study, published in the American Psychological Association Review, stated that “empirical evidence fails to show that sexual orientation is germane to any aspect of military effectiveness including unit cohesion, morale, recruitment and retention.”<sup>68</sup> In 2005, the Government Accountability Office reported that the cost of implementing DADT included \$95.4 million in recruiting costs.<sup>69</sup>

After President Obama’s election in 2008, the new President and the Democratic Party that held a majority in both Houses of Congress sought repeal of DADT. During President Obama’s State of the Union address

60. 10 U.S.C. § 654 (1993) (repealed 2010).

61. See, e.g., *Able v. United States*, 847 F. Supp. 1038 (E.D.N.Y. 1994); *McVeigh v. Cohen*, 983 F. Supp. 215 (D.D.C. 1998); *Witt v. United States Dep’t of the Air Force*, 444 F. Supp. 2d 1138 (W.D. Wash. 2006); *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011).

62. ‘Don’t Ask, Don’t Tell’ Is Challenged in Suit, N.Y. TIMES, Mar. 8, 1994, at 18.

63. 847 F. Supp. 1038 (E.D.N.Y. 1994).

64. See, e.g., *id.* at 1038; *ACLU History: Challenging Don’t Ask Don’t Tell*, ACLU (Sept. 1, 2010), <https://www.aclu.org/other/aclu-history-challenging-dont-ask-dont-tell> [<https://perma.cc/Q63M-ULRF>].

65. See, e.g., *Able*, 155 F.3d at 628.

66. See *infra* Part V.

67. DADT REPORT, *supra* note 11, at 32.

68. *Sexual Orientation & Military Service*, AM. PSYCH. ASS’N, <https://www.apa.org/about/policy/military-archived> [<https://perma.cc/S2RD-FUHA>] (last visited Aug. 5, 2021).

69. U.S. GOV’T ACCOUNTABILITY OFF., GAO-05-299, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 30 (2005).

on January 27, 2010, he announced that he would pursue repeal.<sup>70</sup> Less than five weeks later, Secretary of Defense Gates established a Comprehensive Review Working Group (Working Group) whose task was to assess the impact of repeal and recommend any changes necessary for implementation if repeal occurred.<sup>71</sup> The Working Group's vital role in the repeal process and its scope of responsibilities will be examined in the next Part.<sup>72</sup>

*LAL: I was a Fourth Class Cadet (freshman) at the U.S. Air Force Academy when the DADT debate raged in the spring of 1993. While I certainly had gay and lesbian classmates, few trusted others enough to reveal their sexual orientation . . . and for good reason. The environment was hostile toward open service; “queer jokes” were the norm. Flash-forward seventeen years, to when I was a field grade officer (an O-4) and an Air Force JAG and I received an urgent call from the top Air Force Judge Advocate, Lt Gen Jack Rives. “Mr. Johnson wants you to be a scribe for the DADT report. Interested?” That same day, the Secretary of Defense announced the establishment of a working group to the Senate Armed Services Committee, and I started a new job. Jeh Johnson was selected as Co-Chair of the Working Group.*

## II. DoD WORKING GROUP MANDATE

Secretary of Defense Gates established an “intra-Department, inter-Service working group to conduct a comprehensive review of the issues associated with a repeal of the [DADT] law.”<sup>73</sup> Gates’ directive was a response to the President’s appeal to Congress to repeal DADT and the President’s directive to the Pentagon “to consider how best to implement a repeal.”<sup>74</sup> Gates explained that the Department owed the President “an assessment of the implications of such a repeal, should it occur.”<sup>75</sup>

Gates appointed as co-chairs two senior DoD officials, a highly regarded civilian and then General Counsel to the Defense Department, Jeh Johnson, and an Army General with 37 years of distinguished service, General Carter Ham.

The Working Group performed a central role in the public and private debates as Congress moved toward decision day when members would vote for or against repeal. The Working Group’s assigned role was not as

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70. 2010 State of the Union, *supra* note 5.

71. *See infra* app. A.

72. *See infra* Part II.

73. *See infra* app. A (emphasis added).

74. Mike Mount, *Gates Outlines Study on Letting Gays Serve Openly in the Military*, CNN (Mar. 2, 2010, 9:06 PM), <http://www.cnn.com/2010/US/03/02/gates.gays.military/index.html> [<https://perma.cc/P2U2-TAN4>].

75. *Id.*

a facilitator although as a practical matter, it did function as a de facto one.<sup>76</sup>

That practical role was evident from the Defense Secretary's Directive, starting with what it did *not* direct the Working Group to do. It was not instructed to answer the ultimate question—whether DADT ought to be repealed, an exclusion that spurred the Working Group toward a more non-partisan, neutral role. The Directive also instructed the Working Group to engage stakeholders and supply information that policymakers needed to make an informed decision, instructions that spurred the Working Group toward a facilitative role.<sup>77</sup>

In particular, Gates directed the Working Group to “assess and consider the impacts, if any, a change in the law would have on military readiness, military effectiveness and unit cohesion, and how to best manage such impacts during implementation.”<sup>78</sup> He also directed the Working Group to systematically engage the force, other key stakeholders, and Members of Congress, and to carry out the entire effort “in a professional, thorough, and dispassionate matter.”<sup>79</sup> The directive included a detailed Terms of Reference that covered Objectives and Scope, Methodology, Deliverables, and Support. He also imposed a short deadline of only nine months to submit a report.<sup>80</sup>

*LAL: We understood at the outset that we were NOT answering “should” the law be repealed; that was a political question. We were answering “could” and if so, “how.” For nine months, I carried with me the two-page directive and pulled it out multiple times a day for vector checks as we explored each issue at hand. By the time the final report was published, my directive was wrinkled and worn, but it never once failed to provide guidance.*

*Second only to the SecDef's directive was a succinct order by Co-Chair General Ham. At the Working Group's first meeting, General Ham announced his number one rule for serving on this Group: “Check your personal views at the door.” He explained that our personal views did not matter. We had a task to do to the best of our ability. The question was not whether any individual approved or disapproved of homosexuality in general or of gays and lesbians serving openly in the military. We needed to put aside our personal beliefs to accomplish*

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76. As expressed by Jonathan Lee, who served as Special Assistant to the Co-Chair Jeh Johnson, the Working Group “helped facilitate a DADT repeal process that met the President's and the Secretary of Defense's vision of the right way to accomplish this change.” See Jonathan Lee, *The Comprehensive Review Working Group and Don't Ask, Don't Tell Repeal at the Department of Defense*, 60 J. HOMOSEXUALITY 282, 308 (2013).

77. See *infra* app. A.

78. *Id.*

79. *Id.*

80. For the full directive and terms of reference, see *infra* app. A.

objectively what the Working Group was asked to do. He then directed anyone to leave who could not accomplish the task because of their personal beliefs. No one left.<sup>81</sup>

I did not appreciate the degree to which General Ham set aside his own personal views until the morning the Working Group's Final Report was released nine months later. General Ham, when presenting the Report in a closed-session hearing before the House Armed Services Committee, was asked his personal opinion about gays and lesbians serving openly in the military. The Report had concluded that the risk of repeal to overall military effectiveness would be low. General Ham responded by explaining that "his personal, deeply held religious views did not condone homosexuality." General Ham's co-chair Jeh Johnson remarked afterwards that Ham's statement was the first time he heard Ham give his personal view.<sup>82</sup>

**HA:** From a vantage point of a person trained in dispute resolution, I thought it was clever to carve out of the Working Group's mandate any consideration of the merits of a repeal and not for the obvious political and perception reasons. As a consequence of the Working Group and Co-Chairs assessing only the impact of repeal, members could try to do their work without being distracted by developing a view for or against repeal. This more limited role pulled members toward a more neutral perspective, that was reinforced by the second task—to develop an implementation plan regardless of their personal views on repeal.

Dividing the Working Group's work product into two separate reports also was an astute choice when considering how the reports would be used by policymakers. Because the Co-Chairs presented a report that assessed the repeal impact separately from a report on an implementation plan, policymakers could weigh whether to vote for repeal based on the assessment report with reassuring knowledge of a feasible pathway for implementation if they chose to repeal.

Notwithstanding the admirable efforts to boost neutrality of the Working Group through the formal directive and informal instructions, the Working Group as an "intra-Department, inter-Service working group" could not ultimately be viewed as neutral. It was composed of interested parties, Service members and civilian DoD employees, all of whom would be affected by the outcome of the process.<sup>83</sup> Rather than

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81. Linell A. Letendre & Martin L. Cook, *Right to Right: Personal Beliefs vs. Professional Obligations*, 48 U.S. ARMY WAR COLL. Q. 7, 12–14 (2018).

82. *Id.* at 13–14.

83. This point will be considered in-depth in the Part on information-gathering. See *infra* Part VII.

operating as neutral-facilitators, the Working Group functioned more accurately as party-facilitators.

As interested parties, members could be perceived as reluctant to risk their status within the group by asking difficult questions or challenging superiors up the chain of command or as biased for or against particular outcomes, as can commonly occur when using party-facilitators. However, DoD personnel also offered the benefits of party-facilitators: the members came with valuable knowledge, experience, and relationships with many stakeholders that gave the Working Group the necessary expertise, credibility, and head start on the short timetable.<sup>84</sup>

The Working Group informally facilitated a robust negotiation process by engaging numerous stakeholders as will be considered in the Part on Stakeholders,<sup>85</sup> by gathering a massive amount of information to inform the discussions as will be examined in the Part on Information-Gathering,<sup>86</sup> and by fashioning recommendations that considered stakeholders' interests as will be analyzed in the Part on Commitment.<sup>87</sup>

### III. NEGOTIATION FRAMEWORK

Before delving into the elaborate DADT repeal process as a negotiation, this Article will set out well-recognized negotiation benchmarks that it will apply. As noted in the introduction, this was not a process where theory led practice. Instead, theory provides a basis for assessing what was done.

In this overview of the negotiation process, we identify benchmarks based on the popular interest-based model,<sup>88</sup> which is used today by the military.<sup>89</sup> This model and its benchmarks can be packaged in multiple

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84. See Lisa Hinz, *Pros and Cons of Using Internal and External Facilitators*, U. MINN. EXTENSION, <https://extension.umn.edu/public-engagement-strategies/pros-and-cons-using-internal-and-external-facilitators#sources-611660> [<https://perma.cc/3YJH-YUWQ>] (last visited Aug. 5, 2021); Sylvie Lessard, et al., *External Facilitators and Interprofessional Facilitation Teams: A Qualitative Study of Their Roles in Supporting Practice Change*, IMPLEMENTATION SCI. 3 (July 16, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4947272/> [<https://perma.cc/BNY4-5T28>] (studying the use of external and internal facilitators in health care).

85. See *infra* Part V.

86. See *infra* Part VI.

87. See *infra* Part VII.

88. ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 42–57 (3d ed. rev. 2011).

89. This interest-based negotiation framework is used within the military. See U.S. DEP'T OF DEF., DOD INSTRUCTION 5145.05, ALTERNATIVE DISPUTE RESOLUTION (ADR) AND CONFLICT MANAGEMENT (May 27, 2016), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/514505p.pdf> [<https://perma.cc/5PHP-ST6U>]; U.S. AIR FORCE, AIR FORCE INSTRUCTION 51-1201, NEGOTIATION AND DISPUTE RESOLUTION PROGRAM (Oct. 2, 2018), <https://www.af.mil/Portals/1/documents/eo/1/afi51-1201.pdf> [<https://perma.cc/X8FH-CWZC>]. The model is also used to teach cadets at USAFA and West Point with a variation used by Air Force Negotiation Center.

ways. We will use a circle metaphor that will be introduced in this Part and further elaborated upon in Appendix B on the Negotiation Framework as well as in the relevant Sections of the Article when applied to the DADT repeal process.<sup>90</sup> We will consider what the Working Group did before going into the circle to negotiate, what happened inside the circle, and how the Working Group exited the circle.<sup>91</sup>

This circle metaphor as a negotiation map incorporates seven key elements, or for our purposes, benchmarks. Before entering the circle to negotiate, parties build relationships among themselves (Relationships) and gather the information they will need for the negotiations (Communications). When inside the circle, parties identify the interests of the different stakeholders (Interests), develop numerous options for a possible resolution (Option-generation), and then claim what they need for resolution by citing objective standards, trading options, or negotiating positionally (Claiming). If the negotiation is successful, parties exit the circle to solidify their resolution (Commitment). If the negotiation fails to succeed, parties exit the circle to implement their alternatives to settlement, known as their Best Alternatives to a Negotiated Agreement (BATNA).<sup>92</sup> Most of the elements in this negotiation map will be cited throughout this Article as benchmarks.

We also will consider how the Working Group used two “plus” techniques that can be especially helpful in multiparty negotiations: (a) the I-C-N Framework for classifying the roles of parties into one of three groups: parties that need to be informed about what is happening, parties that need to be consulted as the negotiation proceeds, and parties that are directly involved in the negotiations; and (b) the Single Text Procedure for eliciting feedback on drafts before a final proposed resolution is presented.<sup>93</sup>

#### IV. STAKEHOLDERS

##### A. *Identifying and Grouping Stakeholders by Positions (Not Interests)*

When gathering information while still outside the circle, major stakeholders in any dispute should be identified. That is exactly what

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90. See *infra* app. B.

91. Bruce Patton, *Building Relationships and the Bottom Line: The Circle of Value Approach to Negotiation*, NEGOT., Apr. 1, 2004, at 4–7; Bruce Patton, *Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005) (summarizing the Circle of Value and Seven Element Problem-solving negotiation model).

92. A negotiator’s BATNA is simply a negotiator’s best alternative to an emerging negotiated resolution, as further explained in Appendix B. In the DADT negotiations, the best alternative to a negotiated resolution was seeking a judicial resolution.

93. See *infra* app. B on Negotiation Framework for brief explanation of these two techniques.

Secretary of Defense Gates sought when setting up the Working Group. He directed it to engage a broad and diverse list of stakeholders.<sup>94</sup>

In his directive, Secretary Gates stated that it was “essential that the working group systematically engage the force.”<sup>95</sup> In the attached terms of reference, he instructed the Working Group to “[e]nsure participation” within the military community by involving “military service leadership; appropriate OSD staff elements; cross service officer and enlisted communities; mid-grade and senior ranks; human resources/personnel specialists; pay and benefits specialists; family support programs specialists; accession point and training communities; service academies and/or senior service schools; and medical, legal and religious support personnel.”<sup>96</sup> He also directed the Working Group to reach outside the military to other stakeholders “[i]n an appropriately balanced manner” and to “engage Members of Congress, key influencers of potential service members and other stakeholder groups that expressed a view on the current and prospective policy.”<sup>97</sup>

The Working Group had to translate this mandate into a list of specific people and organizations. The mandate went beyond the obvious stakeholders that were directly involved in changing the law, the Members of Congress. Even in a conventional two-party conflict, there can be other parties who may have a stake in the outcome like a spouse or business partner. And in this negotiation, there were many other stakeholders who were affected, including people who may have been necessary for implementing any resolution or were capable of derailing it. In a multiparty negotiation, identifying all the parties with a stake in the outcome can be challenging for the obvious reasons: a large number of possible stakeholders can be impacted and the degree of impact on each one is not always evident.<sup>98</sup>

The Working Group in its final report identified a long list of interested organizations and people that it engaged in meetings including those who were “prominent advocates for and against the repeal.” The Working Group met with fifteen different advocacy groups plus same-sex partners of current gay and lesbian Service members.<sup>99</sup> It also consulted with the four heads of the Services’ chaplains corps and their endorsing organizations, met with the Service Surgeons General and key medical associations and solicited input from twenty veteran and military service organizations and met with several members of Congress and

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94. *See infra* app. A.

95. *Id.*

96. *Id.*

97. *See infra* app. A for the Directive and Terms of Reference.

98. *See* Carrie Menkel-Meadow, *Conflict Resolution by the Numbers*, 33 NEGOT. J. 317, 318 (2017).

99. *See infra* app. A.

their staffs.<sup>100</sup> The Working Group surveyed 400,000 Service members and 150,000 heterosexual spouses—one of the largest DoD surveys conducted at that time.<sup>101</sup>

As in all negotiations, identifying the stakeholders is only a starting point. Stakeholders' positions and interests also need to be understood in order to learn what motivates each of them. Grouping positions and interests also can suggest likely alliances and coalitions that might develop, an inherent and complicating dynamic in any multiparty process.<sup>102</sup>

For the purposes of this study, stakeholders can be divided into three primary groups: those who were against repeal or at least resisted it (resist repeal), those who favored immediate repeal (for repeal), and those who preferred gradual repeal (gradualists). The gradualists may have preferred this approach because, in the case of an immediate repeal, there was a concern that it would cause chaos and undermine military effectiveness. There was a fourth group that is worth noting even though we will not give much attention to them in this Article: the undecided. This group included Members of Congress, Service members, and even some Chaplains. Many in this fourth group seemed to be influenced by, if not deferential to, the ultimate position of the Pentagon and its leaders.

The stakeholders within each group were bound by a common *position* on DADT: resist repeal, support repeal, or gradual repeal. Of course, a common position is not the same as a common interest. A position is the result a stakeholder wants; an interest reflects the reason for the position as was discussed in the Part on the Negotiation Framework.<sup>103</sup> A common position of stakeholders within a group can be motivated by different interests. For example, many Chaplains and some military leaders may have shared a common position to resist repeal, but Chaplains and military leaders may have been motivated by different interests. The opposition of some Chaplains may have been based on religious principles while the opposition of some military leaders was due to the timing of repeal while fighting two wars. These different interests may have brought together the stakeholders to support a common position.

### B. *Stakeholders' Roles and Concerns*

The role of each stakeholder within each group can be classified based on its degree of involvement in the negotiations, as introduced in the

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100. *Id.* at 40–42 (full list stakeholders and process for engaging them).

101. *Id.* at 1–2 (See Part 7 on information-gathering for more details of how the surveys were conducted.).

102. See LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 209–13, 239 (Pearson Education, 7th ed. 2019) (explaining how coalitions operate in multi-party processes).

103. See *infra* Part III.

Section on Negotiation Framework when discussing the I-C-N decision making tool.<sup>104</sup> Under the I-C-N tool, three possible roles can be identified: Does the stakeholder *decide* (directly involved in the negotiations)? Should the stakeholder be *consulted*? Or should the stakeholder just be *informed*? These three descriptions can help clarify how to involve each stakeholder in a multiparty process.<sup>105</sup>

The parties who *decided* were easy to identify because the negotiation involved the repeal of a law. The only deciders were the two houses in Congress and the President who announced at the outset that he supported repeal. Among these deciders, there was a lot of direct negotiating.

The other two categories cover stakeholders that lacked decision-making authority although they had different degrees of influence over the deciders. Stakeholders that needed to be *consulted*, like senior military leaders, had subject matter expertise, were influential and were affected by any repeal. Their support or acquiescence were essential for repeal to be successful. Stakeholders that needed to be *informed*, like most Service members, also were influential and were affected by any decision. Their support or acquiescence also was necessary, although they lacked subject matter expertise and their status did not warrant greater involvement in the negotiations.

If a stakeholder without decision-making authority feels involved and believes their input has been understood and considered, they may be more willing to support or acquiesce to a decision, even one with which they disagree or that imposes negative consequences. Giving attention to these non-decision-makers can help cultivate their buy-in to the ultimate outcome and its implementation.

With this three-category framework in mind, we will classify the role of key stakeholders, indicate their position in brackets, and identify the primary concerns that induced their position.

## Deciders

### *The President [Repeal]*

President's Obama's position on DADT was clear: repeal it. As emphasized during his election campaign, along with the 2008 Democratic party platform that included gay and lesbian rights as a major component, repeal of DADT was a priority for President Obama as highlighted in his first state of the union address.<sup>106</sup>

### *Congress [Resist, Repeal, Gradualists]*

Members of Congress were split among those who favored repeal,

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104. See *infra* Part III.

105. See *supra* Part III; JEFF WEISS, HBR GUIDE TO NEGOTIATING 112–16 (2016).

106. 2010 State of the Union, *supra* note 5.

gradualists, and resisters. Those favoring repeal wanted to give gays and lesbians the full opportunity to serve freely in the military and argued that their service would enhance military effectiveness. Gradualists favored action on the military's timeline; they were concerned that judicial rescission of DADT would not allow time for a smooth transition. And, those resisting repeal argued that "if it ain't broke, don't fix it."<sup>107</sup> Some made moral arguments and viewed repeal as a threat to religious liberty and as marginalizing religious beliefs.<sup>108</sup> Others contended that repeal would undermine military effectiveness and increase the risk of harm to service personnel in war zones during the transition or after the transition.<sup>109</sup> Even Senator John McCain, a powerful and persuasive voice on military matters, opposed repeal throughout the 2008 presidential debates and voted against repeal. He described the vote to repeal as a "very bad day" that would "prove deadly distracting."<sup>110</sup>

### **Consulting Parties-Primary** (close to being Deciders)

#### *Secretary of Defense and Uniformed Service Leadership* [Gradualists]

The Secretary of Defense and the Uniformed Service Leadership did not have formal decision-making authority during the nine-month process but did have de facto veto authority because key members of Congress were unlikely to support repeal without support of the defense department's leadership. As evidence of the essential role (and influence) of the defense department's leadership, the repeal statute that was ultimately adopted would not become effective until certified by the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff that, among other matters, repeal implementation will be "consistent with standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces."<sup>111</sup>

The Service leaders were officially neutral as they were obligated to be,<sup>112</sup> although they were probably restrained skeptics. They kept their

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107. See 156 CONG. REC. S10649 (2010).

108. See *id.*

109. See *id.*; 156 CONG. REC. S10669-10679 (2010).

110. See Garance Franke-Ruta, *John McCain's 'Don't Ask, Don't Tell' Last Stand*, ATLANTIC (Dec. 18, 2010), <https://www.theatlantic.com/politics/archive/2010/12/john-mccains-dont-ask-dont-tell-last-stand/68243/> [<https://perma.cc/GKB7-X8YN>].

111. Don't Ask, Don't Tell Repeal Act, S. 4023, 111th Cong. (2010).

112. For example, when Lt. General Mixon wrote a letter to the editor of Stars and Stripes in March 2010 outlining his position against repeal and advocating for Service members and families to speak out in opposition, both the Secretary of Defense and Chairman of the Joint Chiefs of Staff rebuked Mixon's statements as "inappropriate" to say because of his military status. See Kevin Baron, *Pentagon rebukes general for opposing repeal of 'don't ask, don't tell' law*, STARS AND STRIPES (Mar. 25, 2010), <https://www.stripes.com/news/pentagon-rebukes-general-for-opposing-repeal-of-don-t-ask-don-t-tell-law-1.100302> [<https://perma.cc/3F7B-CX4R>]. Chairman

personal views private. As the process progressed and repeal seemed possible, they unsurprisingly became gradualists. They wanted to produce their own plan of incremental change to maintain military effectiveness. The Service Branches' worst nightmare was an overnight change in policy. They wanted to control any repeal so that they could minimize chaos and confusion during any transition and deal directly with any backlash from some Service members and supporting organizations.

As might be expected, the five services chiefs also were not in agreement on repeal at every step. Even at the Senate Armed Service Committee hearing right after the Working Group's Report was released, "[t]he chiefs varied in their views, with, generally speaking, the Vice Chairman of the Joint Chiefs of Staff, the Chief of Naval Operations, and the Commandant of the Coast Guard in favor of repeal, and the Chiefs of Staff of the Army and Air Force and the Commandant of the Marine Corps not in favor of repeal at this time."<sup>113</sup> The Marine Corps Commandant was most resistant; however, they all agreed that the military could execute the implementation plan if DADT were repealed.<sup>114</sup>

### Other Consulting Parties

This is a sampling of key consulting stakeholders who had considerable subject matter expertise and influence, who would monitor any implementation, and whose support would ease implementation.

#### *Center for Military Readiness (CMR) [Resist Repeal]*

CMR was a powerful and conservative military lobbying group with the core interest of maintaining military effectiveness.<sup>115</sup> It was formed to address issues at the intersection of social issues and military defense.<sup>116</sup> The CMR focused on the military's ability to effectively execute its operations.<sup>117</sup> It opposed repeal because there were too many unanswered questions about the implications of repeal, including the risk of undermining military effectiveness.<sup>118</sup>

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of Joint Chiefs, Admiral Mullen, even thought Nixon should consider resigning over the comments. *Id.*

113. Lee, *supra* note 76, at 306.

114. *Id.*

115. *About CMR*, CTR. FOR MIL. READINESS, <https://www.cmrlink.org/about> [https://perma.cc/KN2T-WKNC] (last visited June 13, 2018).

116. *Id.*

117. *Id.*

118. *See Military Culture Coalition Memo: Would LGBT Law and Policies Benefit or Harm Our Military?*, CTR. FOR MIL. READINESS, <https://www.cmrlink.org/data/Sites/85/CMR>

*Chaplain Corps Members (and their Endorsing Agencies)* [Primarily Resist Repeal]

Chaplain Corps Members that conducted religious services for the military had multiple interests. Many chaplains were concerned that their free exercise of religion and speech would be curtailed, and any conflict between their religious beliefs and military policy would impact negatively on their career, including promotional opportunities.<sup>119</sup> Some were worried that contrary to their religious beliefs, they would have to counsel, marry, or work with gay and lesbian Service members.<sup>120</sup> A minority of chaplains, primarily some Episcopalian and Lutheran chaplains, supported repeal.<sup>121</sup>

Of the 200 Religious Endorsing Agencies, most opposed repeal although would not withdraw endorsements if the law were repealed, unless chaplains' free exercise of religion or speech would be curtailed. An endorsement by a qualified religious organization was essential for a military chaplain to serve.<sup>122</sup>

*OutServe and the Service Members Legal Defense Network (SLDN)* [Repeal]

OutServe and SLDN have since merged and have the common interest of advocating for LGBT rights in the military.<sup>123</sup> Obviously, OutServe and SLDN wanted gay and lesbian servicemembers to have the same rights as heterosexual servicemembers.

*Palm Center* [Repeal]

Palm Center conducts research on critical and controversial public policy issues. It did studies that focused on the rights and opportunities for LGBT persons in the military as part of its push for immediate repeal.<sup>124</sup>

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Documents/CRWG\_QUESTIONS-6.pdf [https://perma.cc/9QZN-5DCC] (last visited June 13, 2018).

119. DADT REPORT, *supra* note 11, at 134–36.

120. *Id.*

121. *See* DADT REPORT, *supra* note 11, at 135.

122. *Id.* at 135.

123. As of May 2019, OutServe and SLDN merged with the American Military Partner Association to form the Modern Military Association of America (MMAA). *See Who We Are*, MOD. MIL. ASS'N OF AM., <https://modernmilitary.org/about/> [https://perma.cc/FGX8-S6WC] (last visited Aug. 8, 2021).

124. *About the Palm Center*, PALM CTR., <https://www.palmcenter.org/about/> [https://perma.cc/4FUU-HB49] (last visited Aug. 9, 2021).

## Parties to be Informed

Two large groups needed to be informed because they would be affected by repeal and involved with implementation due to their status but would not be directly involved in the negotiations: heterosexual Service members and their families and gay and lesbian Service members and their families.

### *Service Members in Support of Repeal*

These Service members expressed interests in promoting freedom of service, recognizing the changing times, and reducing burdens on gay and lesbian Service members.<sup>125</sup> Many Service members saw the integration of gays and lesbians into the military as the next logical step after integration based on race and gender.<sup>126</sup> Those in support of repeal viewed any resistance as largely generational as younger Service members were “more accepting of open homosexuality.”<sup>127</sup> They thought that repeal would be an insignificant change because they believed they had already served alongside gay and lesbian Service members and saw repeal as a “non-event.”<sup>128</sup> Their primary interests included insuring everyone was capable and that the military had enough personnel to accomplish its mission.<sup>129</sup>

### *Service Members Against Repeal*

These Service members often expressed religious and moral objections.<sup>130</sup> They were also concerned about sharing living facilities with gay and lesbian Service members, socializing within units, new training for a repeal during wartime, flamboyancy in the face of standards, spread of STDs such as HIV, money and resources expended on benefits for gay and lesbian Service members, using the military as a social experiment, and diminishing family values.<sup>131</sup>

### *Heterosexual Spouses of Service Members*

Heterosexual spouses of Service members were largely okay with repeal according to the Working Group’s Survey where 78% of families said “repeal would have no effect on or would improve their family readiness” while 8% said it would reduce family readiness.<sup>132</sup>

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125. DADT REPORT, *supra* note 11, at 56–61.

126. *Id.* at 59–60.

127. *Id.* at 59.

128. *Id.* at 59.

129. *Id.* at 58.

130. *Id.* at 51.

131. DADT REPORT, *supra* note 11, at 50–56.

132. *Id.* at 114.

### *Gay and Lesbian Service Members*

Input from these Service members and their families was difficult to gather. The Working Group wanted to ensure that it heard from them and their spouses and partners, but the Working Group could not learn their names because the DADT statute required that they be discharged.<sup>133</sup> So, the Working Group designed a third-party process with confidentiality safeguards to gain their input.<sup>134</sup> Their interests included removing the heavy burden of DADT, which promoted lying about their lives, and increasing their personal effectiveness and unit cohesion by promoting honesty with fellow unit members.<sup>135</sup> They also wanted to stop hiding their families and involve them in their work lives.<sup>136</sup>

### *C. Transition to Next Sections*

As appropriate for any multiparty process, the Working Group identified and engaged a diverse range of stakeholders, learned their concerns, and involved them at appropriate junctures. The stakeholders actively participated in the deliberative process as will be examined under the Information-Gathering Part.<sup>137</sup> In the final Part on Commitment, we will highlight how the Working Group's Recommendations addressed many of the stakeholders' interests.<sup>138</sup> In the next Part, we will consider why many of the stakeholders, whether resisting appeal, pushing for repeal, or advocating for a gradualist approach, stayed involved in the negotiations due to their unattractive alternative to a negotiated agreement (their BATNA).<sup>139</sup>

*LAL: As should be apparent by this description of the various stakeholders, DoD was pulled in multiple directions by the legislative and executive branches, a large number of diverse advocacy groups, and, as highlighted in the next Part, the judiciary. Right in the middle of this morass of heated conflicting views was DoD and its Working Group trying to conduct studies and surveys, review an array of policy decisions, and prepare recommendations to help inform this controversial debate. To make matters more complicated, we needed to remain vigilant to not only engage the full range of advocacy groups, but also to do so in an equitable manner regarding time spent and topics discussed. One key member of the Working Group had a full-time job to handle all engagements and to ensure parity of access among interested groups.*

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133. *Id.* at 2.

134. *Id.*

135. *Id.* at 60–61.

136. *Id.*

137. *See infra* Part VI.

138. *See infra* Part VII.

139. *See infra* Part V.

*(Yes, this is my undisguised attempt to make readers feel at least a little bit sorry for DoD!)*

## V. WHY NEGOTIATE? THE BATNA

Why would these stakeholders prefer to negotiate at the proverbial negotiation table rather than exit the circle? The answer lies in what would have happened if they left. Parties leave when they think they can gain a more favorable outcome elsewhere. In negotiation nomenclature, the leaving option is known as the Best Alternative to a Negotiated Agreement (BATNA)<sup>140</sup>

For some stakeholders, the preferred alternative to a negotiation can be the status quo. If they do nothing or find a way to derail the negotiations, then the status quo would be maintained, which in this case would be retaining the 1993 DADT law. This was a preferred alternative for any stakeholder that opposed repeal until the 2003 U.S. Supreme Court *Lawrence v. Texas*<sup>141</sup> decision when doing nothing no longer necessarily meant nothing would happen. The changed legal landscape precipitated by the *Lawrence* decision posed a palpable risk of a judicially imposed modification or invalidation of DADT.

Legal challenges to DADT began before the *Lawrence* decision; they began soon after the federal statute and DoD implementing regulations were adopted in late 1993.<sup>142</sup> Within only a few months, in early March, the ACLU and Lambda Legal Defense & Education Fund filed a federal suit on behalf of six gay and lesbian Service members arguing that DADT was invalid under the First and Fifth Amendments to the Constitution.<sup>143</sup> Other suits soon followed.

In a series of early appellate court decisions, the courts ruled entirely in DoD's favor because the courts gave military views great deference and because the law was tested against a minimum standard of scrutiny under the equal protection and free speech clauses. Any rational basis for DADT was sufficient for upholding the statute.<sup>144</sup> These decisions

140. FISHER ET AL., *supra* note 88, at 102. *See also infra* app. B.

141. *Lawrence v. Texas*, 539 U.S. 558 (2003) (held a Texas sodomy statute as unconstitutional under the due process clause).

142. For a discussion of legal cases from the adoption of DADT to repeal, see JODY FEDER, CONG. RSCH. SERV., R40795, 'DON'T ASK, DON'T TELL: A LEGAL ANALYSIS' (2013).

143. *See Able v. United States*, 847 F. Supp. 1038, 1039 (E.D.N.Y. 1994) (granting a preliminary injunction but not reaching the full merits of the claims) *rev'd*, 88 F.3d 1280 (2d Cir. 1996); '*Don't Ask, Don't Tell*' *Is Challenged in Suit*, *supra* note 62; *see also* Thomasson v. Perry, 80 F.3d 915, 919 (4th Cir. 1996) (upholding the constitutionality of DADT).

144. Challenges to DADT were consistently rejected in various circuits when the Government only had to show a rational basis for the policy. *See Able v. United States*, 155 F.3d 628, 632 (2d Cir. 1998); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996); *Able*, 88 F.3d at 1296; *Thomasson*, 80 F.3d 928–29 (4th Cir. 1996) (en banc).

offered an attractive BATNA for stakeholders who opposed repeal and the gradualists that feared an overnight change in policy. Judicial outcomes provided more certainty than negotiating a resolution.

The legal landscape for DADT was transformed by the *Lawrence* decision when it reversed the decision in *Bowers v. Hardwick*.<sup>145</sup> For the first time, the Supreme Court gave heightened scrutiny to a statute that impacted homosexuals.<sup>146</sup> Even though the Court did not articulate the level of scrutiny other than requiring a “careful analysis,”<sup>147</sup> the decision opened the judicial door to probing laws more deeply rather than merely looking for a rational basis to uphold them.

Litigants were eager to find out whether DADT would survive under *Lawrence*’s heightened level of scrutiny. This new era of rapidly unfolding litigation changed the BATNA for stakeholders in the period leading up to President Obama’s effort to repeal DADT and the formation of the Working Group. Three cases quickly became the testing grounds for crafting a new BATNA for the stakeholders.

In the first decision by a circuit court to apply the new *Lawrence* standard, *Witt* restored a substantive due process claim after rejecting the limited rational basis review by the lower court.<sup>148</sup> The government needed to advance an important governmental interest under a multi-factor test.<sup>149</sup> The court applied a heightened level of scrutiny to DADT and found that the government advanced an important governmental interest involving the management of the military.<sup>150</sup> However, it was unclear whether DADT, when applied to the plaintiff reservist, Major Witt, satisfied the other required factors for upholding the law.<sup>151</sup> When applied to Major Witt, did the law further significantly the government’s interest? Was there a less intrusive means that would serve that interest? In this first heightened scrutiny case, the court remanded it to the trial court to consider whether the Government’s defense of DADT satisfied these other two factors.<sup>152</sup> This as-applied test also opened the door to the possibility of different results for different gay or lesbian Service members.

Less than three weeks later, a decision by another Circuit Court dismissed a challenge to DADT based on its interpretation of *Lawrence*. In *Cook v. Gates*,<sup>153</sup> the court noted that courts and commentators interpreting *Lawrence* have diverged over the doctrinal approach for

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145. 478 U.S. 186 (1986).

146. *Lawrence*, 539 U.S. 558, 578.

147. *Id.*

148. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 821 (9th Cir. 2008).

149. *Id.*

150. *Id.*

151. *Id.* at 821.

152. *Id.*

153. 528 F.3d 42, 51 (1st Cir. 2008).

invalidating the sodomy statute. Some had read *Lawrence* to apply a rational basis approach.<sup>154</sup> Others viewed the test as one based on strict scrutiny.<sup>155</sup> A third group thought the case balanced state and individual interests in a way that was neither a strict scrutiny nor rational basis test. The court concluded that there was no consensus on how to read *Lawrence*'s doctrinal approach.<sup>156</sup> The court in *Cook* was persuaded that "*Lawrence* did indeed recognize a protected liberty interest for adults to engage in private, consensual sexual intimacy, and applied a balancing of constitutional interests that defies either the strict scrutiny or rational basis label."<sup>157</sup> The court applied a middle-ground standard of review.

In *Cook*, the court concluded that the Supreme Court gave Congress "the highest deference" in ordering military affairs because the courts lack institutional competence, and the Constitution gives the power to raise and support armies to Congress.<sup>158</sup> The court reasoned that "[a]lthough the wisdom behind the statute at issue here may be questioned by some, in light of the special deference we grant Congressional decision-making in this area [military affairs] we conclude that the challenges must be dismissed."<sup>159</sup>

Then, six weeks before the Working Group released its Report and Recommendations, a district court in the Ninth Circuit held DADT invalid. The court applied the *Witt* standard after conducting a full trial with witnesses, expert statements, and reports. In *Log Cabin Republicans*,<sup>160</sup> the court concluded that the evidence showed that the Act's effect had not been to advance the government's interests of military readiness and unit cohesion, but instead to harm those

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154. See *Sylvester v. Fogley*, 465 F.3d 851, 858 (8th Cir. 2006); *Muth v. Frank*, 412 F.3d 808, 818 (7th Cir. 2005); *Williams v. Att'y Gen. of Ala.*, 378 F.3d 1232, 1238 (11th Cir. 2004); *Lofton v. Sec'y of the Dep't of Child. & Fam. Servs.*, 358 F.3d 804, 817–18 (11th Cir. 2004); *Witt v. U.S. Dep't of Air Force*, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006); *United States v. Extreme Assocs., Inc.*, 352 F. Supp. 2d 578, 591 (W.D. Pa. 2005); *Conaway v. Deane*, 401 Md. 219, 310 (Md. 2007); *State v. Lowe*, 861 N.E. 2d 512, 517 (Ohio 2007); *Ex parte Morales*, 212 S.W.3d 483, 493 (Tex. App. 2006); *State v. Limon*, 122 P.3d 22, 29 (Kan. 2005); *Martin v. Zihlerl*, 607 S.E.2d 367, 370 (Va. 2005); *State v. Clinkenbeard*, 123 P.3d 872, 878 (Wash. App. 2005).

155. See *Williams*, 378 F.3d at 1252 (Barkett, J., dissenting); See *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1221 (C.D. Cal. 2003) (holding that *Lawrence* established a fundamental right); *Doe v. Miller*, 298 F. Supp. 2d 844, 871 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005); *Hudson Valley Black Press v. IRS*, 307 F. Supp. 2d 543, 548 (S.D.N.Y. 2004) (same); see also Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 969 (2005); Laurence H. Tribe, *Lawrence v. Texas: The Fundamental Right that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1917 (2004).

156. *Cook v. Gates*, 528 F. 3d 42, 52 (1st Cir. 2008).

157. *Id.*

158. *Id.* at 57.

159. *Id.* at 63.

160. 716 F. Supp. 2d 884 (C.D. Cal. 2010).

interests.<sup>161</sup> The court ruled that plaintiffs' evidence amply illustrated that the Act did not have a "plainly legitimate sweep" and that defendants failed to satisfy the burden of proving that the Act significantly furthered the government's interests.<sup>162</sup> The court also noted that it was not bound to follow authority from another Circuit.<sup>163</sup> In any event, it found the logic of *Cook* unpersuasive.<sup>164</sup> The court, when finding that the defendants failed to satisfy their burden under the *Witt* standard, issued a nation-wide injunction barring the enforcement of DADT.<sup>165</sup>

The court decision invalidating DADT with *no* implementation plan was issued while the Working Group was occupied preparing its recommendations and plan. The decision generated considerable confusion. Could DoD discharge gay members? Could DoD recruit openly gay members? In a period of a few weeks, the answers changed multiple times as the injunction went into place and then was lifted by appellate courts.<sup>166</sup> This "on-again-off-again" switch reminded senior military leaders how unstable and unpredictable personnel policy would be if left to the courts.<sup>167</sup>

These three cases that applied the more exacting *Lawrence* review made it clear that DADT was now vulnerable to legal attacks. This momentous change in the BATNA calculus kept many key stakeholders at the proverbial negotiation table while litigants pressed forward with the Supreme Court as the likely final stop unless there was a negotiated resolution.

These changes in the BATNA were appealing to parties that favored repeal. Courts would no longer reliably uphold DADT. And, if repealers were successful in court, DADT would be held invalid, and gays and lesbians would be able serve openly in the military. This less predictable BATNA posed uncertainty for repeal opponents.

This post-*Lawrence* BATNA created terrifying uncertainty for

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161. *Id.* at 919.

162. *Id.* at 961.

163. *Id.* at 925–26.

164. *Id.* at 962.

165. *Id.*

166. See DEPT. OF DEFENSE, MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS: HOMOSEXUAL CONDUCT DISCHARGE PROCESSING (2010), [https://politico.com/pdf/PPM152\\_memo\\_from\\_undersecretary\\_stanley.pdf](https://politico.com/pdf/PPM152_memo_from_undersecretary_stanley.pdf) [<https://perma.cc/78YF-3QV7>] (illustrating the challenges of operating in this legally uncertain environment).

167. See *id.* The Under Secretary of Defense for Personnel and Readiness tried to give guidance as the litigation was unfolding. He first explained that because a court enjoined enforcement of DADT, DoD will discontinue proceedings for dismissal while noting that the injunction might be stayed soon and the uncertainty about the future of DADT. *Id.* Six days later, he issued a second memorandum after the stay was granted and DADT was back in force. *Id.* He indicated that given this "twist" and "legally uncertain period," the Secretary Defense directs that no servicemembers will be separated from service under DADT without personal approval by designated DoD officials. *Id.*

military leadership and other gradualists who wanted stability and uniformity. Senior military leaders, regardless of individual opinions on DADT, found court decision disconcerting when they could no longer rely on foreseeable judicial outcomes. They feared that a judicial decision invalidating DADT or one that allowed “as-applied” challenges could result in the military leaders losing control of any roll-out. They feared chaos. Lower court decisions were already creating a web of differences on standards of conduct and training requirements across the force. Antithetical to leadership doctrines, courts would not provide what senior military leaders needed most to ensure military effectiveness—control, uniformity, and certainty.

With the circuits split, it was no longer clear which side would prevail.<sup>168</sup> It was in this precarious legal environment that the Working Group and Co-Chairs reached out to stakeholders and prepared its recommendations and plan. And this unpredictable BATNA motivated many stakeholders to engage in the multiparty process facilitated by the Working Group.

*LAL: It was clear to me why the senior military Service leaders stayed engaged, and it was not just because the Secretary of Defense said to stay engaged! They knew they had a bad BATNA. Military leaders could not control the disruptive court decisions. The Services stayed at the table because the BATNA was worse than a negotiated resolution.*

*In United States v. Witt, for which I had been part of the government legal team prior to joining the Working Group, the 9th Circuit employed an “as-applied” standard. This legal approach meant that the military could have a different answer with every litigant. The idea that DADT may be constitutional in one circuit and unconstitutional in another circuit was alarming to Military Leaders. The notion that we might have an as-applied standard that would tell one soldier she could serve openly and another soldier that he couldn’t would be highly disruptive and contrary to the fundamental principles of uniformity that we treasure and need in the military.*

## VI. INFORMATION-GATHERING

### A. Research, Surveys, and Studies

Secretary Gates’s directive called for an “analysis of current data and information” as well as to contract with the RAND Corporation to update its report *Sexual Orientation and the U.S. Military Personnel Policy: Options and Assessment*.<sup>169</sup> Pursuant to this Directive, the Working

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168. Lee, *supra* note 76, at 305.

169. For the full letter and terms of reference, see *infra* app. A.

Group completed and commissioned a massive number of surveys and studies to assist stakeholders in assessing repeal.<sup>170</sup> During the nine-month undertaking, dozens of modest and large-scale surveys and studies were completed at a cost of over \$9.1 million.<sup>171</sup>

The Secretary of Defense also directed the Working Group to engage Service members in the information-gathering process:

To effectively accomplish this assessment, I believe it essential that the working group systematically engage the force. The participation of a range of age, rank and warfare communities in this study including families, in addition to active outreach across the force is a critical aspect that will undoubtedly lead to insights and recommendations essential to the Department's implementation of any change.<sup>172</sup>

The directive induced the Working Group to solicit views and expert input through a variety of means not only from Service members and their families but also interest groups for and against DADT repeal, scholars, and experts.

According to the Working Group's Report:

[T]he Working Group received survey responses from 115,052 Service members and 44,266 military spouses. Ninety-five information exchange forums were conducted with over 24,000 service members, 140 smaller focus group sessions with a total of about 14,000 service members, and received 72,384 online inbox entries. Westat<sup>173</sup> engaged in interactive online confidential communications with 2,691 service members, including 296 who self-identified as gay or lesbian. The Working Group also engaged in discussions with a variety of different foreign governments, interested groups, historians, academics, doctors, chaplains, lawyers, veterans, communities within the military, and members of Congress on this topic.<sup>174</sup>

These numerous surveys and studies are described and assessed in Appendix C on Information-Gathering.<sup>175</sup> Based on the Working Group's research and outreach, the Co-Chairs Johnson and Ham completed two herculean tasks: (1) They assessed the impact of repeal on military

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170. DADT REPORT, *supra* note 11, at 49.

171. This estimate is from Retired Air Force Lt. General Biscone who served as Chief of Staff for the Working Group (received information in August 2020).

172. *See infra* app. A.

173. Westat is an independent research firm whose capabilities include data collection and survey research. *See* WESTAT, <https://www.westat.com> [<https://perma.cc/J255-VWM4>] (last visited Aug. 10, 2021).

174. DADT REPORT, *supra* note 11, at 49.

175. *See infra* app. C.

effectiveness and (2) They recommended how best to manage the impact of a repeal if it occurs (including recommendations to modify statutes and DoD policies.)

One way to appraise this mammoth collection of information is to assess which surveys and studies carried the persuasive power of an “objective standard.”<sup>176</sup> Information meeting this standard will be more credible and easier to defend because, by definition, the information would be from independent and trustworthy sources, including ones that the parties cannot influence.<sup>177</sup>

For example, a statement of a member of the Australian military that the integration of gays and lesbians did not impact the military’s effectiveness would not be based on an objective standard. It would simply be the opinion of this one member. However, an independent and statistically valid study of the integration of gays and lesbians in the Australian military would carry more weight as an objective standard. This defensible study would offer insights into the possible impact of DADT repeal on the U.S. military although the study of another military would not be dispositive in the U.S. context. It could still sway the discussion and be used to justify choices. Not all objective standards are equally persuasive.<sup>178</sup> For example, an independent academic who has studied the integration of gays and lesbians in the Australian military can offer her personal expert opinion and be convincingly defended but may not be as persuasive as a statistically valid study.

Negotiators are fond of citing objective standards because of their persuasive power.<sup>179</sup> Objective standards can include independent substantive studies such as the ones the Working Group sponsored, fair processes, precedents, and common practices.<sup>180</sup> Their use can reduce the adversarial propensities of parties to press for results based on brute will.<sup>181</sup> Instead, parties advance positions based on defensible objective criteria, that are not merely rationalizations for a desired result. Parties

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176. Because of the connection between information-gathering (outside the circle) and assessment of information (inside the circle), we treat together these two analytically separate stages of negotiations.

177. FISHER ET AL., *supra* note 88, at 82–95.

178. Chuck Doran & Megan Winkeler, *What Are Objective Standards?*, MWI <https://www.mwi.org/what-are-objective-standards/> [<https://perma.cc/UPX3-NJKV>] (last visited May 3, 2022) (discussing different forms of objective standards and how some forms are more persuasive than others).

179. *Setting Standards in Negotiations*, HARV. L. SCH. PROGRAM ON NEGOT. (Dec. 3, 2020), <https://www.pon.harvard.edu/daily/salary-negotiations/the-power-of-standards-how-not-to-negotiate-your-salary/> [<https://perma.cc/C6MW-4KJ4>].

180. Amanda Penn, *Objective Criteria: Keys to Successful Negotiation*, SHORTFORM (Sept. 28, 2019), <https://www.shortform.com/blog/objective-criteria-in-negotiation/> [<https://perma.cc/MLS6-8AF6>] (describing ways to obtain objective standards).

181. FISHER ET AL., *supra* note 88, at 23.

can jointly examine and assess legitimate and practical objective standards.<sup>182</sup> When they probe standards, they can engage in a rational discussion that offers opportunities to persuade each other on the merits.<sup>183</sup> An empirical study, for example, offers parties a credible source to discuss and interpret. Even though the study may not be decisive because of conflicting views on the validity of its design or inputs (data), the study can provide upper and lower boundaries for reasoned discussion and compromise.<sup>184</sup>

Objective standards can be especially valuable in a multiparty negotiation, like this one because standards can become the basis for moving multiple parties from conflicting positions and counter-attacks to a more measured discussion and a reasoned result.<sup>185</sup>

The Working Group's surveys and studies are assessed in Appendix C, including which ones did not qualify as objective and yet still had some persuasive power.<sup>186</sup> Both objective and non-objective information-gathering produced useful insights relevant to the repeal discussion and an implementation plan.

The Working Group offered its own self-assessment of these two categories of information-gathering, including recognizing the limitations of the non-objective ones.<sup>187</sup> As to the massive survey of

182. See James J. White, *The Pros and Cons of Getting to YES*, 34 J. LEGAL EDUC., 114, 116–17 (1984); Roger Fisher, *Comment on White's Review*, 34 J. OF LEGAL EDUC. 121–22 (1984).

183. Fisher, *supra* note 182, at 122.

184. See White, *supra* note 182, at 117.

185. FISHER ET AL., *supra* note 88, at 83–84 (explaining the benefits of objective standards in multi-party negotiations).

186. See *infra* app. C.

187. The working group explained:

For this section of the report, there is an important caveat. If the Working Group were to attempt to numerically divide the sentiments we heard expressed in IEFs, online inbox entries, focus groups, and confidential online communications between those who were for or against repeal of the current Don't Ask, Don't Tell policy, our sense is that the majority of views expressed were against repeal of the current policy. However, any such effort to divide the sentiments into one camp or another would not have any quantitative value, and would be highly misleading and flawed. As we discovered from the survey results, the views voiced both for and against repeal in IEFs, online inbox entries, focus groups, and confidential communications were not representative of the force as a whole. The Service members we heard from through these mechanisms were those individuals who felt strongly enough and motivated enough to give voice to their views. Further, the Service members and spouses participating in IEFs, focus groups, the online inbox, and online confidential communication mechanism were not selected through a formal sampling process to ensure representativeness of the force. Many volunteered to participate, while others were asked by their local commands to participate. It is also true that Service members could make multiple inputs to the online inbox and online confidential communication

Service members and the survey of families, it concluded that, “[t]he survey results . . . were intended to and did capture the views of the force as a whole in an analytically sound and *objective* manner, and were representative across every component of the force.”<sup>188</sup>

This information-gathering process by the Working Group that extensively involved military stakeholders and their families did more than inform the discussions; it also likely cultivated buy-in to whatever the result might be, as will be discussed in Subsection C.<sup>189</sup>

### B. Critique of Information-Gathering

The results of the Working Group’s surveys worried advocates for and against repeal for the obvious reason—each side feared the outcome might hurt their positions. One of the sharpest critiques was from a group of gay veterans’ organizations that supported repeal.<sup>190</sup> They condemned the survey questions as a referendum on the wisdom of repeal and as biased against gays and lesbians.<sup>191</sup> They were concerned that the results could be used to justify discriminatory measures in the name of unit readiness.<sup>192</sup> As Alexander Nicholson, executive director of Servicemembers United and a former U.S. Army interrogator, expressed: “It is simply impossible to imagine a survey with such derogatory and insulting wording, assumptions and insinuations going out about any other minority group in the military. Unfortunately, this expensive survey stokes the fires of homophobia by its very design.”<sup>193</sup>

However, when a favorable report was published later in the year, the same Alex Nicholson offered a more positive view, stating: “The Pentagon Working Group did a very thorough job of trying to explore a wide variety of concerns over the repeal of the U.S. military’s gay ban, but I really think their results reflect an overabundance of caution.”<sup>194</sup>

Of course, advocates against repeal were equally critical of the Working Group reports. In a memorandum prepared by the Military Culture Coalition entitled, “Would LGBT Law and Policies Benefit or

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mechanism.

See DADT REPORT, *supra* note 11, at 49–50.

188. *Id.* (emphasis added).

189. *See infra* Section 7.C.

190. *See* David S. Cloud, *Pentagon Survey on ‘Don’t Ask, Don’t Tell’ Criticized as Biased*, L.A. TIMES (July 9, 2010), <https://www.latimes.com/archives/la-xpm-2010-jul-09-la-na-military-gays-20100710-story.html> [<https://perma.cc/S4F5-J2V6>].

191. *See id.*

192. *See id.*

193. *Id.*

194. Ed Hornick, *‘Don’t Ask, Don’t Tell’: The Reality of Repeal*, CNN (Dec. 2, 2010), <http://www.cnn.com/2010/POLITICS/12/02/dadt.future.questions/index.html> [<https://perma.cc/PCB5-QU86>].

Harm Our Military?” coalition members criticized the reports for the outstanding issues that it “failed to anticipate or resolve” and for its “unrealistic promises, and flawed assumptions and platitudes about leadership.”<sup>195</sup> They then posed a long list of questions for members of Congress to ask in hearings with the exhortation that “[i]f Pentagon officials cannot or will not provide specific answers, it is not fair to expect commanders in the field to sort it all out.”<sup>196</sup> They organized the questions around ten issue headings and grouping of topics.<sup>197</sup>

While advocacy groups expressed a range of critiques about the information-gathering approach, they overlooked the utility of the surveys and focus groups for engaging stakeholders and cultivating buy-in to whatever the result might be.

### C. *Overcoming Obstacles and Cultivating Buy-in*

The surveys and focus groups that involved service members and their families did more than spawn information and insights to inform the discussions and ultimate recommendations. Engaging stakeholders in information-gathering also likely helped them overcome value-based obstacles and status quo bias while bolstering support for whatever the outcome might be.

As highlighted in this Article’s introduction,<sup>198</sup> value-based conflicts are among the most difficult ones to resolve and were a central feature of the DADT debate. The discussions implicated religious beliefs that condemned homosexuals and viewed homosexuality as a sin, as well as personal views hostile to working with homosexuals in close quarters and in the battlefield.<sup>199</sup>

For overcoming value conflicts, MIT Professor and Practitioner Professor Susskind suggests a few non-exclusive approaches.<sup>200</sup> Professor Susskind suggests reframing a values-driven dispute based on shared and universal overarching values.<sup>201</sup> Broad values are baked into military training that is designed to reach a large and diverse population in uniform. While each service has a slightly different approach, key tenets of honor, service before self, and duty are fostered to develop a

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195. *Military Culture Coalition Memo: Would LGBT Law and Policies Benefit or Harm Our Military?*, *supra* note 118 (memorandum that was distributed after the repeal was adopted by Congress but before the required review and certifications were completed in order for repeal to become effective).

196. *Id.*

197. *Id.*

198. *See supra* Part I.

199. DADT REPORT, *supra* note 11, at 134.

200. Susskind & Rose, *supra* note 10.

201. *Id.*

common military ethos.<sup>202</sup> Learning and living these shared core values start on day one of military training, and entire organizations within each service are dedicated to developing these values that are essential to the profession of arms.<sup>203</sup> These common values can sidestep other value differences while opening lines of communication, opportunities for building trust, and becoming a springboard for working together.

Professor Susskind also suggests engaging parties in relationship-building dialogue.<sup>204</sup> Rather than resolving a values-based dispute, parties “move beyond demonization toward mutual understanding and respect through dialogue.”<sup>205</sup> They try to reach an accurate understanding of each other’s point of view.<sup>206</sup> This type of understanding does not require sympathy or emotional connection, only possible ground rules that may guide parties in their future interactions.<sup>207</sup>

In his third approach, Susskind calls for confronting directly value differences.<sup>208</sup> Parties explore and question each other’s values with the goal of possibly altering them.<sup>209</sup> Although parties typically resist changing fundamental beliefs, he indicated that it can surprisingly happen.<sup>210</sup> Altering values might occur as a result of thoughtful discussion that entails going deeper than usual, developing empathetic understandings that go beyond stereotypes, and improving

202. The Army core values include loyalty, duty, respect, selfless service, honor, integrity, and personal courage. See *The Army Values*, U.S. ARMY, <https://army.mil/values/> [<https://perma.cc/5TTS-KZGY>] (last visited Aug. 10, 2021); The Navy and Marine Corps share the core values of honor, courage, and commitment. See *About: Our Core Values*, U.S. NAVY, <https://navy.mil/About/Our-Core-Values/> [<https://perma.cc/D533-AT2R>] (last visited Feb. 2, 2022); *Marine Corps Values*, MARINES, <https://marines.com/life-as-a-marine/standards/values.html> [<https://perma.cc/LM3R-52WV>] (last visited Aug. 10, 2021). The Air Force’s core values are “Integrity First,” “Service Before Self,” and “Excellence in all We Do.” See *Vision*, U.S. AIR FORCE, <https://airforce.com/mission/vision> [<https://perma.cc/MSA6-8A3T>] (last visited Aug. 10, 2021).

203. *Core Values: Honor, Courage, Commitment*, RECRUIT PARENTS, <https://rp.marineparents.com/bootcamp/core.asp> (last visited Aug. 10, 2021). The Air Force promotes value development through PACE, the Profession of Arms Center of Excellence, which promotes training and tools to develop values and leadership across the Service. *Home*, PACE, <https://airman.af.mil> (last visited Aug. 10, 2021). One such product includes “The Little Blue Book,” describing what it means to live the values expected as a member of the profession of arms. U.S. AIR FORCE, *AMERICA’S AIR FORCE: A PROFESSION OF ARMS* (2022).

204. *Id.*

205. Katie Shonk, *3 Types of Conflict and How to Address Them*, HARV. L. SCH. PROGRAM ON NEGOT. (Oct. 11, 2021), <https://www.pon.harvard.edu/daily/conflict-resolution/types-conflict/> [<https://perma.cc/CJ53-WMQG>].

206. *Id.*

207. *Id.*

208. Susskind & Rose, *supra* note 10.

209. *Id.*

210. *Id.*

relationships.<sup>211</sup> Even if parties do not compromise or change their beliefs, they can learn to cooperate and live side by side with fundamentally different values.<sup>212</sup>

These three approaches were in play in the way the questions in the surveys and focus groups induced respondents to reflect on the common military values highlighted above, the quality of relationships among themselves, and personal values and differences.

Answering the questions also may have helped the respondents overcome any status quo bias, a common obstacle in disputes. Parties can be reluctant to change doing what they already feel safe and comfortable doing. By maintaining the status quo, they can avoid the unknown and unpredictable effects that change might precipitate, even for those that may not fully embrace the status quo. Repealing DADT would reverse a seventeen-year-old policy that replaced an even longer policy that banned service by gays and lesbians.<sup>213</sup> Repeal would open the door to many uncharted and uncertain implementation issues. Any status quo bias due to the unknowns was likely reduced by respondents considering the probing DADT related questions.

### *Survey and Focus Group Questions*

Consider how the survey questions may have facilitated change in the face of value conflicts and status quo bias while cultivating buy-in when repeal occurred.

Westat's purposes for the surveys and research questions were clear and limited:

#### 2.1 Purpose of the surveys

The surveys were designed to measure perceptions of how a repeal of DADT might affect military readiness, military effectiveness, unit cohesion, morale, family readiness, military community life, recruitment, and retention. The surveys were not designed to be a referendum on the issue of DADT repeal, nor can survey results alone answer the question of whether repeal should or should not occur.<sup>214</sup>

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211. *Id.*

212. *Id.*

213. *See supra* Part 2.

214. WESTAT, 1 SUPPORT TO THE DoD COMPREHENSIVE REVIEW WORKING GROUP ANALYZING THE IMPACT OF REPEALING "DON'T ASK, DON'T TELL" 17 (2010). Research questions—formal statements of what analysts want to discover from the survey results—were developed for both the Service member and spouse surveys. The primary research questions for the Service member survey included the following:

The survey questions were formulated in accordance with standard procedures for framing valid, neutral questions.<sup>215</sup> The questions were subjected to a rigorous process by Westat to prepare clear, unambiguous, unbiased questions free of implicit assumptions, as explained in an internal memo.<sup>216</sup> The process included pretesting the survey in cognitive interviews that were designed to enhance recollections by respondents.<sup>217</sup>

For the survey of uniformed members of the military, the 103 questions were reviewed by Working Group representatives, Westat, and internal DoD social science experts.<sup>218</sup> The questions were approved by the co-chairs, and circulated for review by the military service chiefs,

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- ☐ What is the likely impact of repeal on unit cohesion, morale, military effectiveness, and readiness?
  - ☐ What is the past experience with Service members believed to be gay or lesbian?
  - ☐ What demographic and service characteristics and military experiences affect Service members' views about the impact repeal might have?
  - ☐ Overall, what are the main issues associated with repeal for Service members?

The primary research questions for the spouse survey included the following:

- ☐ What is the likely impact of repeal on recruitment, retention, family readiness, and military community life, including use of military programs and services?
- ☐ How and from whom would spouses like to receive information or support about a repeal of DADT, if that occurs?
- ☐ Does acquaintance with gay or lesbian individuals affect spouses' views regarding the potential impact of a DADT repeal?

*Id.*

215. This technique for forming questions can be contrasted with the controversial and widely condemned push polling technique used in political campaigns and marketing. Push polling is when polls that are presented as scientific ones but are designed to sway respondents. See Marjorie Connelly, *Push Polls, Defined*, N.Y. TIMES (June 18, 2014), <https://www.nytimes.com/2014/06/19/upshot/push-polls-defined.html> [https://perma.cc/J65Q-7J87].

216. See *infra* app. E.

217. Cognitive Interviewing techniques are designed to enhance retrieval of information about an event through questions that are formulated to revive context of an event, ask about an event from different perspectives, inquire about an event in several different orders, and probe every major and minor detail about an event. See generally RONALD P. FISHER & R. EDWARD GEISELMAN, *MEMORY-ENHANCING TECHNIQUES FOR INVESTIGATIVE INTERVIEWING: THE COGNITIVE INTERVIEW* (1992); R. Edward Geiselman et al., *Eyewitness Memory Enhancement in the Police Interview: Cognitive Retrieval Mnemonics Versus Hypnosis*, 70 J. APPLIED PSYCH. 401 (June 1985); Mark R. Keibell et al., *The Cognitive Interview: A Survey of Its Forensic Effectiveness*, 5 PSYCH., CRIME, & LAW 101 (1999).

218. Lee, *supra* note 76, at 292.

Secretary of Defense Gates, and Chairman of the Joint Chiefs of Staff Adm. Mullen.<sup>219</sup>

Although the questions were carefully crafted to gather information on perceptions, attitudes, and experiences, the questions likely did much more. As recognized by Dr. Goodwin from the U.S. Army Research Institute, who served on the Working Group and lead the survey design:

Even though the question drafters were determined to formulate a survey with neutral questions that did not prime any ideas that would orient the respondents on the repeal issue, it was difficult to avoid entirely seeding ideas. For example, if a question asks whether a respondent likes pineapple on pizza, the question will plant an idea about an ingredient on pizza that the respondent might have never contemplated. Even though the question was designed to learn about preferences, the question can unintentionally accomplish more than gathering the intended information, like triggering trying pizza with pineapple.<sup>220</sup>

The large-scale survey was designed to probe the respondents' experiences in the military, including with gays and lesbian service members.<sup>221</sup> The questions were strategically divided into two parts although the division was not disclosed to the respondents.

The first thirty-three questions out of 103 did not include any questions that related to DADT or interacting with gay and lesbian service members.<sup>222</sup> Instead, they focused on developing baseline information about the respondents' experiences serving in the military.<sup>223</sup> Respondents were asked to rate how well their units worked together, got their jobs done, collaborated as teams, and socialized among themselves.<sup>224</sup> They were asked to rate unit morale, trust, leadership, and much more.<sup>225</sup> They were asked to reflect on their military experiences without the answers being colored by questions related to their experiences with gay and lesbian service members or with the DADT policy,<sup>226</sup> until they reached Question thirty-four.

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219. *Id.*

220. Zoom Interview with Gerald F. Goodwin, PhD, Senior Research Scientist, U.S. Army Rsch. Inst. for the Behav. and Soc. Scis. (Apr. 13, 2021) (In the interview, we discovered that Goodwin disliked pineapple on pizza while Abramson liked it).

221. Lee, *supra* note 76, at 292.

222. DADT REPORT, *supra* note 11, at 160–79.

223. *Id.*

224. *See id.*

225. *See id.*

226. *See id.*

Question thirty-four inquired whether respondents have served with a male or female that they believed was homosexual.<sup>227</sup> Then, according to an internal memorandum, the questions in this second part probed those experiences based on a strategic ordering by asking:

[P]otentially sensitive questions (such as questions about sharing close sleeping quarters or shower stall areas) only after . . . get[ting] the respondents' answers to the questions on the effects of a change in policy. This ordering should minimize the chance that sensitive questions color or influence responses to questions about the effect of a policy change, if repealed.<sup>228</sup>

The questions covered a respondent's military experiences with gay and lesbian leaders, co-workers, and subordinates as well as social interactions. Here are a few illustrative questions that were posed about working with gay and lesbian leaders:

If they have had experience serving with a leader that they thought was gay or lesbian, how would they now rate how well the unit worked together? How would they rate the unit's morale when looking back in time? How would they rate the unit's performance? And among all the factors that could affect how well a unit worked together, how much do they believe that their leader who was gay or lesbian affected the ability to work together?<sup>229</sup>

Similar questions were asked about working with gay and lesbian co-workers and subordinates, sharing missions in combat, and socializing together.<sup>230</sup> They were asked for example, "[w]hat would be the impact of repeal on job satisfaction, willingness to continue to serve, recruitment in the future, availability of technical capabilities, and much more?"<sup>231</sup>

For the small focus groups, the potential for the questions to do much more than gather information becomes apparent when reading an internal memo that described the script for conducting the sessions.<sup>232</sup> The script for the facilitators started with an introduction for respondents that covered the following points: The Working Group had been directed by the Secretary of Defense to conduct a review of issues associated with repeal of DADT; the review was a response to the President calling on Congress to repeal DADT; the Working Group would "examine the issues that might arise if the law were repealed" and would "develop an

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227. *Id.* at 180.

228. *See infra* app. E.

229. *See* DADT REPORT, *supra* note 11, at 181–82.

230. DADT REPORT, *supra* note 11, at 193–94, 203.

231. DADT REPORT, *supra* note 11, at 210–18 app. C.

232. *See infra* app. D.

implementation plan” if there is a repeal; and the issues that the focus groups will discuss include the impact of repeal on military readiness and military effectiveness with attention on how to “best manage any impacts during implementation.”<sup>233</sup>

These instructions primed respondents with what their Commander-in-Chief wanted done, the person at the top of the chain-in-command for the people being surveyed, while highlighting well-recognized overarching military values and orientating respondents to the possibility of repeal when indicating that an implementation plan would be developed in case there is a repeal.<sup>234</sup>

After this introduction, the questions to be posed were grouped into three categories: learn about past experiences in the military with gays and lesbians (gain context for respondent’s answers); explore issues associated with repeal such as its impact on unit operations and service recruitment (learn views on implications of a repeal); and consider issues to be addressed in an implementation plan, the role of leadership and a few concluding questions on “Who has had the greatest influence on your views regarding Don’t Ask Don’t Tell” and “Who will have the greatest influence in maintaining standards of conduct and the performance of our units following repeal?”<sup>235</sup>

In closing remarks, facilitators were instructed to say:

We have discussed several areas that the military and political leadership should consider when assessing the implications of a repeal of Don’t Ask Don’t Tell, including how integration will affect unit operations, the comfort level of straight and gay service members and their families, as well as actions military leadership might take to facilitate the integration process.<sup>236</sup>

### *Analysis*

As already suggested, the comments and questions posed in the focus groups and surveys that engaged Service members and families did much more than reveal perceptions, attitudes, and experiences. The comments and questions induced self-awareness and reflection on overarching military values, personal reactions, and relationships with superiors, peers, and subordinates whether straight, gay, or lesbian, as respondents confronted their own values. The inquiries also unavoidably conveyed a sense that repeal would be likely, in our view, even though respondents were told that the questions were designed to only investigate issues in case of repeal. The questions oriented service members toward possible

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233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

change and contributed to overcoming any status quo bias by nurturing an understanding of the contours and implications of the DADT policy and preparing them for whatever the outcome might be. Resistant respondents became acquainted with the possible policy change, which presumably fostered their acquiescence even if they were opposed to repeal.<sup>237</sup>

The surveys and focus groups also triggered informal conversations among stakeholders outside of the formal information-gathering process.<sup>238</sup> These informal exchanges, along with the formal ones, gave stakeholders an opportunity to express their thoughts and feel heard as they contemplated the possibility of DADT repeal.

This information-gathering process that engaged numerous stakeholders contributed to cultivating buy-in to the result. Any buy-in might have been the ultimate accomplishment of this nine-month process, even though it was not its explicit aim. By the time Congress voted to repeal, stakeholders were acclimated to possible change.

#### D. Risk Assessment Panel

Following the surveys and focus groups, the Working Group assembled a Risk Assessment Panel to assess the various risks associated with DADT repeal.<sup>239</sup> The panel leveraged not only the survey data but also reams of analysis from other sources.<sup>240</sup>

According to the Report, the Risk Assessment Panel was convened to:

[A]ssess impact of repeal on the areas specified in the Terms of Reference. This panel was made up of subject matter experts and Service members representing a range of Service, rank, and warfare communities. The panel reviewed all of the material relevant to *each assessment area*: military readiness, unit effectiveness, unit cohesion, recruiting, retention, and family readiness. Information and data for this assessment was derived from the Working Group's systematic engagement of the force and their families, input from interested and relevant organizations, scholarly work of civilian and military researchers, experiences of foreign militaries and domestic organizations with similarities to the

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237. As with the consensus voting method in multiparty negotiations, to be contrasted with majority or unanimous voting, some resisting stakeholders might have reached the point that they could live with the outcome even if they did not endorse it. See Lawrence Susskind et al., *An Alternative to Robert's Rules of Order in THE CONSENSUS BUILDING HANDBOOK: A COMPREHENSIVE GUIDE TO REACHING AGREEMENT* 3 (Lawrence Susskind, Sarah McKearnan & Jenner Thomas-Larmer, eds., 1999).

238. Lee, *supra* note 76, at 309.

239. *Id.*

240. See *infra* app. C.

military, and the historic record of racial and gender integration in the U.S. military.

After coming to a numeric assessment of risk within each area, the panel considered the various policy, legal, and training and education recommendations that were intended to mitigate impacts within each assessment area and then developed a final assessment of risk.<sup>241</sup>

These assessments shaped the co-chairs' ultimate conclusions on the impact of repeal if adopted.<sup>242</sup>

Appendix C describes the role of the panel, its methodology, and its risk assessments before and after any risk mitigation.<sup>243</sup> In that Appendix, we explain the steps the Working Group and panel followed to arrive at its final risk assessment if DADT were repealed.<sup>244</sup> They adopted what they describe as “a standard military decision support process recommended by the Force Structure, Resources, and Assessment Directorate of the Joint Staff,” a process used by DoD in a variety of complex military risk assessments and widely used in academia and industry.<sup>245</sup>

The meticulous and intricate assessment process did not qualify as a source of objective standards, however. Even though each panel member applied a military effectiveness standard defined by the Working Group and rendered their “professional judgment” as described in Appendix C when assessing the impact of repeal, each member nonetheless was a DoD employee (either military or civilian).<sup>246</sup> Furthermore, the assessment process was supervised by the Working Group, which consisted entirely of DoD employees selected by the Secretary of Defense.<sup>247</sup> The panel members and Working Group members were interested parties that could influence the outcome of the assessment that would directly affect them.<sup>248</sup>

Nevertheless, the assessment results wielded considerable persuasive power due to the way the assessments were derived. The assessors were a diverse group of knowledgeable and experienced military members and DoD career civilians who offered credible expertise even though laboring

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241. DADT REPORT, *supra* note 11, at 46, 97–117.

242. Lee, *supra* note 76, at 300–01.

243. *See infra* app. C.

244. *See* DADT REPORT, *supra* note 11, at 97–117 (explaining the methodology for assessing the impacts of repeal without a mitigation plan and the impacts if the recommended mitigation plan is adopted).

245. *Id.* at 98.

246. *Id.*

247. *Id.*

248. *See id.*

under a conflict of interest.<sup>249</sup> The assessors considered massive input from the surveys and studies that involved numerous Service members and other stakeholders, and the team was well-versed in the array of research conducted by the Working Group.<sup>250</sup> They also followed an elaborate multi-step assessment process that was monitored and checked by a red team that observed the process from a separate room<sup>251</sup> as explained in Appendix C. Further, the process was transparent as described in the detailed Working Group Report.<sup>252</sup>

While the panel's assessments were not binding on the co-chairs, Jeh Johnson and General Carter Ham, the assessments provided weighty input for the co-chairs as they formulated their answer to the ultimate question: What would be the impact of repeal on military effectiveness? The answer and the Report recommendations were ones made exclusively by the Co-Chairs.<sup>253</sup>

*HA: Even though the members of the working group and panel were instructed to leave their personal views outside the room, we all know how difficult that can be to do. And surely in the world of selecting neutrals, the conflict of interest would have been disqualifying. However, as an offsetting factor, the military ethos to get the mission done might have tempered personal inclinations.*<sup>254</sup>

*LAL: Because General Ham was particularly concerned about this conflict issue, he demanded that a "red team" be added. The military commonly uses red teams to challenge assumptions and sharpen alternatives. The Red Team, although still DoD employees, watched the assessment panel from a separate room as we conducted our deliberations. We were in a proverbial "fishbowl." The Red Team graded us on our use of data and research, critiqued the assumptions we made, and monitored for personal biases that might be influencing the deliberations.*

#### E. Partial One-Text Procedure

Before the Working Group completed its work and the Co-Chairs finalized their recommendations, the Working Group was mandated to

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249. *Id.*

250. DADT REPORT, *supra* note 11, at 98.

251. DADT REPORT, *supra* note 11, at 100; *see also* U.S. ARMY COMBINED ARMS CENTER, THE RED TEAM HANDBOOK: THE ARMY'S GUIDE TO MAKING BETTER DECISIONS 3 (Version 9.0, 2018) (explaining the red team process).

252. *See generally* DADT REPORT, *supra* note 11.

253. Lee, *supra* note 76, at 300–01.

254. *See, e.g.,* Letendre & Cook, *supra* note 81 (considering how the military oath of office demands servicemembers to subordinate their personal beliefs to their professional obligations).

employ what might be described as a partial one-text procedure<sup>255</sup> for enlisting feedback from military leadership. The Secretary's Terms of Reference instructed the Working Group that: "[p]rior to the delivery of the report to the Secretary of Defense, each Service Chief shall be afforded the opportunity to review and comment."<sup>256</sup> The Working Group did this and much more as described in its final Report. The Services input was built into the drafting process from the beginning.

First, while the Information-Gathering process was on-going, a full range of policy choices needed to be considered should repeal occur. The choices covered a range of issues such as what benefits can be available for same-sex partners given that DOMA (Defense of Marriage Act) that defined marriage as being between one man and one woman had not yet been overturned and how to deploy gay and lesbian service members to countries hostile to homosexuality.

The Services coordinated input through a multitude of policy memos in advance of the draft report. In so doing, they had early input into shaping what implementation might look like because they would ultimately be involved with implementation.

Another key juncture for services input came when the Working Group leveraged Service War Colleges and Non-Commissioned Officer Academies to help review and influence the implementation plan. Members of the Working Group visited these schools after policy recommendations have been developed. Feedback panels were conducted at the National Defense University, Army War College, Naval War College, Air War College, and U.S. Marine Corps War College, as well as U.S. Army Sergeants Major Academy, Air Force Senior Noncommissioned Officer Academy, and U.S. Navy Senior Enlisted Academy.

After the Risk Assessments by the Panel were completed but before the Co-Chairs' final assessment was concluded, Services were invited to "red team" the entire Working Group effort. This effort was separate from the red team run by the Working Group for the Risk Assessment panel. Each Service brought in a team that was given access to all the survey data and information gathered by the Working Group. The Services red teams also reviewed the research used by the Risk Assessment Panel and its conclusions. These red teams reported back to their Service Chiefs in advance of any feedback by the Service Chiefs.

Finally, the Working Group provided "the Military Department Secretaries and Service Chiefs with a near-final version of the report for review and comment. The Secretaries and Chiefs provided extensive comments, as well as their perspectives on Service-level impacts, which

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255. A process where a single draft is circulated for comments and then redrafted by facilitator. For further understanding, see *supra* Part IV.

256. See *infra* app. A.

helped inform recommendations and contoured the final version of the report.”<sup>257</sup>

This process was not a full one-text procedure with iterative feedback after each new draft that ended with a “yes” or “no” vote by the stakeholders. It was a partial one-text procedure that resulted in the final report and plan addressing key stakeholders’ interests as a one-text procedure is designed to do, as will be examined in the final Part of this Article.<sup>258</sup>

#### F. *Information-Gathering Conclusion*

As the Section on focus groups, surveys, studies, and panel assessments evinced, the Working Group generated a mountainous amount of information to inform the discussions and negotiations.<sup>259</sup> The information was derived from objective and subjective studies, and professional judgments of the military assessment panelists.<sup>260</sup> This accumulation of information also informed the final report and the recommendations of the Co-Chairs Jeb Johnson and General Carter Ham.

This Part also illustrated another valuable benefit of this information-gathering process.<sup>261</sup> It fostered self-reflection among stakeholders, likely acquiescence, and possible buy-in to whatever the result might be. As explained by Professor Susskind when discussing values-based conflicts:

Negotiators caught up in values-based disputes need not aim for settlement in the traditional sense. Increasing our respect for views contrary to our own and learning to live with fundamental differences in values and beliefs are themselves laudable goals. When we engage in values-based dialogue, we may not resolve our disagreements, yet we can strive to learn more about one another so that we can more easily live side by side.<sup>262</sup>

#### VII. RESOLUTION (COMMITMENT) MET INTERESTS

Reaching the Commitment stage is the goal of any negotiation if parties want a resolution. It is the stage when parties exit the negotiation circle toward resolution. Of course, with the DADT review, an alternative exit would have been going to the courts. We have already examined why that choice did not appeal to many stakeholders.<sup>263</sup>

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257. DADT REPORT, *supra* note 11, at 47.

258. *See supra* Part VII.

259. *See supra* Part VIII.

260. *See id.*

261. *See id.*

262. Susskind & Rose, *supra* note 10.

263. *See supra* Part V.

Two resolutions were reached, first by the Co-Chairs as reflected in the final Report and Implementation Plan, and second, among Members of Congress when they passed the repeal legislation. In this Part, we clarify the Commitment by the Co-Chairs, give special attention to how the report's recommendations and plan met the interests of key stakeholders and explain what Congress did including imposing an unusual contingency before repeal could become effective.

#### A. Commitment by Co-Chairs of Working Group

In the memorandum establishing the Working Group, the Secretary of Defense called for a report that would address the impact of repeal and a plan for implementation if there is a repeal.<sup>264</sup> The Working Group generated multiple studies and risk assessments that the Co-Chairs considered when producing the final report. The Working Group consisted of sixty-eight members, including more than twenty staff members plus teams based on function (policy; legislative, regulatory, and legal; education and training; and surveys).<sup>265</sup> Also, among members of the Working Group, a Panel of twelve to fifteen members were selected to assess risks to military effectiveness if there were a repeal. But none of the Working Group's work products were the result of a consensus or voting process, nor adopted by DoD.<sup>266</sup>

Only the impact assessments and the final recommendations reflected an agreement, and it was an agreement that resulted from negotiations between the Co-Chairs Jeh Johnson and General Ham. They are the only ones that signed their names to the Report. Any references to "we" in the Report were references to the Co-Chairs because ultimately it was their assessment and recommendations.

*LAL: I have reflected on why the Co-Chairs came to an agreement and were comfortable exiting the negotiation circle. I spent nearly every day with the co-chairs for nine months; General Ham in particular was very circumspect about his views. I believe General Ham became comfortable leaving the circle based on his hearing Service members' views—both from his extensive travels during the review and the large surveys. I also believe the Risk Assessment Panel findings made him comfortable that repeal could be implemented, even during a time of conflict.*

The ultimate test of any commitment is whether it meets the interests of key stakeholders. Resolution alone is not the test of success. When

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264. See *infra* app. A.

265. See Lee, *supra* note 76, at 300–01.

266. See *id.*

reading the Report's recommendations and plan through an interest lens, we can see how they addressed, to varying degrees, many interests of stakeholders including the interests of those who were resisting repeal and those endorsing a gradualist approach.

B. *Interests that Needed to be Met*

*Maintaining military effectiveness in event of repeal.* This interest was the primary one for gradualists and some resisters, like military leaders, Service members, Members of Congress, and CMR although it would be fair to suggest that all stakeholders had this interest.<sup>267</sup>

*Minimizing chaos and confusion during any repeal.* This interest was likely the primary one for gradualists, like military leaders, Service members, and some members of Congress.

*Preserving moral and religious values, including freedom of religion and speech.* These interests were the primary ones for resisters, like the Chaplains, some Service members, CMR, Alliance for Defense Fund, and some Members of Congress although they were interests of others too.<sup>268</sup>

*Overcoming practical and economic implementation obstacles.* These interests were the ones for resisters, like some Service members, CMR, Alliance Defense Fund, and some Members of Congress. They were concerned about heterosexual Service members sharing living facilities with gay and lesbian ones, difficulties socializing within the unit, need for new training on repeal during wartime, any "flamboyant" behavior in the face of standards, spread of STDs such as HIV, expending money and resources on benefits for gay and lesbian Service members, and using the military as a social experiment.<sup>269</sup>

*Opening service for gay and lesbian Service members with rights equal to other Service members.* These interests were the ones for advocates of immediate repeal, like the President, OutServe, Service Members Legal Defense Network, Palm Center, and gay and lesbian Service members.<sup>270</sup>

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267. DADT REPORT, *supra* note 11, at 65–66.

268. *Id.* at 12.

269. *Id.* at 50–56.

270. *See id.* at 60.

### C. *How These Interests were Met in the Report and Plan*<sup>271</sup>

Understanding these different interests was essential when the Working Group and Co-Chairs formulated recommendations that would likely be acceptable to different stakeholders. For example, even though many religious leaders and some military leaders were bound by a common position to resist repeal, their different reasons (interests) for the common position likely called for different recommendations that the Report meticulously offered. For the resisting chaplains, the Report recommended to “direct the Services to reiterate the principle that chaplains, in the context of their religious ministry, are not required to take actions inconsistent with their religious beliefs, but must still care for all Service members. Evaluation, promotion, and assignment of chaplains must continue to be consistent with these long-standing Service policies.”<sup>272</sup> For the resisting military leaders, the implementation plan was designed to show that it was feasible to implement repeal while fighting two wars.<sup>273</sup>

The Report specifically addressed the interest in military effectiveness in the event of repeal when the Report stated that “the risk of repeal of Don’t Ask, Don’t Tell to overall military effectiveness is low.”<sup>274</sup> The Report acknowledged that repeal would “bring about some limited or isolated disruption,” but that “the U.S. military can adjust and

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271. For further illustrations of how the report addressed interests, one may want to read its recommendations, which are organized around these topics: “Leadership, Training, and Education;” “Standards of Conduct;” “Moral and Religious Concerns;” “Equal Opportunity” within the Military; “Collection and Retention of Sexual Orientation Data;” modifications to the Uniform Code of Military Justice; “Privacy and Cohabitation” Policies; “Benefits” for Same-Sex Partners and Families; “Duty Assignments” (impacted by U.S. and foreign laws and policies and international agreements); Medical issues (not insurance); “Re-Accession” (for Service members discharged under DADT); “Release from Service Commitments” (for opponents if DADT repealed-recommended against a policy of release); “Fiscal Impact” of Repeal; and “Follow-on Review” of Repeal (after one year). *Id.* at 131–51.

The DADT repeal Implementation Plan also offers other illustrations of how the Working Group tried to address stakeholders’ interests. For example, you might read through an interest lens the “Frequently Ask Questions” (FAQs) and Vignettes (possible post-repeal scenarios). *See* U.S. DEP’T OF DEF., SUPPORT PLAN FOR IMPLEMENTATION, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” app. D [hereinafter DADT PLAN FOR IMPLEMENTATION]. When reading these 17 FAQs and 14 scenarios through an interest lens, it becomes evident how the questions and scenarios were designed to address interests of various stakeholders. For example, one FAQ asked, “how will repeal . . . affect recruitment and retention policies?” *Id.* The answer affirmed that sexual orientation would not be a factor. *Id.* Another one asked what benefits would be available for gay and lesbian members. *Id.* The answer explained that benefits will be available to the Service members but that DOMA law barred benefits for unmarried, same-sex partners.

272. *See* DADT REPORT, *supra* note 11, at 136.

273. *See* DADT PLAN FOR IMPLEMENTATION, *supra* note 271, at 1.

274. DADT REPORT, *supra* note 11, at 3.

accommodate this change, just as it has others in history.”<sup>275</sup> And the implementation plan offered a reassuring pathway for maintaining military effectiveness.<sup>276</sup>

For those with an interest in a gradual transition in order to maintain stability and for those resisters who were concerned about practical and economic implementation issues, the report included a detailed implementation plan that set out three stages and considered how to maintain standards of conduct, respect moral and religious concerns, comply with equal opportunity policies, change the Uniform Code of Military Justice (UCMJ), address privacy concerns, offer equal benefits, and much more.<sup>277</sup>

For those interested in equal rights for gay and lesbian Service members and their families, the recommendations and implementation plan proposed how to do that primarily within existing laws.<sup>278</sup>

As already noted, the interest in preserving freedom of religion and speech were met with recommendations within the limits of what was feasible when adopting a policy contrary to the values of some stakeholders. For this group of resisters, repeal was primarily a distributive negotiation, which they lost.

The original 1993 DADT policy was a rare compromise of a value issue that gave both sides something each side wanted. Value conflicts, as already considered, can be the most difficult ones to resolve because they can involve matters of principle, ideology, or religion that parties want to uncompromisingly preserve.<sup>279</sup> Under the DADT compromise, gays and lesbians were formally excluded from military service (met an interest of religious opponents) but gays and lesbians were permitted to serve if no one knew their sexual orientation (met an interest of those supporting open service). This compromise had the glaring practical impact of limiting service to gays and lesbians who were willing to assiduously hide their orientation while serving under DADT’s onerous restrictions.

Even though religious stakeholders who wanted to exclude gays and lesbians lost with repeal, the recommendations were designed to avoid penalizing them for religious beliefs that would be contrary to the new military policy. The Co-Chairs addressed religious interests with care and in some detail in its recommendations<sup>280</sup> after offering this reassuring

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275. *Id.*

276. *Id.*

277. *Id.* at 131–51.

278. *Id.* at 134–36.

279. ABRAMSON, *supra* note 9, 160, 254–55.

280. See DADT REPORT, *supra* note 11, at 134–36. See also DADT PLAN FOR IMPLEMENTATION, *supra* note 271, at app. D. A frequently asked question reaffirmed Service members’ freedom of speech to express personal views and their freedom to practice religion within limits of existing law. See *id.* One scenario considered how to handle an experienced

introduction:

[I]t is critical that it be made clear to those who are opposed to repeal, particularly on moral and religious grounds, that their concerns are not being rejected and that leaders have not turned their backs on them. In the event of repeal, individual Service members are *not* expected to change their personal religious or moral beliefs about homosexuality; however, they *are* expected to treat all others with dignity and respect, consistent with the core values that already exist within each Service. For the U.S. military, these are not new concepts, given the wide variety of views, races, and religions that already exist within the force.<sup>281</sup>

*LAL: The final edits to the report proofs were made by a small team from the Working Group on November 26, 2010, the day after Thanksgiving. For this holiday weekend adventure, I lugged my kids, then 8 and 4, to the basement of the Pentagon where we staged the final edits prior to the report heading to the publishers. Before I turned on a Disney movie for my children, I gave them a task: make sure the page numbers of the report were in order from 1 to 256. Three minutes into this task, my eldest came running to me, "Mom, someone scribbled his name on the final report!" She found Jeh Johnson's signature on page 17. Four days later, we distributed the "scribbled" signature and 535 copies of the report to Congress.*

#### D. Commitment by Congress

Members of Congress ultimately had to vote for or against repeal.<sup>282</sup> Members were split among resisters, repealers, and gradualists. During the debate in the Senate, Members of all three views cited portions of the Report to support his or her position.<sup>283</sup> Not surprisingly, the Report was cited amply by the repealers who had much support in the Report.<sup>284</sup> But the Report was also cited by resisters and gradualists who either criticized

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recruiter who due to his personal religious beliefs says he cannot process an otherwise qualified gay applicant. *Id.* Another scenario considered how to handle a complaint against a chaplain whose sermon included statements that homosexuality is a sin. *Id.* The discussions of these and other scenarios tried to address and reconcile any conflicting interests. *See id.* In the chaplain scenario, for example, the discussion reaffirmed open service while respecting chaplains right to express religious beliefs. *See* DADT PLAN FOR IMPLEMENTATION, *supra* note 271, at app. D.

281. DADT REPORT, *supra* note 11, at 131.

282. *See* Lee, *supra* note 76, at 304–07 (describing the legislative process from release of Working Group's Reports until passage of repeal legislation and certification for becoming effective).

283. *Id.*

284. *Id.*

the Report or cited selective survey results that could be viewed as supporting their positions.<sup>285</sup>

We all know how this story ends: the law was repealed.<sup>286</sup> The final vote, the Commitment by Congress, also reflected a continuing divide with 65 Yeas and 31 Nays in the Senate, and 250 Yeas and 175 Nays in the House, with voting mostly along party lines.<sup>287</sup> The number of Yeas did not reach the two-thirds that would have been necessary to override a presidential veto if there were one, possibly under a different president.<sup>288</sup>

The repeal statute included an unusual provision that linked the effective date to review of the Co-Chair's Report including certification by military leaders that they are prepared to implement repeal.<sup>289</sup> The statute made the effective date contingent on (1) the Secretary of Defense receiving the Report and (2) the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff (JCS) certifying to the congressional defense committees that they had considered the Report's recommendations and proposed plan of action.<sup>290</sup> They also had to certify that DoD had prepared necessary policies and regulations, and that implementation of the policies and regulations would be consistent with the standards of military readiness and effectiveness, unit cohesion, and military recruiting and retention.<sup>291</sup> Sixty days after certification, repeal would be effective.<sup>292</sup>

Certification to the congressional defense committees occurred on July 22, 2011, seven months after adoption of the repeal law.<sup>293</sup> The repeal law became effective sixty days later, on September 20, 2011, nine months after the law was adopted and less than a year after the Working Group released the Report.<sup>294</sup> Any qualified gay or lesbian who wanted to serve in the U.S. military could finally do so freely and openly.

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285. *See, e.g.*, 156 CONG. REC. 169, S10653 (2010) (Senator Chambliss's remarks on how repeal might have a negative impact on effectiveness); There are also frequent references to the Working Group Report during the Senate debate. *See* 156 CONG. REC. 169, S10669-10679 (2010) (Debate on Repeal Legislation).

286. CLERK, U.S. HOUSE OF REPRESENTATIVES, FINAL VOTE RESULTS FOR ROLL CALL 638 (2010), <http://clerk.house.gov/evs/2010/roll638.xml> [<https://perma.cc/LMX6-N9KA>]; BILL CLERK, U.S. SENATE, FINAL VOTE RESULTS FOR ROLL CALL 638 (2010), [https://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=111&session=2&vote=00279](https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=111&session=2&vote=00279) [<https://perma.cc/W4MY-Y9MJ>].

287. *Id.*

288. *Id.*

289. 10 U.S.C. § 654 (1993) (repealed 2010).

290. *Id.*

291. *Id.*

292. Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

293. Lee, *supra* note 76, at 307.

294. *Id.*

***LAL:** At the end of the day, the final determination and assessment was conducted by the two co-chairs, The Honorable Jeh Johnson and General Ham. When General Ham testified before the Senate Armed Services Committee right after the Report was issued, he stated that after nine months of study he was convinced that we could change this law, even in a time of war.*

*This hearing was followed two days later by every Service chief appearing, and the Service chiefs were asked their individual opinions. Each four-star general and admiral was asked the “should” question. Recall that this report and the co-chairs did not answer whether DADT should be repealed; we answered whether it could be repealed, and if so how. The “should” question was asked of all the Service chiefs: the Chief of Naval Operations agreed with immediate repeal while both the Army and Air Force Chiefs of Staff agreed with the premise of repeal but did not believe it should occur “during a time of war.” The lone “no” came from the Commandant of the Marine Corps who disagreed with repeal at any time.*

*Following repeal, the same Marine Corps Commandant became the first Service Chief to make a statement. He embraced the new law and directed one of his generals to lead implementation of repeal, thereby demonstrating his commitment to open service after Congress had passed the repeal statute.*

*One senior leader called it the biggest non-event in DoD’s history, and I am convinced that one of those reasons for the nonevent was that this nine-month time period, this study, and this multi-party negotiation allowed the military to have a conversation with itself.*

## VIII. LESSONS

The Working Group set up by the Secretary of Defense performed a pivotal role as a de facto facilitator of this massive multiparty process.<sup>295</sup> The Working Group and its Co-Chairs designed and executed an elaborate process that was completed in a record amount of time (only nine months) and helped resolve the long-standing and heated social issue on opening U.S. military service to gays and lesbians. This landmark process offers two lessons.

The primary lesson highlights a feature of negotiation theory that deserves special attention in intractable disputes: the information-gathering stage. As the Working Group process demonstrated, information-gathering can accomplish more than informing the discussions, the conventional benefit of this negotiation stage. Information-gathering, as executed so meticulously by the Working

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295. See *supra* Part II.

Group, also can help stakeholders overcome impediments and cultivate support for the result and implementation, which are essential benefits when resolving social issues.

The benefits of information-gathering for informing discussion are well-recognized. What is new here is that the Working Group illustrated an ambitious and enterprising process. A mountainous amount of information through surveys, focus groups, research, and consultants was generated and published to inform repeal discussions, especially the deliberations by Congress.<sup>296</sup> As this Article illustrated, the methods for information-gathering did much to educate stakeholders—the deciders and the influencers that needed to be consulted and informed.

As explained by Jonathan Lee, who served as Special Assistant to the Co-Chair Jeh Johnson:

[The Working Group's assessments] helped provide an answer to the question of whether DADT could be repealed without unacceptable impacts on the military—information that proved important to Congress as it made its decision as to whether DADT should be repealed. . . . [T]he information compiled by the [Working Group] . . . served as a commonly agreed-upon set of facts from which senior leaders in the DoD, as well as members of Congress, could base their positions about repeal. Prior to this, no widely accepted data on service member attitudes existed, nor did any definitive study of the impacts of repeal.<sup>297</sup>

After the Working Group released the Report and Implementation Plan, as described in the Part on Commitment, Congress gave them considerable attention during its floor debates, including making them required reading for the President, Secretary of Defense and Chair of the Joint Chiefs of Staff before the repeal could become effective.

The Working Group also demonstrated how to employ information-gathering to stimulate a robust consideration of key issues by stakeholders, a consideration that can lay the foundation for a possible policy change. This is the most noteworthy lesson from this study.

Even though the survey and focus group questions were designed primarily to generate information to inform repeal discussions, the natural design of the questions did much more. The questions engaged Service members in reflecting on the repeal, including its pros and cons. Answering the questions helped Service members overcome any status quo bias and helped resisters, including those with value differences, to become acclimated to the possibility of repeal. Formulating answers also

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296. See *infra* Part VII.

297. See Lee, *supra* note 76, at 308.

contributed to preparing respondents for implementing DoD-wide repeal.

Defense Secretary Gates succinctly articulated these benefits when he remarked that “for the first time probably ever, the military actually had a conversation with itself about this subject [DADT].”<sup>298</sup> As elaborated by Jonathon Lee, the Working Group

“encouraged the military to engage in a conversation with itself about what it would mean for gays and lesbians to serve without having to hide their identity . . . [The Working Group’s] effort, and particularly the internal conversation it helped spark among the force about what repeal would really mean to them, were part of a healthy process that contributed to a largely successful and incident-free transition to a post-DADT military.”<sup>299</sup>

Mr. Lee further elaborated on how the internal conversation helped Service members, the stakeholders most affected by repeal, to prepare for any change: “[t]his internal conversation within the force, which took place not only through the formal mechanisms established by the [Working Group], but also in the everyday discussions and interactions among service members and their families, *helped service members better come to terms with what repeal would really mean to them.*”<sup>300</sup>

The other lesson from this study is straightforward and surely not new: negotiation theory works for resolving contentious social issues. When this elaborate process is assessed against the theoretical benchmarks discussed in the Part on Negotiation Framework, the process seems unremarkable. It was done by the book. Information was gathered, stakeholders were identified and involved, their interests were uncovered and considered, and objective standards were generated and employed to persuade and for use as a basis for decision-making. A partial single-text approach was employed to ensure input.

A carefully crafted resolution (the Report) was fashioned by members of the Working Group and adopted by the Co-Chairs. The Report addressed stakeholders’ interests and answered the ultimate question when it concluded that the risk of DADT repeal to overall military effectiveness was low.<sup>301</sup> Congress crafted its own commitment in the

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298. Robert Gates: *Former Defense Secretary, CIA Director—and Eagle Scout*, STATE LEGISLATURES MAG., Oct.–Nov. 2015, at 22.

299. See Lee, *supra* note 76, at 284.

300. *Id.* at 309 (emphasis added).

301. See DADT REPORT, *supra* note 11, at 119 (In the final chapter of the Report that included its recommendations, the Co-Chairs concluded that:

Based on all we saw and heard, our assessment is that, when coupled with the prompt implementation of the recommendations we offer below, the risk of

form of the repeal legislation that incorporated the Report as required reading.

Throughout the process, the Working Group understood that any result would need to be better than the stakeholders' BATNA, the likely judicial outcome that hovered over the entire process and kept stakeholders at the table.

This successful backstory on the repeal of DADT should inspire others to use these proven negotiation techniques for resolving intractable issues with attention to how process design can bolster acceptance of the result and its implementation. The Working Group's information-gathering process, which did more than inform discussions, can serve as a model for future efforts to address intractable disputes including those that involve social change.

*HA: Whenever I conduct a negotiation or mediation training program, I commonly hear practitioners tell me how the theory is not relevant to practice. They know what works from experience without all the esoteric nomenclature. I agree that thoughtful and self-reflective practitioners can figure it out based on intelligence and considerable experience, as illustrated in this study and the one I did on Nelson Mandela as Negotiator.<sup>302</sup> These studies also confirm the efficaciousness and explanatory power of the theory that can be a valuable guide to practitioners for assessing and improving their negotiation effectiveness.*

*I would like to share a final observation and pose several open questions, at least for me.*

*This was indeed an impressive process that must be admired for the breadth, depth, and quality of work that was completed in only nine months. It showed what can be done when a group has vision, resources, expertise, and discipline. As someone who was brought up during the era*

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repeal of Don't Ask, Don't Tell to overall military effectiveness is low. We conclude that, while a repeal of Don't Ask, Don't Tell will likely, in the short term, bring about some limited and isolated disruption to unit cohesion and retention, we do not believe this disruption will be widespread or long-lasting, and can be adequately addressed by the recommendations we offer below. Longer term, with a continued and sustained commitment to our core values of leadership, professionalism, and respect for all, we are convinced that the U.S. military can adjust and accommodate this change, just as it has others in history.

*Id.* at 119–29. They arrived at this overall assessment based on the survey results, misperceptions about “open” service apparent from the survey results, risks of repeal within warfighting units, changes possible during a time of war, resistance to change generally, lessons from history when the military was integrated by race and gender, experiences with integration of other militaries, experiences with integration of other domestic organizations (police and fire departments, FBI, CIA and others), and conclusions of assessment panel. *Id.* at 119–29.

302. See generally Harold I. Abramson, *Nelson Mandela as Negotiator: What Can We Learn from Him?*, 31 OHIO ST. J. ON DISP. RESOL. 19 (2016).

*of anti-Vietnam War protests and much hostility toward the military among my generation and who never served in the military, the eleven months at USAFA and research on this project gave me much to contemplate and commend.*

*I end this Article with four open inquiries for assessing the lessons for future application and a few of my thoughts.*

*First, I wonder whether our conclusions would be verified by a follow-up study with stakeholders. We could not survey them ten years later about the impact of the surveys and focus groups on overcoming values and any status quo bias. All we know for sure is that the repeal and transition was mostly a non-event.*

*Second, I wonder how easy it will be to replicate what was accomplished. The large Working Group with a military, mission-driven ethos appeared to be highly disciplined, well resourced, and laser-focused. I wonder how feasible it will be to replicate the lessons and benefits in a smaller-scale multi-party process. I am optimistic and think there are system design opportunities for engaging stakeholders that ought to be tried (and explored in another article). For example, for a tumultuous conflict over locating a homeless residence in a residential neighborhood, as occurred near me during the height of the Covid-19 pandemic, an informative brochure and a thoughtful survey of local residences followed by Zoom meetings might have led to a smoother acceptance of this proposal to offer local, safe, and temporary living quarters.*

*Third, I wonder whether the process would have succeeded if the military and country had not already begun to become culturally receptive to this momentous social change in 2010, although as indicated in the Part on Information-Gathering, the Working Group helped prepare resisters for this policy change. I wonder whether this process would have worked seventeen years earlier, in 1993, when the ban was initially proposed to be lifted and DADT compromise was adopted. I like to think the process would have and might have avoided the intermediate step of DADT.*

*Finally, I wonder why the resisters did not attack the credibility of the panel's risk assessments or the Working Group's studies. The results were vulnerable even though the Report, including its recommendations and implementation plan, were substantial, thorough, and thoughtfully presented.*

*The central feature of the Report, the panel's risk assessments, was not the product of independent, objective judgements, as examined in the Part on Information-Gathering. The assessments were made by panel members who were stakeholders (employees of DoD). Even though members of the risk assessment panel were instructed that "[i]n performing their assessment, each of the panel members should apply*

their own individual, professional judgment,” the judgements were not made by independent experts.<sup>303</sup> Furthermore, the entire working group’s membership consisted of DoD employees who had an interest in the outcome as they designed the studies that were used to inform the repeal discussions.

Although resisters did attack the process as too rushed and the interpretation of the surveys, I wonder whether the reason that many resisters did not attack the credibility of the panel members, assessments, studies, and Co-Chairs was because of their respect and deference to the military leadership, especially the stature of the Co-Chairs.<sup>304</sup> I suspect that the repeal advocates would have assailed the objectivity of the assessments if they were unfavorable.<sup>305</sup>

**LAL:** I would like to share a few final observations.

As we have noted in this Article, negotiations theory did not inform how the Working Group approached its work. While I remain humbled and proud of the work we accomplished, I do wonder whether we could have been more effective had we recognized and intentionally applied the tenets of multi-party negotiations.

I am grateful I crossed paths with Professor Hal Abramson. Because of him, I grew to appreciate the critical importance of negotiations as a skillset for military leaders. Professor Abramson helped USAFA establish the Leadership and Appropriate Dispute Resolution (LADR) research center. This entity is dedicated to furthering pedagogy and research into negotiations in the military. Over 300 cadets a year now take negotiation courses prior to commissioning in the Air Force and Space Force. I know they will be much better equipped to lead because of this education.

A decade has passed since the DADT repeal became effective. In that short time, the Supreme Court has repealed the Defense of Marriage Act, the final step in ensuring that all military families—regardless of sexual orientation—are treated equally. Last summer,<sup>306</sup> I officiated the

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303. DADT REPORT, *supra* note 11, at 98.

304. See ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION ch. 6 (2007) (considering how people can defer to authority and the appearance of authority).

305. See Sean Gibbons & Aaron Belkin, *Dismantling “Don’t Ask, Don’t Tell”*, STAN. SOC. INNOVATION REV. (Apr. 6, 2016), [https://ssir.org/articles/entry/dismantling\\_dont\\_ask\\_dont\\_tell#](https://ssir.org/articles/entry/dismantling_dont_ask_dont_tell#) [<https://perma.cc/S2AN-B8U6>]. Aaron Belkin, Director of Palm Center and a leading advocate of DADT repeal, explained how he viewed the discussion of “unit cohesion rationale” and the “military readiness argument” as phony points for disguising homophobia, an argument that could not be made publicly. *Id.* He believed any strategy for repeal had to directly confront these cohesion and readiness arguments, which the focus group and survey result did when it concluded the impact of repeal would be low. *Id.* Therefore, there was no reason for him to question the validity of the studies. *Id.*

306. July 2021.

*promotion ceremony of my executive officer to O-4 (major). He and his husband could openly celebrate this milestone with friends and colleagues, including cadets from Spectrum, an official affinity LGBTQ group at USAFA. The joy in the room was contagious, and yet, just a short ten years ago, such a ceremony would not have been possible.*

*If you had asked me in December 2010 as Congress passed DADT repeal, whether I would have an openly gay executive officer in a matter of ten years, I honestly would have been skeptical. I was confident in our implementation plan, but I anticipated a much longer time before “real” integration would occur.*

*Finally, I think what the military took from this experience is the importance of bringing together parties and stakeholders from across a range of perspectives and bringing them together to work through a hot-button issue. We saw the benefits of holding a conversation in and of itself. The military unwittingly validated the negotiations process on one of the toughest social issues of our time. And while the end result may not have made everyone happy, the outcome was accepted, we could move on and we did.*

## Appendix A

### Secretary of Defense Directive and Terms of Reference



SECRETARY OF DEFENSE  
1000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1000

MAR 2 2010

MEMORANDUM FOR THE GENERAL COUNSEL  
COMMANDER, US ARMY EUROPE

SUBJECT: Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654

The President has requested that the Congress repeal 10 U.S.C. § 654, "Policy Concerning Homosexuality in the Armed Forces," and directed the Department to consider how best to implement a repeal of this law.

The Chairman of the Joint Chiefs of Staff and I owe the President an assessment of the implications of such a repeal, should it occur. We also must develop an implementation plan for any new statutory mandate. To be successful, we must understand all issues and potential impacts associated with repeal of the law and how to manage implementation in a way that minimizes disruption to a force engaged in combat operations and other demanding military activities around the globe. Should Congress take this action, strong, engaged and informed leadership will be required at every level to properly and effectively implement a legislative change.

Accordingly, you are to stand up an intra-Department, inter-Service working group to conduct a comprehensive review of the issues associated with a repeal of the law. An integral element of this review shall be to assess and consider the impacts, if any, a change in the law would have on military readiness, military effectiveness and unit cohesion, and how to best manage such impacts during implementation.

To effectively accomplish this assessment, I believe it essential that the working group systematically engage the force. The participation of a range of age, rank and warfare communities in this study including families, in addition to active outreach across the force is a critical aspect that will undoubtedly lead to insights and recommendations essential to the Department's implementation of any change.

It is critical that this effort be carried out in a professional, thorough and dispassionate manner. Given the political dimension of this issue, it is equally critical that in carrying out this review, every effort be made to shield our men and women in uniform and their families from those aspects of this debate.



OSD 02309-10



Your terms of reference are attached. By copy of this memorandum, all DoD Components will fully cooperate in the execution of this Review and be responsive to all requests for information, detail personnel, or other support. The working group shall submit its report to me by December 1, 2010.

A handwritten signature in black ink, appearing to read "Robert M. Gates". The signature is fluid and cursive, with the first name "Robert" and last name "Gates" clearly distinguishable.

Attachment(s):

As stated

cc:

Secretaries of the Military Departments

Under Secretary of Defense for Personnel and Readiness

General Counsel of the Department of Defense

Joint Chiefs of Staff

## TERMS OF REFERENCE

### Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. § 654

These Terms of Reference (TOR) establish the objectives of the Secretary of Defense- directed Comprehensive Review for the Repeal of 10 U.S.C. § 654, "Policy Concerning Homosexuality in the Armed Forces." The Review will examine the issues associated with repeal of the law should it occur and will include an implementation plan that addresses the impacts, if any, on the Department.

#### **Objectives and Scope:**

The Review will identify the impacts to the force of a repeal of 10 U.S.C § 654 in the areas reflected below:

1. Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.
2. Determine leadership, guidance, and training on standards of conduct and new policies.
3. Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.
4. Recommend appropriate changes (if any) to the Uniform Code of Military Justice.
5. Monitor and evaluate existing legislative proposals to repeal 10 U.S.C § 654 and proposals that may be introduced in the Congress during the period of the review.
6. Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.
7. Evaluate the issues raised in ongoing litigation involving 10 U.S.C § 654.

**Methodology:**

1. Review all DoD directives, instructions and other issuances potentially impacted by a repeal. Identify where new directives and instructions may be needed.
2. Ensure participation in the working group by: military service leadership; appropriate OSD staff elements; cross service officer and enlisted communities; mid-grade and senior ranks; human resources/personnel specialists; pay and benefits specialists; family support programs specialists; accession point and training communities; service academies and/or senior service schools; and medical, legal and religious support personnel.
3. In an appropriately balanced manner, engage Members of Congress, key influencers of potential service members and other stakeholder groups that have expressed a view on the current and perspective policy.
4. Research/study methods shall include systematic engagement of all levels of the force and their families, analysis of current data and information, and review the experiences of foreign militaries.
5. Engage the RAND Corporation to update the National Defense Research Institute report on "Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment" (1993).

**Deliverables:**

- A Report addressing the areas above will be delivered to the Secretary of Defense not later than December 1, 2010. Prior to the delivery of the report to the Secretary of Defense, each Service Chief shall be afforded the opportunity to review and comment.
- The Review will provide a plan of action to support the implementation of a repeal of the law. The Review shall identify areas for further study.

**Support:**

- The Under Secretary of Defense (Comptroller)/Chief Financial Officer will provide adequate funding for the Review.

- The DA&M, through Washington Headquarters Services, will coordinate for and provide human resources, office/facilities, and other support to ensure success of this effort.
- The Military Departments and other DOD Components will provide full support to the Review with detail personnel, information (including but not limited to documents and interviews of personnel), analytical capacity as determined necessary and any other support as requested.

## Appendix B

### Negotiation Framework

This Appendix on the Negotiation Framework is offered as a primer for understanding key benchmarks that are used throughout this Article to assess the Working Group's multiparty negotiation process. The framework is built around the metaphor of a circle<sup>307</sup> that offers a map of the process that begins with preparation before entering the circle to negotiate and ends with two options for exiting the circle and concluding the negotiation.

#### Before Entering Circle to Negotiate

Parties ought to prepare before they go inside the circle to negotiate. This is not a novel idea although it is not always done or done well. Parties should first build relationships and gather information they may need for negotiating inside the circle.

#### Building Relationships

Any negotiation is likely to go more smoothly if parties have a working relationship before going inside the circle. There is much that parties can do to try to develop rapport and possibly some trust. Relationship building can take place during small talk, meals, and random encounters when parties can show appreciation and respect for each other and possibly connect over similar experiences and interests. When the Working Group was designing studies and surveying interested parties as part of its information-gathering, the Working Group was in contact with a large number of stakeholders over matters not inside the negotiation circle. These interactions provided opportunities to cultivate rapport and possibly trust in advance of any negotiations. As one example, the facilitators' opening script for focus group meetings, with respondents whose buy-in was needed, reads like a textbook description of building rapport.<sup>308</sup> The facilitators were scripted to demystify the process and try to make respondents comfortable before asking questions about the DADT policy.<sup>309</sup> This feature of negotiations will not be delved into other

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307. See Bruce Patton, *Building Relationships and the Bottom Line: The Circle of Value Approach to Negotiation*, NEGOT., Apr. 1, 2004, at 4–7 [hereinafter Patton, *Circle of Value*]; Bruce Patton, *Negotiation*, in THE HANDBOOK OF DISPUTE RESOLUTION 279 (Michael L. Moffitt & Robert C. Bordone eds., 2005) [hereinafter Patton, *Negotiation*].

308. See WESTAT, SUPPORT TO THE DoD COMPREHENSIVE REVIEW WORKING GROUP ANALYZING THE IMPACT OF REPEALING “DON’T ASK, DON’T TELL” app. A (2010) (They were told to explain that this is a voluntary process, that anyone could leave if they want to, that no one would be penalized for leaving, and that participants are encouraged to speak if have something to say.).

309. *Id.*

than to note that the Working Group and its consultants gave some attention to this preparatory step.

### Information-Gathering (Communications)

Parties should gather in advance the information they will need inside the circle. As a first step, parties might preliminarily frame neutrally the issues that they want to resolve. The “issues” are what bring people together at the table to negotiate like “will there be an impact on military effectiveness if repeal occurs?” Issues are the source of possible conflict between parties that they should identify and consider before going inside the circle.

Parties interested in the dispute should be identified in advance. Interested parties, known as stakeholders, have a stake in the outcome and will be affected by any resolution. All key stakeholders need to be involved to some degree for one simple reason. Left out stakeholders can delegitimize the negotiation and derail any implementation. As examined in this Article’s discussion of Stakeholders, a large number were identified and engaged in various ways in the repeal consideration process.

Parties should gather the information that they will need inside the circle. Information-gathering process includes learning the parties’ interests, developing possible options for resolution, and identifying potential objective standards to guide the negotiation, as will be explored next on negotiating inside the circle. In this repeal consideration, a massive amount of information was amassed. As this Article’s Part on Information-Gathering illustrated, the information was used for more than informing the negotiations; the techniques for gathering the information also helped build support and possible buy-in for whatever the outcome might be.

Finally, it may be helpful for parties to develop in advance a draft agenda that might include, among other matters, the issues to be resolved and whether any additional information needs to be gathered. An early agenda should be tentative and further developed and refined when inside the circle.

### Negotiating Inside the Circle

After parties have prepared, they are ready to go inside the circle to negotiate. This description will focus on three key elements although each one opens a door to more inquiries and opportunities.

#### Interests

The central feature of the interest-based model is to identify the interests of the parties, thus the model’s name. And there is a compelling

justification for viewing the interest inquiry as central. The interest lens shifts the focus of the negotiation from exchanging positions (what parties want as a solution) to discussing interests (what is motivating the parties to want the particular solution). By giving attention to “why” parties want what they want, parties can learn the underlying reasons a party prefers a particular outcome (solution). By understanding the reasons, parties can move the negotiations along a pathway that commences with identifying interests and progresses toward generating new options and selecting optimum resolutions.

When a party opposed DADT repeal, for example, all that the other parties learned was the solution the party wanted. Advocating for a particular solution does not reveal why the party wanted that result. When asked why a party opposed repeal, the party’s reply can reveal valuable information about his motivating interests. A party might explain that he was worried that the presence of gay and lesbian Service members would undermine military effectiveness. That answer would change the focus away from debating for and against repeal and toward a more useful inquiry. The discussion would move toward figuring out the impact of gay and lesbian Service members on military effectiveness—a more meaningful inquiry that also would address parties’ underlying likely shared interests in an effective military.

### Options

Option-building is the stage when negotiators can get creative. After identifying interests, parties should generate multiple options for meeting them. This crucial feature of interest-based negotiations may not feel natural for parties to do. Option-building through brainstorming requires a disciplined and focused effort to generate a list of options without parties simultaneously assessing each option as the list is being compiled. The options are assessed afterwards and separately.

For example, parties might first brainstorm multiple options for researching the impact of repeal on military effectiveness. Options might include surveying domestic police departments without a bar, militaries in other countries where repeal has taken place, current Service members experiences, current gay and lesbian Service members experiences, and independent experts. Notice how the option-building shifts the discussion from a “for or against repeal” debate to generating options for assessing the impact of repeal on military effectiveness, which would presumably address a common interest of all parties. Deciding which is the best option takes a negotiator to the last element inside the circle.

### Claiming

After interests have been identified and options generated, it is time for parties to make decisions. Parties need to select options that not only

meet their interests but are also better than their alternatives to settlement. There are different ways to do what has been described as the third element inside the circle, Claiming. Parties can claim by using objective standards, trading, and positional negotiations.<sup>310</sup>

The preferred claiming technique is to identify objective standards that can be the basis for justifying the selection of the options. This technique can reduce posturing by inducing parties to work together to identify relevant standards.

An objective standard is one that is trustworthy, independent of the parties, and fair. For example, when negotiating for a salary, instead of exchanging strategic offers and counteroffers and splitting the difference (positional negotiations), parties might agree to a salary based on a formula like the average salary or slightly above average salary for that job in the relevant region. This would be an objective standard because neither party can sway the average salary amount. The standard is derived from information that is independent of the parties and can be trusted as objective.

An objective standard relevant to DADT surveys of Service members might be the standards employed by social scientists for designing valid surveys. Then parties would select a survey option that would most likely meet the standards, like a survey that used random selection of participants and questions that have been tested to be non-biased. Part VI of this Article considers the use of objective standards by the working group and their impact on the negotiations.

Parties also can claim by trading options. A party can offer something of low value to the offering party that might be of high value to another party. For example, one party may offer to endorse surveying U.S. Service members that another party might view as a high priority in return for that party endorsing a high priority for the offering party such as gathering studies on the impact of repeal in other countries. Although the trade as a package could be viewed as an option when generating options, at the claiming stage parties also might select the two options by making a trade during the claiming stage.

Use of objective standards and trading can move parties most of way toward resolution, but sometimes there may be a few remaining issues

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310. Bruce Patton, when describing the seven-element problem-solving model, identified the third element within the circle as “Legitimacy,” which includes standards, as a basis for justifying selecting an option that is fair. In contrast, he characterizes a trade as a possible option as part of option-building. In this Article, we label the third element as Claiming and group three techniques under the heading. In addition to legitimacy (standards), we include trading and positional negotiations, as three techniques for claiming as parties move toward resolution and commitment. See Patton, *supra* note 307, at 279; HAROLD I. ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM-SOLVER* 74 (3d ed. 2013).

that can be more efficiently resolved through the old-fashioned positional negotiation dance of offers and counteroffers. For example, both parties might agree to survey Service members but disagree on the number of people to be surveyed. One party might want to survey 100,000 Service members which both parties agree would meet the standard for statistical validity. But the other party might prefer to survey 200,000 people because the party thinks a larger survey would be more persuasive. The first party might view doubling the size of the sample as a waste of money and time when a 100,000 sample can be easily defended as valid. Parties might negotiate over the number to be surveyed with one party counteroffering with a 175,000. The other party might counter with 125,000 and then the parties might split the difference at 150,000 sample-size. This method can be more efficient if not employed prematurely than tenaciously applying an objective standard that justifies 100,000 sample. Positional negotiations can be a handy claiming method to employ toward the end of the negotiations as parties are preparing to exit the circle.

### **Exiting the Circle to Conclude the Negotiations**

Parties can exit the circle in one of two ways.

#### **Commitment**

If the parties reach a settlement, they shift their focus to solidifying their commitment. Parties want to be sure that everyone is on the same page regarding the details of any agreement and how to implement it. When entering this last stage, parties, who have reached an agreement in principle inside the circle, may encounter unresolved details when finalizing the agreement. As discussed at the end of this Article, the Working Group, Co-Chairs, and Congress reached the Commitment stage.

#### **BATNA**

If parties fail to reach a settlement, they usually do so because their BATNA (Best Alternative to a Negotiated Agreement)<sup>311</sup> seems more attractive than the agreement emerging in the circle. In many cases, including the DADT negotiations, the BATNA can be a judicial decision that would resolve the dispute if the parties don't. As examined in Part V, a judicial outcome was an unattractive BATNA for many stakeholders, which motivated them to negotiate over repeal where they thought they would have more control and could achieve a better outcome.

Finally, although organizing these negotiation elements around entering the circle, inside the circle, and exiting it may suggest a neat

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311. See ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 99–108 (3d ed. rev. 2011).

sequencing of stages, negotiation reality is much messier or, to put it more eloquently, more dynamic. In practice, two or more elements can be in play at the same time, like gathering information outside the circle while simultaneously identifying interests inside the circle. Or parties can regress after relationships become strained inside the circle while parties are learning interests, as another example. Then, parties may retreat to repair relationships before returning inside the circle to further understand interests. Negotiations are a fast-moving, dynamic process. This circle provides a map with benchmarks to track and assess what is happening, in a negotiation.

### Plus Techniques

We will briefly identify two additional techniques that were employed, to some degree, by the Working Group when informally facilitating this multiparty process.

#### I-C-N Framework

Any facilitator should give attention to the *role* of each stakeholder when structuring the involvement of the stakeholders. Although all stakeholders, by definition, have an interest in the outcome, not all of them are necessarily deciders. A stakeholder's role can be classified based on its degree of involvement in the negotiations, as clarified in the I-C-N decision-making tool where stakeholders are grouped into three categories: Who decides? Who should be consulted? And, who should be informed?<sup>312</sup> In the Article's discussion of Stakeholders, the numerous stakeholders involved with the DADT repeal discussions were classified into one of these three categories for engagement.

#### One-Text Procedure<sup>313</sup>

In a process with numerous parties, a facilitator should consider employing a one-text procedure for managing the flow of proposals in order to avoid confusion that can be caused by circulating multiple, conflicting proposals that can be difficult to track.

The one-text procedure begins with the facilitator first listening to different views and priorities of the parties, learning different interests, and drafting a possible agreement. Then, the facilitator asks parties to criticize the first draft by explaining why it does not meet their interests. And so begins an iterative process: the facilitator re-drafts when in a listening and learning mode; listens to reactions by parties, which does not require any concessions by them; and presents a new draft, without a recommendation, for further reactions. The facilitator continues this

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312. JEFF WEISS, HBR GUIDE TO NEGOTIATING 112–16 (2016).

313. FISHER ET AL., *supra* note 88, at 112–16.

iterative process until the facilitator thinks there is nothing else that can be done to meet parties' interests. For this last step, the facilitator presents a recommended final draft for the parties to either accept or reject.

This one-text procedure can be valuable for two party disputes and essential for multiparty ones. Perhaps the most famous illustration was when it was used by President Carter in 1978 when mediating the historic Camp David peace treaty between Egypt and Israel. After thirteen days and around twenty-three drafts, President Carter recommended the last draft and Egypt and Israel accepted it.<sup>314</sup>

As considered in this Article's Part on Commitment, the Secretary of Defense's Directive called for and the Working Group employed a partial version of the one-text procedure before the Working Group and Co-Chairs finalized its Report and Implementation Plan.

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314. FISHER ET AL., *supra* note 88, at 116.

## Appendix C

### Information-Gathering Surveys and Studies

This Appendix provides a list of the massive number of information-gathering initiatives undertaken by the Working Group and considered when the final reports and recommendations were formulated. This summary is divided into three parts: surveys and studies that qualified as objective standards, surveys and studies that did not, and assessments produced by the risk assessment panel of the Working Group.

#### 1. Surveys and Studies that Met Objective Standards

##### Westat Surveys<sup>315</sup>

The Westat surveys were the only ones that were intended to produce “statistically valid results suitable for quantitative analysis.”<sup>316</sup> Westat, an independent research and statistical survey firm, was contracted by the Working Group to conduct two large-scale surveys that were

designed to *measure perceptions* of how repeal might affect military readiness, military effectiveness, unit cohesion, morale, family readiness, military community life, recruitment, and retention. The Surveys were not designed to be a referendum on issue of DADT repeal, nor can survey results alone answer the question of whether repeal should or should not occur. The surveys can, however, contribute to the decision making process by providing information on what Service members and their spouses think will be the likely impact of repeal.<sup>317</sup>

The large-scale Service Members’ Survey of 103 questions with subparts initially targeted 200,000 Service members, but the target was doubled to 400,000 at the direction of the Secretary of Defense. The response rate was in-line with other DoD surveys of 28% (115,000 Service members). It was one of the largest surveys ever done within the U.S. military.<sup>318</sup>

The large-scale Spouse Survey of 43 questions with subparts was undertaken to learn about spouses’ attitudes and the potential “impact of

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315. WESTAT, 1 SUPPORT TO THE DoD COMPREHENSIVE REVIEW WORKING GROUP ANALYZING THE IMPACT OF REPEALING “DON’T ASK, DON’T TELL” app. A (2010) [hereinafter WESTAT REPORT VOLUME 1].

316. See Jonathan Lee, *The Comprehensive Review Working Group and Don’t Ask, Don’t Tell Repeal at the Department of Defense*, 60 J. HOMOSEXUALITY 282, 308 (2013).

317. WESTAT REPORT VOLUME 1, *supra* note 315, at 1 (emphasis added).

318. U.S. DEP’T OF DEF., REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” 36–38 (2010) [hereinafter DADT REPORT].

repeal on recruiting, retention, and family readiness.” The survey, which was sent to 150,186 spouses of Service members, resulted in 44,266 responses for a 30% response rate.<sup>319</sup> The results of these perception surveys were given considerable attention in the final reports and recommendations as discussed in the Article under the Parts on information-gathering and commitments.

### RAND Study Update

The Secretary of Defense directed the Working Group to engage RAND, an independent research firm,<sup>320</sup> to update its influential 1993 RAND Study on Sexual Orientation and U.S. Military Personnel, in part as a response to the Chairman of the Senate Armed Services Committee, Senator Carl Levin, and ranking member, Senator John McCain.<sup>321</sup> The original study greatly influenced the adoption of the 1993 DADT statute. RAND’s updated 2010 study addressed four key issues:

- How has the environment changed within and outside the military over the 17years since the inception of DADT?
- How might repeal of DADT affect military readiness and effectiveness, such as recruitment and retention, unit cohesion, and force health?
- What do military personnel, including currently serving gay men and lesbians, think about repeal?
- What has been the experience of other institutions in which gay people currently serve, work, and study?<sup>322</sup>

The new study centered on updating nine areas, which included examining the experiences of seven foreign governments;<sup>323</sup> collecting information on the experiences of domestic police and fire departments, FBI, CIA, U.S. AID, and State Department;<sup>324</sup> researching recruitment and retention experiences since 1993;<sup>325</sup> conducting 22 focus groups with

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319. *Id.* at 38. The surveys could not include partners/spouses of gays and lesbians because their names were not in the DoD databases. *Id.* Only married couples were included, and under federal law at the time (DOMA-Defense of Marriage Act), marriage could only be between a man and women. *Id.*

320. RAND is an independent research organization that was formed after WWII to focus on military planning. Its two core values are quality and objectivity. *See A Brief History of RAND*, RAND, <https://www.rand.org/about/history.html> (last visited May 26, 2022).

321. RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY v (2010), <https://www.rand.org/pubs/monographs/MG1056.html>.

322. *Id.* at xix.

323. *Id.* at 275

324. *Id.* at 322, 324.

325. *Id.* at 167.

Service members;<sup>326</sup> conducting a limited survey of gay and lesbian service personnel on DADT;<sup>327</sup> an updating report on unit cohesion and performance since adoption of DADT;<sup>328</sup> an updating report on prevalence of homosexuality in the general population and military;<sup>329</sup> researching health issues within the gay and lesbian community;<sup>330</sup> examining developments in military personnel policy and public opinion;<sup>331</sup> and conducting a literature review and field observations on how organizations have changed policies concerning sexual orientation in workplace and other relevant contexts.<sup>332</sup>

The RAND Report made the following findings if DADT were repealed: the impact on recruitment would be small and any negative impact on retention would likely be offset by increases due to reenlistment bonuses, military pay, and allowances; there was little reason to expect notable deterioration in unit performance; increased rates of HIV infection were unlikely; and other health issues would probably not substantially affect readiness.<sup>333</sup>

The RAND updated report served as additional input into the Working Group's assessment and recommendations. The Report's key findings were consistent with the Working Group's own studies but also generated new information.<sup>334</sup>

### Law as a Source of Standards

Law, which is customarily formulated by an independent third party (legislatures and courts), can be a source of objective standards in negotiations and influence if not control what parties do. In the repeal discussions, the federal law, DOMA (Defense of Marriage Act)<sup>335</sup> was a legal standard that controlled portions of any repeal implementation plan. DOMA defined marriage as only between a man and woman. Any implementation plan had to comply with this federal law and therefore could not offer gay and lesbian couples family medical benefits, married housing, or collocation opportunities if the Service members as a couple wanted assignments near each other, among other benefits that were only available for couples that met the statutory definition of marriage. Of

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326. *Id.* at 233.

327. RAND, *supra* note 321, at 255.

328. *Id.* at 137.

329. *Id.* at 91.

330. *Id.* at 197.

331. *Id.* at 69.

332. *Id.* at 351.

333. RAND, *supra* note 321, at xxii–xxiii.

334. DADT REPORT, *supra* note 11, at 43–44.

335. 1 U.S.C. § 7 (2020).

course, other laws also were available as objective standards, such as the conflicting court decisions on the legality of DADT.

*HA: The Weststat large-scale surveys and the notes from the Service member and spouse focus groups in the next Section generated a rich understanding of views, or as the Weststat Report indicated, their “perceptions.” The resulting report reflected what was happening on the ground including any prejudices of respondents at that moment in time. It offered a revealing snapshot across the services. I would like to think that if the surveys were repeated today, the perception results would be much more positive. The Westat report was useful at the time for developing the implementation plan because it flagged what obstacles needed to be overcome.*

*I also think it is worth noting what these surveys did not cover. They never considered whether gay and lesbian Service members have the physical, cognitive, or emotional abilities to serve effectively. I suspect that after the 1993 RAND study concluded homosexuality was “not germane” to serving in the military and recommended holding all Service members to the same standards,<sup>336</sup> the capabilities of gays and lesbians were no longer an issue. The surveys primarily measured the reactions of straight Service members and their families to the presence of gays and lesbians in the military and whether those reactions might undermine military effectiveness.*

## 2. Surveys and Studies that Did Not Meet Objective Standards

These informal surveys and research studies that also were considered by the Working Group and Co-Chairs did not qualify as objective standards in that they were not produced independent of the stakeholders and did not appear to follow research protocols for producing statistically sound surveys or studies, other than Westat analyzing the qualitative data from the forums below. The surveys and studies involved a diverse mix of stakeholders and experts.

### Military Service Members and Spouses Forums

Westat analyzed the notes and five sets of qualitative data from five forums. It identified systematic themes. The summaries of the forums below are from the Working Group’s Report; a more detailed analysis is available in a Report prepared by Westat.<sup>337</sup>

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336. Bernard D. Rostker et al., RAND CORPORATION, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, xxiv (1993), [https://rand.org/pubs/monograph\\_reports/MR323.html](https://rand.org/pubs/monograph_reports/MR323.html).

337. See WESTAT, 1 SUPPORT TO THE DoD COMPREHENSIVE REVIEW WORKING GROUP ANALYZING THE IMPACT OF REPEALING “DON’T ASK, DON’T TELL” 1 (2010) [hereinafter WESTAT REPORT VOLUME 2] (noting that the number of inputs are a little different than what was reported

-95 information exchange forums (IEF) were held at 51 installations that engaged 24,000 active duty, guard and reserve Service members.<sup>338</sup>

-140 Service members participated in Focus Groups of 9–12 participants, as a follow-on to the IEFs, that probed deeper in an effort to understand views “in a more intimate and relaxed setting.” Trained facilitators from Westat led the sessions.<sup>339</sup>

-72,384 confidential comments were collected via an “Online Inbox” from Service members and their families who could anonymously express their views through a website.<sup>340</sup>

- 2691 Service members and family members including 296 who self-identified as gay, lesbian, or bisexual were engaged in a customized survey mechanism that was designed to reach Service members who are gay and lesbian and wanted to share their thoughts and concerns about DADT. Any survey was constrained by the then applicable law that would result in discharging any known gay and lesbian Service members. Westat designed and

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in the Working Group’s Report). Westat summarized the five sets of qualitative data it examined as follows:

1. Notes from 81 Information Exchange Forums (IEFs) and 29 Leadership Discussion Groups (Discussion Groups).
2. Notes from 119 Service Member Small Member Focus Groups (military focus groups) conducted with Service members at these same locations.
3. Notes from 7 Family Small Focus Groups, 9 Family Readiness Coordinator Discussion Groups, and 12 Family Information Exchange Forums (Family IEFs) and 4 Service Member IEFs with family members attending.
4. Transcripts of 160 on-line dialogs from the confidential communication mechanism web site, 80 with Service members who identified themselves as gay, lesbian, bisexual or uncertain of their sexual orientation and 80 with those self-identifying as heterosexual.
5. Inbox comments: for Phase 1, a total of 546 free-form verbatim “Don’t Ask, Don’t Tell” inbox comments received during April, May and June, roughly twice as many from females as from males; for Phase 2: 1505 inbox comments received from April through August, divided more or less equally by Service.”

*Id.* at viii.

338. DADT REPORT, *supra* note 11, at 33–34.

339. *Id.* at 34–35.

340. *Id.* at 35.

managed a confidential communication mechanism that supplemented the safeguards afforded in the other surveys to safely engage gay and lesbian Service members in a live interactive online exchange with Westat moderators. The secured confidentiality protocols were designed to give the Service members confidence to discuss issues related to their service without fear that the information might be disclosed and lead to an investigation and discharge under DADT.<sup>341</sup>

### Interest Groups For and Against Repeal

The Working Group enlisted a large number of interested organizations for advice and views including prominent advocates for and against DADT repeal. They held meetings with over fifteen groups and organizations.<sup>342</sup> According to the Report, the views solicited from these diverse groups did much to “inform the assessment and recommendations in this report.”<sup>343</sup>

### Other Stakeholders

The Working Group met with fifteen same-sex partners of gay and lesbian current Service members.<sup>344</sup> It consulted current and former military chaplains in groups and as individuals, drawn from the full spectrum of religious affiliations. It also consulted chaplains’ endorsing organizations (202 of them).<sup>345</sup> It met with Service Surgeons Generals to discuss medical issues and reached out to the American Medical Association, American Psychological Association, and Gay and Lesbian Medical Association.<sup>346</sup> It solicited input from more than twenty veteran and Military Service organizations by meeting with them and soliciting written input, including meeting with a number of gay and lesbian veterans.<sup>347</sup> The Working Group solicited views of several members of Congress and their staff.<sup>348</sup>

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341. *Id.* at 38–39.

342. *Id.* at 40. The organizations and groups included: Alliance Defense Fund, Center for American Progress, Center for Military Readiness, Center for Security Policy, Family Research Council, Focus on the Family, Heritage Foundation, Human Rights Campaign, Liberty Counsel, OutServe, Palm Center for the Study of Sexuality in the Military, Service Members Legal Defense Network, SLDN Military Outreach Committee, Service Members United, and USMA Knights Out. *Id.*

343. DADT REPORT, *supra* note 11, at 40.

344. *Id.* at 41. The meeting occurred on September 16, 2010. *Id.* at 41.

345. *Id.*

346. *Id.*

347. *Id.* at 41–42.

348. DADT REPORT, *supra* note 11, at 42.

### Fiscal Assessment

The Working Group identified likely net implementation costs of repeal in view of the policy changes that would result from full integration of gays and lesbians.<sup>349</sup>

### Legal and Policy Review

The Working Group undertook an extensive legal and policy review in order to assess and recommend changes to policies if DADT were repealed. Based on in-depth analysis, input from the force, and consultation with policy experts, “the Working Group developed a range of potential courses of action for each issue area.”<sup>350</sup> It conveyed policy options and recommended an approach to the Executive Committee whose comments informed the ultimate recommendations and any implementation plan.<sup>351</sup>

### Leadership, Education, and Training Experts

“The Working Group worked with the Services’ training experts, Service academy staff, and the Defense Equal Opportunity Management Institute to define education and training requirements in the event of repeal and to develop leadership, education, and training guidance and tools.”<sup>352</sup>

### Scholars and Researchers

The Working Group engaged academic and research sources including scholars from the military service academies. The military scholars prepared white papers relevant to the repeal on a wide range of subjects—on philosophy and ethics, organizational behavior including unit cohesion, psychology, sociology, management, religion and morality.<sup>353</sup> Historians from DoD and the Services provided historical insights and compiled past surveys and experiences with racial and gender integration in the military.<sup>354</sup> The Working Group also hosted meetings with faculty, scholars and researchers from the military academies, war colleges, research laboratories, and civilian academia with relevant expertise.<sup>355</sup>

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349. *Id.* at 46.

350. *Id.* at 45.

351. *Id.* at 44–45.

352. *Id.* at 45–46.

353. *Id.* at 39.

354. DADT REPORT, *supra* note 11, at 39–40.

355. *Id.*

## Foreign Militaries

The Working Group reached out to foreign militaries to learn about their experiences with the integration of gay and lesbian personnel.<sup>356</sup> It contacted representatives of all nation members of NATO. Co-Chair of the Working Group, General Ham, had conversations with counterparts in the European and Israeli militaries. Members of the Working Group attended relevant conferences and learned about integration experiences from senior military officers and experts in Australia, Britain, Canada, Israel, and Sweden, including gaining a detailed understanding of the transition experiences from the United Kingdom, Canada, and Australia with an emphasis on learning lessons that have already been learned.<sup>357</sup>

### 3. Risk Assessments by the Working Group's Panel

In this Section, we describe the role of the risk assessment panel and its methodology. Before the risk assessment panel was constituted, the Working Group defined the outcome that the panel would be measuring: What would be the impact of repeal on “military effectiveness”?<sup>358</sup> This standard is a widely used one for evaluating choices made by or for the military.

The Working Group formulated a definition of “military effectiveness” based on its parts identified in the Terms of Reference.<sup>359</sup> The Working Group concluded that assessing “Military Effectiveness” required measuring two primary components: “Military Readiness” and “Unit Cohesion.”<sup>360</sup> The “Military Readiness” component could be measured by assessing several subcomponents including “Family Readiness,” “Retention,” and “Recruiting.”<sup>361</sup> The “Unit Cohesion” component could be measured by assessing subcomponents of “Task Cohesion” and “Social Cohesion.”<sup>362</sup>

These components and subcomponents and their relationship to each other are depicted in Figure 6 below.<sup>363</sup> Each of these components and subcomponents needed to be measured because when taken together, they answered the ultimate question on the impact of repeal on “Military Effectiveness.”

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356. *Id.* at 42.

357. *Id.* at 42–43.

358. *See id.* at 46.

359. *See supra* app. A.

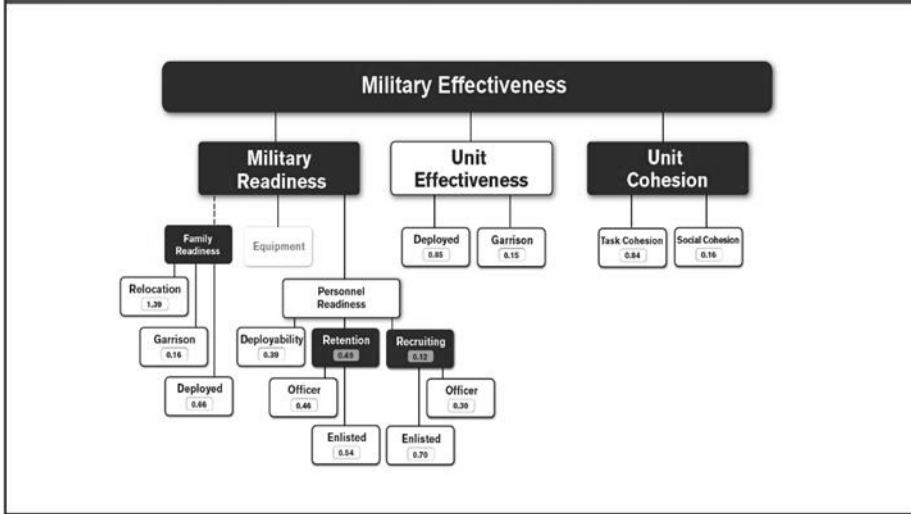
360. *See id.*

361. *See id.*

362. *See id.*

363. DADT REPORT, *supra* note 11, at 99.

Figure 6. The Weighting of the Assessment Areas and Supporting Sub-Areas



After each component and subcomponent had been specified by the Working Group, it selected the Assessment Panel to measure the impact of repeal:

The panel was selected to represent all the Services and a wide range of ages, grades, warfare specialties, and experiences. The assessment panel included military officers, three senior non-commissioned officers, and several DoD career civilians. The panel consisted of combat arms personnel, aviators, surface combat personnel, an intelligence officer, a personnel specialist, family readiness specialists, a recruiter, a judge advocate, an aeromedical officer, and a military researcher. Eight of the panel members were part of the Working Group, including three Working Group members who were brought into the Working Group specifically because of their recent operational experience. For most of the review, the panel consisted of 11 members; for the family readiness review, the panel was increased to 15 members. *In performing their assessment, each of the panel members applied their own individual, professional judgment.* Through inclusion of panel members representing the operational communities in each service, the concerns and views of those communities were both heard and incorporated into the panel deliberations.<sup>364</sup>

364. *Id.* at 98 (emphasis added).

The panel engaged in a multi-step process for assessing each subcomponent and component.

The panel first reviewed relevant scholarly and other materials, including what was learned from the numerous surveys/studies and other methods used to systematically engage the force and their families. It considered the experiences of others with open service, studied expert statements, and heard expert presentations. Then, the panel members deliberated among themselves to arrive at *individual (not group) assessments* for each subcomponent.

They did this by each panel member mapping risk assessments for each subcomponent. Each member selected a number from 1 to 10 along a horizontal bar chart bound by Low Risk at one end and High Risk at the other end for each subcomponent.<sup>365</sup> Each individual numeric rating reflected the risk posed by repeal for each subcomponent.<sup>366</sup>

The individual assessments of the panel members for each subcomponent were totaled and divided by the number of assessments to produce an average risk assessment for each subcomponent.<sup>367</sup> For example, each member offered a numeric risk rating for the impact of repeal on subcomponent task cohesion. One panel member might give a risk rating of 4. A rating of 4 on a scale of ten would be a moderate risk. Then, risk ratings of all the panel members were totaled for the subcomponent and averaged to arrive at a single risk assessment number for task cohesion. In the Report, that number was 3.3.<sup>368</sup> This averaging process produced results that reflected the collective judgement of the Panel.

The panel members also developed relative weights for the various subcomponents. For example, after considering scores of scholarly articles and the two subcomponents of Unit Cohesion, the panel gave greater relative weight to Task Cohesion subcomponent (.84) over Social Cohesion subcomponent (.16).<sup>369</sup> Figure 6 above shows the relative weights for various subcomponents.

The panel applied the *relative* weights to each *average* risk assessment.<sup>370</sup> For example, for unit cohesion, the combined assessments of panel members yielded a risk rating of LOW–MODERATE for task cohesion (3.3) and of MODERATE–HIGH for social cohesion (6.3) before mitigation measures were considered.<sup>371</sup> Given the greater relative importance of task cohesion over social cohesion, the panel rated the

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365. *Id.* at 100.

366. *Id.*

367. *Id.*

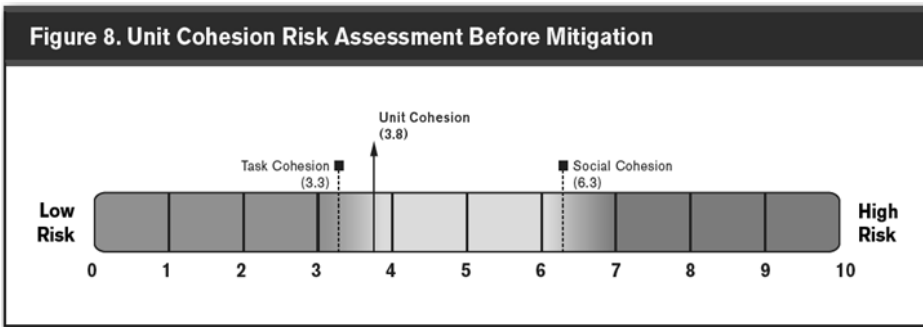
368. DADT REPORT, *supra* note 8, at 100.

369. *Id.* at 98–99.

370. *Id.*

371. *Id.* at 103.

overall repeal risk on unit cohesion as LOW–MODERATE” (3.8).<sup>372</sup> See Figure 8 Bar Chart for mapping of unit cohesion risk before mitigation.<sup>373</sup>



Each panel member did two assessments for each subcomponent: The first assessment considered the impact of repeal before any risk mitigation.<sup>374</sup> The risk values before any mitigation gave Congress, the Service Branches, and the White House an idea of how each subcomponent and military effectiveness would be affected if repeal were immediate due to judicial invalidation of DADT.

The second assessment assumed that recommendations for risk mitigation were adopted and there would be time for an orderly repeal transition.<sup>375</sup> See Figure 9 Bar Chart for mapping of unit cohesion risk after mitigation.<sup>376</sup> The mitigation recommendations were designed to lessen any potential negative impact that repeal would have on “military effectiveness.” Recommendations included policy modifications, additional training and education, and leadership actions.<sup>377</sup> Unit Cohesion risk dropped from 3.8 to 2.6.

372. *Id.*

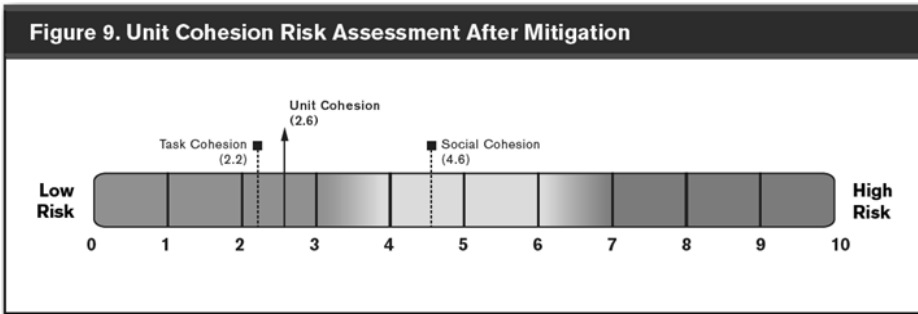
373. *Id.*

374. DADT REPORT, *supra* note 8, at 103.

375. DADT REPORT, *supra* note 8, at 103.*Id.*

376. *Id.*

377. See U.S. DEP’T OF DEF., SUPPORT PLAN FOR IMPLEMENTATION, REPORT OF THE COMPREHENSIVE REVIEW OF THE ISSUES ASSOCIATED WITH A REPEAL OF “DON’T ASK, DON’T TELL” app. D [hereinafter DADT PLAN FOR IMPLEMENTATION].



This elaborate process for assessing repeal risks was observed and evaluated by a “red team” that watched the assessment process from a separate room. This is a commonly employed safeguard in the military.<sup>378</sup> As explained in the Report:

The purpose of the red team was to critically evaluate the application of the methodology by the assessment panel, to ensure that the methodology was applied fairly and objectively, and that the assessment was based on relevant data and subject matter expertise. The red team was composed of seven individuals, co-led by a general officer [an officer with a rank of general] and a career SES civilian [Senior Executive Services that is the civilian equivalent of a general rank], with personnel from each Service, as well as civilian analysts that specialized in red teaming. The red team was provided with the same information as the panel members and was able to hear and see everything during the assessment. The red team provided a summary report noting areas of concern with regard to methodology, discussion of ratings, group dynamics, and weaknesses in logic and analysis.

The red team noted that, in general, the assessment panel’s conclusions and assessments were somewhat more conservative (i.e., presuming greater risk) than warranted given the data and information considered. Additionally, although the panel members did not always agree on their assessment of risk, panel deliberations were noted to be thoughtful, dispassionate, and without undue influence by one panel member.<sup>379</sup>

These two risk assessments (before and after mitigation), that were a product of this elaborate process, were completed by the Panel for each of the 18 components and subcomponents.<sup>380</sup> The Panel provided the

378. *Id.* at 100–01.

379. DADT REPORT, *supra* note 8, at 100–01.

380. *Id.* at 97.

various results to the Working Group's co-chairs who formulated the overall risk assessments for both scenarios.

***LAL:** I served as a member of both assessment panels. While I already was well versed in the information gathered by the Working Group, this role required even more immersion. As a panel member, I read scores of research papers, policy papers, survey results, and more that was available to us in the "Reading Room." Then, over multiple days in October, I joined the other panel members in a small conference room in the depths of the Pentagon basement. This was the same room where wargaming exercises and analysis about future conflicts is conducted. Over those days, we discussed and wrestled with the wide array of issues facing repeal—from unit cohesion to overall military readiness. We each evaluated the risk should repeal occur immediately and then again if DoD was allowed time to complete its implementation plan. We knew that history would judge not only our conclusions but the way in which we came to them.*

## Appendix D

### Westat

# Possible Revisions to CRWG Small Focus Group Script

## **Introduction**

Time for Introduction: 5 minutes

Good morning/afternoon. My name is \_\_\_\_\_ and I am with the Department of Defense Comprehensive Review Working Group. This is the working group the Secretary of Defense directed to conduct a comprehensive review of the issues associated with repeal of the law commonly known as “Don't Ask, Don't Tell.” My colleagues with me this morning/afternoon are \_\_\_\_\_ and \_\_\_\_\_. We have asked you to be here to gain your perspective on issues, if any, associated with repeal. Your help is essential to our review.

## *Background*

Let's begin by talking about why we are conducting focus groups. In his State of the Union Address, the President called on Congress to repeal the law commonly known as "Don't Ask, Don't Ask Tell." A repeal of the law will mean that servicemembers will no longer be separated from the armed forces because they have engaged in homosexual conduct, which includes saying they are gay. The Working Group will examine the issues that might arise if the law were repealed, should it occur, and will develop an implementation plan that addresses any possible impacts on DOD.

As a preliminary step to developing a plan, we are conducting surveys and focus groups with military personnel and their spouses to learn what, if any, impact a change in the law would have on military readiness, military effectiveness, unit cohesion, recruiting/retention, family readiness, and other issues, and how to best manage any such impacts during implementation. This focus group is an opportunity for you to share your insights directly with the Working Group.

## *Ground Rules*

First, this is a **voluntary focus group**. You were chosen at random to be invited to participate in the focus group. If you prefer not to sit in on this focus group, you are free to leave. If you decide to stay, I will be asking your perspectives on several issues concerning a possible repeal of Don't Ask Don't Tell. We plan on discussing this issue in depth for one hour and will end at (give specific end time).

If you decide to stay, this is not a confidential forum. So please do not identify your own sexual orientation or identify anyone else you believe may be gay or lesbian. The current Don't Ask, Don't Tell law is still in effect. The "Don't Ask" part of the policy means that servicemembers aren't asked their sexual orientation when they join the military, and commanders are only allowed to ask if there is credible information that a servicemember engaged in homosexual conduct. The "Don't Tell" part of the policy means that if servicemembers reveal their homosexual relationships or sexual orientation, they will be discharged. Are there any questions about this before we move on?

We would like to hear from all of you during this discussion, but please do not feel like you have to say something for every topic that we cover. In addition, we do not expect everyone to agree on these issues. There may be different perspectives on the issues we cover today, and that's ok - the reason we're here today is because we want to hear all of those viewpoints. We urge you to be open and honest, but speaking with the respect and dignity befitting your service. We would also ask you to please keep crosstalk to a minimum – we want to be able to hear from all of you who have an opinion to share, and it can be difficult to sort out conversations if people are talking over each other.

Finally, although this is not a confidential forum, it is a non-attribution session. \_\_\_\_ and I will co-lead the discussion and \_\_\_\_ will be helping us to take notes. We will record comments but will not record names or other identifying information. Only an analysis and summary of the data will go in our report. And, after you leave today's session, please do not discuss what was said here with anyone including the media. This will help us protect the information shared today. Please turn off cell phones and other recording devices.

Before we get started, do you have any questions?

**Past Experiences**

|  |
|--|
| <b>Time for Past Experiences:<br/>10 minutes</b> |
|--|

1. Let's begin with a few general questions about your experiences:
  - o In your time in the military, how many of you have served in a unit with someone you believed to be gay or lesbian? (Moderator notes percentage of the group.)
    - For those of you who have served with someone you believed to be gay or lesbian, what impact - if any - did this have on the functioning of your unit? Explain. [IF NECESSARY, PROBE: On the unit's cohesion? On its state of readiness?]
  - o How many of you have served alongside other militaries who have integrated gays and lesbians?
    - For those of you who have, how do you believe the integration affected the functioning of those militaries?
    - To what extent did your experience affect your willingness to serve, if gays and lesbians are integrated into the U.S. military? Please explain.

**Issues Associated with Repeal**

|   |
|---|
| <b>Time for Issues Associated with<br/>Repeal: 15 minutes</b> |
|---|

2. Let's now discuss some of the possible issues associated with repeal of Don't Ask, Don't Tell. You can share how you feel personally, or if you are uncomfortable doing that, how the others you have talked to feel about this issue.
  - o If Don't Ask Don't Tell was repealed, and gays and lesbians were permitted to serve openly, what effects do you believe the repeal would have on the U.S. military overall? Please explain.

- o Let's look at some specific areas that might be affected positively or negatively - or perhaps not at all - by a repeal of Don't Ask Don't Tell.

[MODERATOR-COVER THOSE ISSUES THAT HAVE NOT ALREADY EMERGED AS A RESULT OF THE FIRST QUESTION HERE IN SECTION 2]

### *Unit Operations*

- How do you think a repeal of the law would affect your unit's morale? Please explain.
- How do you think a repeal of the law would affect your unit's cohesion, for example, their ability to pull together to get a job done? Please explain.
- How do you think a repeal of the law would affect the camaraderie among the members of your unit? Please explain.
- How do you think a repeal of the law would affect your unit's ability to accomplish its mission? Please explain.

### *Service Recruitment, Recommendations*

- How do you think a repeal of the law would affect the ability of your service to recruit new service members? Please explain.
- If Don't Ask Don't Tell were repealed, to what extent would that affect your likelihood of recommending military service to someone who is considering joining? Please explain.
- Do you think that people are going to change their plans regarding staying in the military, if a repeal occurs? Please explain.

### **Issues to Be Included in Implementation Plan**

**Time for Implementation  
Plan Issues: 15 minutes**

3. If the law were to be repealed, what key issues do you think the military will need to include in its implementation plan? Please explain.

[ALLOW PARTICIPANTS TO FREELY EXPRESS ISSUES; PROBE ON THE ONES LISTED BELOW IF THEY DO NOT COME UP IN THE COURSE OF CONVERATION - MOD AND NOTE TAKER SHOULD PAY CLOSE ATTENTION TO WHICH ISSUES ARISE NATURALLY, AND WHICH NECESSITATE PROMPTING]

- Religious counseling
- Housing/living quarters
- Confined work areas
- Superior-subordinate relations
- Dealing with negative reactions to a policy change
- Interpersonal relations in a combat situation
- Benefits
- Integrating gay and lesbian partners into the military spouse community
- Of the issues we have discussed [MOD- PROVIDE A BRIEF LIST], what do you think should be the first priority for leaders to address?

## **Role of Leadership**

|  |
|--|
| <p><b>Time for Role of Leadership:</b><br/><b>10 minutes</b></p> |
|--|

4. Now that we have a sense of the issues that may be associated with repeal, let's examine possible ways in which leadership may successfully address those issues.
  - o What efforts on the part of leadership will make the greatest impact on fostering a command climate that successfully integrates service members regardless of sexual orientation?

### **FACILITATOR MAY PROBE WITH RESPECT TO LEADERS:**

- Ensuring respectful/non-violent treatment of service members
  - Affecting non-prejudicial attitudes and nondiscriminatory behavior
  - Inspiring unit cohesion
  - Promoting positive development and training of subordinates
5. What do you see as key elements of a plan for your service to successfully adapt to a repeal of the law? **FACILITATOR MAY PROBE WITH RESPECT TO:**
    - Training and education
    - Fostering cohesion and unit readiness
    - Enforcing codes of conduct
  6. Who has had the greatest influence on your views regarding Don't Ask, Don't Tell? [Hand out sheet and have participants check answer to first question.]
  7. Who will have the greatest influence in maintaining standards of conduct and the performance of our units following repeal? [Second question on handout.]

**Closing Remarks**

|  |
|--|
| <b>Time for Closing Remarks -<br/>5minutes</b> |
|--|

We have discussed several areas that the military and political leadership should consider when assessing the implications of a repeal of Don't Ask Don't Tell, including how integration will affect unit operations, the comfort level of straight and gay service members and their families, as well as actions military leadership might take to facilitate the integration process. Are there other issues we should note that have not been addressed already? [ALLOW 5 MINUTES FOR DISCUSSION, AS NEEDED]

Thank you for taking the time to participate in this focus group. As I mentioned at the beginning, we will treat all of your comments as non-attribution. We will not link your name to any of the specific comments you made today. Please also respect that non-attribution when you leave here today. Our goal is to provide the best data possible and you have helped us greatly today with your comments and insights. Thank you again for your participation.

### Handout

1. Who has had the greatest influence on your views regarding Don't Ask, Don't Tell? (circle one only)
  - ☐ Family
  - ☐ Friends
  - ☐ Peers
  - ☐ General community
  - ☐ Military leaders within my chain of command
  - ☐ Military leaders outside my chain of command
  - ☐ Other government leaders
  - ☐ Religious leaders (e.g., chaplain, priest, deacon, rabbi, imam, pastor, clergyman)
  - ☐ Press
  - ☐ Social media
  - ☐ Other (please list here \_\_\_\_\_)
  
2. Who will have the greatest influence in maintaining standards of conduct and the performance of our units following repeal? (circle one only)
  - ☐ Officer leaders
  - ☐ NCO leaders
  - ☐ Individual Soldiers, Sailors, Airmen, and Marines
  - ☐ Other (please list here \_\_\_\_\_)

## Appendix E

### **Westat's Survey Design Approach to the DoD Survey and Survey Development Steps (Revised)**

#### **We based our design decisions on the following considerations:**

- On a global level, we are trying to keep the tone of the survey balanced so that respondents can provide feedback on both positive and negative implications of a possible repeal of the Don't Ask, Don't Tell policy.
- To understand the effect of a possible repeal of the Don't Ask, Don't Tell policy, one must first understand the survey population's opinions about the way things are now—for example, their perceptions about unit cohesion and effectiveness. Thus, we open the survey with traditional questions asked in military surveys to provide context and help us to interpret results. Change is meaningful only if you know what the starting point is.
- To the extent possible, we tried to limit the number of assessments of hypothetical behavior. Research, as well as Westat's own experience, indicates that data on hypothetical behavior is often not true or predictive of actual behavior. Other factors often determine subsequent action. Thus, we separated questions for respondents who report working with leaders and coworkers in the military they believe to be gay or lesbian from questions about potential experiences with leaders and coworkers they believe to be gay or lesbian. The web mode facilitates skipping respondents from one question to the next question that applies to them.
- We ordered questions related to the Don't Ask, Don't Tell policy such that respondents focus first on their opinions about the Don't Ask, Don't Tell policy and their assessment of the effects of a change in policy. We ask the potentially sensitive questions (such as questions about sharing close sleeping quarters or shower stall areas) only after we get the respondents' answers to the questions on the effects of a change in policy. This ordering should minimize the chance that sensitive questions color or influence responses to questions about the effect of a policy change, if repealed.

- We did not include a question on sexual orientation and thus do not have self-reported sexual orientation as an explanatory variable during analysis.
- We also limit the number of general attitude questions to those for which responses can be interpreted without ambiguity (for example, we do not include attitude questions where the same response may represent a positive attitude for gays or lesbians, but a negative attitude for heterosexual respondents).
- We applied best practices in questionnaire design—for example, (1) writing questions that are clear and unambiguous, are free of implicit assumptions, and do not ask about more than one topic per question and (2) using response sets that match the question wording and are appropriate for analysis.
- We assessed each question and response set for cognitive difficulties in understanding and interpreting the questions as intended and difficulties in answering them. We noted potential problems for respondents in the draft survey that we will investigate during the cognitive interviews.
- We also assessed possible problems in analyzing the collected data and reporting findings.
- Because of constantly updated information, we ask basic demographic questions in the survey to get the most current and accurate data available from the respondents themselves. The demographic data will be confidential, not anonymous.

**Our survey development process has included the following steps:**

- We reviewed the literature, the item bank provided by the CRWG, other existing military surveys, other surveys on the survey topic, and the CRWG's priority measurement goals.
- We prepared an initial draft of the survey.
- We conducted 20 cognitive interviews with 20 military service members to pretest the draft survey.
- We circulated the draft survey for review to and input from CRWG members, Survey Team and Service Research (ISSCC) representatives.

- We revised the draft survey in response to findings from the cognitive interviews and comments from reviewers. We identified potential problems to investigate during the second round of cognitive interviews.
- We mapped the questions to the CRWG's survey priorities and principles (see attached file) and made some additional changes.
- Survey was then staffed to the CRWG Co-chairs and Service Personnel Chiefs for further comments that were then incorporated in the current draft. Substantive comments that were not incorporated were reviewed and adjudicated with the Service that made the comment.