

## INTRODUCTION

### IMPLEMENTATION OF “DON’T ASK, DON’T TELL” REPEAL<sup>†</sup>

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I am happy to be here at Albany Law School. I have never been to Albany Law School before. Everyone keeps saying: “Well, thank you for coming up from Washington to Albany,” and this was not such a huge deal for me because I was raised in the Hudson Valley. I grew up in a little town called Wappingers Falls. Many of you here are probably familiar with Wappingers Falls. I married the girl next door there. We now live in Washington, but my parents still live in Dutchess County, so the Hudson Valley, this part of the world, is very much home to me.

I must confess that I do not consider myself an expert or an activist or an advocate for any particular policy position, though I am a political appointee in the Obama administration. I was asked in February of 2010 to do an assessment,<sup>1</sup> and that is what we did.<sup>2</sup> So my talk to you will be very much in the nature of another talk that is slated for this afternoon, which is an oral history about the legalization of same-sex marriage in the state of New York.<sup>3</sup> My discussion will be an oral history about the

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<sup>†</sup> Delivered as the Keynote Address at the *Albany Government Law Review* Symposium *LGBT Rights: Toward a More Perfect Union*, on October 13, 2011. The transcript was edited for clarity and readability.

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<sup>1</sup> Robert M. Gates, Sec’y of Def., Statement on “Don’t Ask, Don’t Tell” (Feb. 2, 2010), *available at* <http://www.defense.gov/speeches/speech.aspx?speechid=1419>.

<sup>2</sup> *See generally* 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” (2010) [hereinafter DOD REPORT], *available at* [http://www.defense.gov/home/features/2010/0610\\_dadt/DADTReport\\_FINAL\\_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_dadt/DADTReport_FINAL_20101130(secure-hires).pdf).

<sup>3</sup> The daylong symposium on October 13, 2011, featured a discussion with Assemblyman Daniel O’Donnell, sponsor of the Marriage Equality Act, and Katherine Grainger, assistant counsel to Governor Cuomo. The transcript is

repeal of “Don’t Ask, Don’t Tell” in the U.S. military.

The story really does begin with the president’s campaign position. President Obama campaigned on the position that he would seek repeal of “Don’t Ask, Don’t Tell,” but he said he would do so in close collaboration with the military, with the Joint Chiefs.<sup>4</sup> In other words, the Obama administration very much did not want to repeat the experience of 1993 when the issue of gays in the military really did get out of hand, compared to where the Clinton administration really wanted it be. As some of you may have seen in the recent HBO documentary on the repeal of “Don’t Ask, Don’t Tell,”<sup>5</sup> early on in his presidency, Bill Clinton was met with political forces in opposition to what he wanted to do—opposition that the Clinton administration really did not anticipate. The Obama administration really did want to spend some time with the issue; we wanted to consider repeal in collaboration with the military after careful study.

Early on in the Obama administration, we were confronted with a decision of the Ninth Circuit in a case that many of you here are probably familiar with, *Witt v. Department of the Air Force*.<sup>6</sup> It was decided in late 2008 and it broke new legal ground in that the Ninth Circuit held that “Don’t Ask, Don’t Tell” should be subject to the intermediate level of constitutional scrutiny on an as-applied basis.<sup>7</sup> Previously, all of the circuit courts had held that when it came to constitutional challenges of “Don’t Ask, Don’t Tell,” the law was subject to rational basis review, the lowest level of constitutional scrutiny, and the government had to demonstrate a rational basis for the law.

For fifteen years in the Department of Defense (DOD), the government prevailed in a number of lawsuits that challenged “Don’t Ask, Don’t Tell” on that basis.<sup>8</sup> Then, in the *Witt* case, the Ninth Circuit held that, in light of *Lawrence v. Texas*,<sup>9</sup> the intermediate level of review was the appropriate standard and sent the case back on remand to the district court to apply that

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published in this issue. *An Oral History of the Marriage Equality Act in New York*, 5 ALB. GOV’T L. REV. 651 (2012).

<sup>4</sup> See *Democrats Aim to Repeal “Don’t Ask, Don’t Tell”*: Obama Supports Lifting the Ban on Open Gays in Military, S.F. CHRON., July 23, 2008, at A1.

<sup>5</sup> THE STRANGE HISTORY OF DON’T ASK, DON’T TELL (HBO 2011).

<sup>6</sup> 527 F.3d 806 (9th Cir. 2008).

<sup>7</sup> *Id.* at 821–22.

<sup>8</sup> See, e.g., *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1132–33 (9th Cir. 1997) (applying rational basis review to “Don’t Ask, Don’t Tell” because “homosexuals do not constitute a suspect or quasi-suspect class”).

<sup>9</sup> 539 U.S. 558 (2003).

intermediate level of review on an as-applied basis.<sup>10</sup> So, the issue we were confronted with early on was whether to seek certiorari in the Supreme Court.

On April 20, 2009, I wrote a very carefully worded letter to then-Solicitor General Elena Kagan:

You have asked for the Department of Defense views about how to proceed in *Witt v. Department of the Air Force*. As you know, whether to petition for certiorari, in a case, is a matter for the Department of Justice to determine after receiving a recommendation from the relevant agency. After a careful consideration of the law and the facts in the case, and the current policy considerations, DOD has no objections to a remand of the case pending the law in the case at the district court level.<sup>11</sup>

At that point, we decided that this was not an issue that we were ready to push to the national spotlight by pressing for Supreme Court review. We wanted to take more time with the issue, to carefully study the issue in collaboration with the military just as the president pledged to do.

Shortly after that, Secretary Gates asked me on a very confidential basis to look to see whether in the regulations<sup>12</sup> implementing the “Don’t Ask, Don’t Tell” law,<sup>13</sup> there was some legal room to make them, in his words, “fairer and more appropriate.” Secretary Gates, I think, was moved by the situation of Margaret Witt, the plaintiff in that case, an officer in the Air Force who had been outed by a third party.<sup>14</sup> Many “Don’t Ask, Don’t Tell” separations were because of the service member’s own statements, but here was a service member who was leading a private life, serving with a relatively good track record, who had been outed by a third party.

He was moved by that and asked me if we could, in some way, revise the implementing regulations to make them fairer and

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<sup>10</sup> *Witt*, 527 F.3d at 821–22.

<sup>11</sup> Letter from Jeh Johnson, General Counsel, U.S. Dep’t of Def., to Elena Kagan, U.S. Solicitor Gen. (Apr. 20, 2009) (on file with the U.S. Dep’t of Def.).

<sup>12</sup> *See, e.g.*, U.S. Dep’t of Def. Directive No. 1332.14, Enlisted Administrative Separations, at encl. 3 ¶ E3.A1.1.8.1.1 (“Homosexual conduct is grounds for separation from the Military Services . . .”) (1994); *see id.* at 3 ¶ E3.A1.1.8.1.2.2 (“A statement by a Service member that he or she is a homosexual . . . or words to that effect, creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.”).

<sup>13</sup> 10 U.S.C. § 654 (2006), *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010).

<sup>14</sup> *See* William Saletan, *Hypocritical? Don’t Ask*, WASH. POST, Sept. 2, 2007, at B2.

more appropriate for someone in that kind of situation. He asked me this on a very confidential basis, and, in fact, throughout 2009, whenever we had a discussion about “Don’t Ask, Don’t Tell” anywhere in the Pentagon, it was always in a group of three or less behind closed doors. Be it me, the Secretary of Defense, the Chairman of the Joint Chiefs—it was never more than three or four people—because we were so concerned about this issue getting out prematurely.

I started to revise the regulations and I worked on the project on a very quiet basis in the summer of 2009. Then, all of a sudden one day I see an e-mail saying: “General Counsel reviewing ‘Don’t Ask, Don’t Tell’ Regs, Gates says.”<sup>15</sup> The one person who was authorized to leak my secret project in July 2009, leaked and so the whole world suddenly knew that the general counsel of the Defense Department was looking at how to revise “Don’t Ask, Don’t Tell” regulations, which created all kinds of expectations. In the latter part of 2009, we became very preoccupied with a number of issues including the Afghanistan assessment, which culminated in December 2009,<sup>16</sup> so we really didn’t have an opportunity to revisit the issue of the regulations to push forward on them, make them public. That brought us to January 2010.

In January 2010, we moved to the next phase. The President, in his State of the Union Address on January 27, 2010, said, “This year, I will work with Congress and our military to finally repeal [Don’t Ask, Don’t Tell] . . .”<sup>17</sup> And that’s exactly what happened in the course of 2010. Several days later, Secretary Gates and Admiral Mullen, the Chairman of the Joint Chiefs, testified in front of the Senate Armed Services Committee. Admiral Mullen gave his very moving and elegant statement about his personal view of “Don’t Ask, Don’t Tell,” noting that in his personal view, allowing gays and lesbians to serve openly was a matter of integrity for service members and the military, though he noted that he did not know what the military attitude would be.<sup>18</sup>

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<sup>15</sup> See Editorial, *Marching Orders: Ending “Don’t Ask, Don’t Tell” Will Take An Act of Congress—and Voters Actively Pushing For It*, WASH. POST, July 20, 2009, at A16.

<sup>16</sup> U.S. DEP’T OF DEF., REPORT ON THE PROGRESS TOWARD SECURITY AND STABILITY IN AFGHANISTAN (2010).

<sup>17</sup> President Barack Obama, State of the Union Address (Jan. 27, 2010), in 156 CONG. REC. H414–20 (daily ed. Jan. 27, 2010).

<sup>18</sup> *Department of Defense Authorization for Appropriations for Fiscal Year 2011, and to Receive Testimony Relation to the “Don’t Ask, Don’t Tell” Policy*

Secretary Gates, at the same time, announced the appointment of a high-level DOD internal working group to assess essentially two things: one, the risk to overall military effectiveness of the repeal of “Don’t Ask, Don’t Tell,” if the law were repealed, and, two, what recommendations for new policies we would make in the event that the law was repealed.<sup>19</sup> Because of my own prior experience dealing with the issue, I was volunteered for the assignment and, in addition to my day job as general counsel of the Department of Defense, I was given the task of co-chairing this working group along with General Carter Ham, an Army four-star general, then-commander of the U.S. Army Europe. We put together a working group of sixty-eight people, mostly military across all the services. The working group included a lot of enlisted personnel<sup>20</sup> because most of the separations under the “Don’t Ask, Don’t Tell” law and policy were among the enlisted forces, not officers. The secretary told us to “systematically engage the force.” This is in stark contrast to what I had said earlier, when I said whenever I talked about “Don’t Ask, Don’t Tell” in the Pentagon, it was very hush-hush, very quiet, three or less. By contrast, the secretary told us, basically, to go have a conversation about this issue with the entire U.S. military over a ten-month period, from February to December 2010. And that is pretty much what we did.

It turned out to be the largest engagement of the military on any personnel-related issue. We surveyed 400,000 service members; we received 115,000 survey responses; we surveyed 150,000 military spouses, received 44,266 responses from them; we solicited e-mails on this subject; we received 72,000 e-mails.<sup>21</sup> General Ham and I conducted 95, what we call, IEFs, information exchange forums, most of which we presided over personally.<sup>22</sup>

We conducted 95 IEFs and met face-to-face with about 24,000 service members in groups of 200 to 300 each. I personally probably came in contact, face to face, in a discussion on this issue with probably 10,000 service members across all the services and the Coast Guard. We conducted 140 focus groups, we visited the service academies, we spoke to groups in favor of

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*Before the U.S. S. Comm. On Armed Servs.*, 111th Cong. 59, 64, 65 (2010) (statement of Admiral Michael Mullen, Chairman of the Joint Chiefs of Staff).

<sup>19</sup> Gates, *supra* note 1.

<sup>20</sup> DOD REPORT, *supra* note 2, at 31.

<sup>21</sup> *Id.* at 49, 63.

<sup>22</sup> *Id.* at 33.

repeal, against repeal, veterans groups, we had a number of engagements with members of Congress. This assessment took ten months, it was made public in a report on November 30, 2010.<sup>23</sup> As I said earlier, we were asked to assess the risk of repeal to overall military effectiveness. Included within that were sub-categories: we were asked to assess the impact of repeal on military readiness, unit cohesion, recruiting, retention, and this thing called family readiness—how families would feel about this recruitment retention—the big six as they called them.

The bottom line of our 250-page report, which is public, was this:

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 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 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.<sup>24</sup>

Now, in the course of getting there, to that conclusion, there was a tremendous amount that we saw and heard. I told you about the large group sessions we had, and the large group sessions were informative, not so much because they were representative of the attitudes of the military, that is what the survey was for, but they continually highlighted about ten or eleven different things that people had on their minds when they talked to us about this issue. One of the things that I discovered was that in these large group sessions, the people who wanted to give voice to their reservations or concerns about the issue were not representative of the rest of the people in the room, necessarily.

I began every session, in a group of say, 300 service members, by asking the same two questions, first: How many of you in this room have already had the experience of serving in a unit with someone you believe to be gay or lesbian? Invariably, in almost

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<sup>23</sup> *See id.* at 1.

<sup>24</sup> *Id.* at 3.

every session, 80 to 90 percent of the hands went up. I soon learned that in that group of 300 people, when they all raised their hands they were very often talking about only five individuals, but 80 to 90 percent of the hands went up. Then, I would ask: Of those who had that experience how many of you believe that it affected the unit’s ability to get its job done adversely? And, very, very few hands went up—maybe five or six. The purpose of those questions was first of all, trying to set a tone for the discussion, but the purpose of the questions was to really to get service members focused on the reality of the actual experience they already recognized they had had, versus stereotypes of what it would be like to serve in a military where gays and lesbians were allowed to be open about their sexual orientation.

One of the things we discovered in talking to people was that there was a tremendous amount of, what we say in the report, misperception and stereotypes; just use of the word “open”—gay and lesbian service members being open about their sexual orientation—conjured up a negative image for a lot of people. In these large group sessions I continually heard the same thing, and very often the discussion would turn to, “Well everyone here, 80 to 90 percent of you, have already had the experience of serving in a unit with somebody you believe to be gay.” The response I heard was, “But I don’t know that they’re gay, and if I know that they’re gay, that somehow changes things.”

In the report, we have a whole section on some of the comments we continually heard that were representative of the comments in the 72,000 e-mails we received.<sup>25</sup> We also set up a confidential communication mechanism where gay and lesbian service members could talk to us anonymously about their own experiences. Because of the way the law worked, we could not solicit gay and lesbian service members for their views as gay and lesbian service members. There were some common themes to the comments, which are reflected in the report, pro-repeal and anti-repeal, and I would like to read them to you.

First, we heard a lot of religious and moral objections to repeal of “Don’t Ask, Don’t Tell.” Like, for example, “For me personally, it’s morally wrong and socially unacceptable.”<sup>26</sup> “[H]omosexuality is morally offensive. Like adultery, and drug use, I can not [sic]

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<sup>25</sup> *See id.* at 49–61 (quoting service members’ and their spouses’ replies to the Working Group’s survey questions).

<sup>26</sup> *Id.* at 51.

tolerate homosexuality. I will not work side by side with someone that is an adulterer, a drug addict, or a homosexual.”<sup>27</sup> We heard a lot of that. “If the state favors the demands of the homosexual activists over the First Amendment, it is only a matter of time before the military censors the religious expression of its chaplains and marginalizes denominations that teach what the Bible says about homosexual behavior.”<sup>28</sup> We also heard a lot of: “The law works; why change it?”; “Doesn’t DADT work, doesn’t it make sense? They can serve; just keep it to yourself”; “If you know for sure, it would freak people out more. There are rumors, but you never know. If it is out of sight it is out of mind, but once you know for sure that’s when people are freaked out.”<sup>29</sup> Other concerns were: “We are at war”; “Not now, we’ve got too much on our plates.”<sup>30</sup> We also heard, “How far are we going to go with this whole gay thing? Am I supposed to celebrate gayness—do they get to wear a rainbow flag on their uniform? If that is the case, this uniform isn’t worth wearing.”<sup>31</sup> “The military shouldn’t be a testing ground for social experiments.”<sup>32</sup> I heard a lot of this.

Then we also heard a very different kind of sentiment: “Please repeal the act. We need all available men and women who are willing to serve their country, no matter what their sexual orientation is.”<sup>33</sup> It’s not such a big deal, times are changing, we have done it before for interracial and gender integration, we can do it again.<sup>34</sup>

Then we heard a number of comments anonymously from gay and lesbian service members that I know had a tremendous impact on a number of people in the working group. One of the things that carried the most weight for me, in reaching the overall assessment is a working group member, who I recall was a Navy officer, or a Marine, who had not thought a whole lot about the issue of “Don’t Ask, Don’t Tell,” brought to the issue his own preconceived notions and then said to me at the end of the review at about month nine, “You know, I’ve been listening to this, I’ve been talking to people about it, I think we can do this.” For me it carried a lot of weight to hear a service member who

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<sup>27</sup> *Id.* at 52.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 53.

<sup>31</sup> *Id.* at 55.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 58.

<sup>34</sup> *Id.* at 59.

had been in the military for twenty or thirty years to say, “I have started off here, now I am here after listening to it all.”

But I know that for a lot of members of the working group the expressions that came anonymously from gay and lesbian service members had a big impact. Like the following: “I doubt I would run down the street yelling ‘I’m out’; but it would take a knife out of my back I have had for a long time. You have no idea what it is like to have to serve in silence.”<sup>35</sup>

We heard from the professional military, officers who had been in the military a long time, whose focus was “yes, we know how to follow orders, just give us the clear guides we need, give us the training tools, we can do this.” We heard expressions from the more senior officers—the general and flag officers—things like this: “We must ensure we are ready for this change, with the necessary policies and practices to provide a safe, tolerant, supportive environment for all who serve”; “In the military, you are given orders and you drive on. This policy needs to come from the top, with specific guidelines. Soldiers will then adapt, as they always do.”<sup>36</sup>

Other expressions: “Personally, I don’t feel that this is something I should have to ‘disclose.’ Straight people don’t have to disclose their orientation. I will just be me. I will bring my family to family events. I will put my family pictures on my desk. I am not going to go up to people and say, hi there—I’m gay.”<sup>37</sup> Next quote: “I think a lot of people think there is going to be this big ‘outing’ and people flaunting their gayness but they forget that we’re in the military. That stuff isn’t supposed to be done during duty hours regardless if you’re gay/straight.”<sup>38</sup> The quote in the report, which I know is the president’s favorite quote in this whole report, which we heard from a special operations warfighter: “We have a gay guy [in the unit]. He’s big, he’s mean, and he kills lots of bad guys. No one cared that he was gay.”<sup>39</sup>

In our assessment, we basically reached the conclusions we did based on three things. First, we used a method the military often uses for any risk assessment, setting up criteria, assessing them as a “yellow light,” “green light,” “red light”; quantifying risk factors and so forth. And we had these panels of service members

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<sup>35</sup> *Id.* at 60.

<sup>36</sup> *Id.* at 61.

<sup>37</sup> *Id.* at 124.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 126.

sit down and evaluate each of the big six: unit cohesion, readiness, retention, and so forth with numeric scores. With proper training and education, and following recommendations for policy changes, all of the boxes came out either green or yellow/green,<sup>40</sup> which is the kind of thing the military really likes to see. The rainbow across the top and all these boxes are largely green or close to green in terms of the risk assessment it was a very formulaic process.<sup>41</sup> Then we had the survey results, which I will get to in a moment. And then we had the following, which General Ham and I both felt strongly about, just in the course of listening to people talk about the issue:

In the course of our assessment, it became apparent to us that aside from the moral and religious objections to homosexuality, much of the concern about “open” service is driven by misperception and stereotypes about what it would mean if gay Service members were allowed to be “open” about their sexual orientation. Repeatedly, we heard Service members express the view that “open” homosexuality would lead to widespread and overt displays of effeminacy among men, homosexual promiscuity, harassment, and unwelcome advances within units, invasions of personal privacy, and an overall erosion of standards of conduct, unit cohesion and morality. Based on our review, however, we conclude that these concerns about gay and lesbian Service members who are permitted to be “open” about their sexual orientation are exaggerated, and not consistent with the reported experiences of many Service members.

In today’s civilian society, where there is no law that requires gay men and lesbians to conceal their sexual orientation in order to keep their job, most gay men and lesbians still tend to be discreet about their personal lives, and guarded about the people with whom they share information about their sexual orientation. We believe that, in the military environment, this would be true even more so. According to a survey conducted by RAND of a limited number of individuals who anonymously self-identified as gay and lesbian Service members, even if Don’t Ask, Don’t Tell were repealed, only 15% of gay and lesbian Services members would like to have their sexual orientation known to everyone in the unit. This conclusion is also consistent with what we heard from gay Service members in the course of this review[.]<sup>42</sup>

Then this:

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<sup>40</sup> *Id.* at 116 fig.20, 117 fig.21.

<sup>41</sup> *See, e.g., id.* at 104 fig.9 (Unit Cohesion Risk Assessment After Mitigation).

<sup>42</sup> *Id.* at 5 (citing RAND, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND’S 1993 STUDY 27 (2010)).

In communications with gay and lesbian current and former Service members, we repeatedly heard a patriotic desire to serve and defend the Nation, subject to the same rules as everyone else. In the words of one gay Service member, repeal would simply “take a knife out of my back. . . . You have no idea what it is like to have to serve in silence.” Most said they did not desire special treatment, to use the military for social experimentation, or to advance a social agenda. Some of those separated under Don’t Ask Don’t Tell would welcome the opportunity to rejoin the military if permitted. From them, we heard expressed many of the same values that we heard over and over again from service members at large—love of country, honor, respect, integrity, and service over self. We simply cannot square the reality of these people with the perceptions about “open” service.<sup>43</sup>

Then we received the survey results. We asked 102 questions of 4,000 service members and we got 115,000 responses.<sup>44</sup> It was the largest non-census ever of the U.S. military. Over the course of 102 questions, we asked in a whole bunch of different ways for service members to predict for us the negative consequences or the consequences of repeal to their unit’s ability to get the job done, and consistently we heard basically the same thing. Fifteen to 20 percent said that repeal would have a positive effect on unit cohesion,<sup>45</sup> and I think I know what they meant by that. In other words, if this person over here in my unit was allowed to be honest about his personal life, it would improve unit cohesion. Then we heard another 30 percent who predicted mixed positive and negative effects.<sup>46</sup> And then we heard from another 20 percent that they anticipated repeal would have no effect.<sup>47</sup> And 30 percent across the services predicted negative consequences.<sup>48</sup> Now that became the headline.

Sure enough, like most everything in Washington, the survey results leaked. Despite our best to keep this report when it was in draft under close wraps, the survey results leaked about three weeks before the document went public. The media got those numbers. They matched them together and the headline was: 70 percent of the U.S. military doesn’t care about this issue anymore, when you add up those different numbers. The other

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<sup>43</sup> *Id.* at 6.

<sup>44</sup> *See id.* 63–79.

<sup>45</sup> *Id.* app. C, at 197, questions 68a, 68b.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

big headline of the survey results, which was consistent in what we heard in these larger sessions, 69 percent of the U.S. military had already had the experience of serving with somebody that they believed to be gay or lesbian. Of those that had the experience, when we asked them “how did your unit perform?,” 92 percent said it was fine.<sup>49</sup> The most critical piece, when the matter got to Congress in the lame duck session was, in combat arms units in the Marine Corps, the predictions for negative consequences was much higher, in some instances over 60 percent.<sup>50</sup> But, even in combat arms units, we asked service members, “Have you had the experience and how would you rate that unit’s ability to work together?”; approximately 80 percent of respondents across the services rated the unit’s ability to work together as either “good” or “very good.”<sup>51</sup>

Again, you ask someone about the reality of serving with someone whom they believe to be a gay or lesbian service member, consistently, the results indicated it was like every other experience versus the perception. So, we had the survey results and the report went public on November 30, 2010. General Ham and I, the Secretary of Defense, and the Chairman of the Joint Chiefs testified for the Senate Arms Services Committee two days later. The Secretary of Defense urged immediate repeal of “Don’t Ask Don’t Tell.”<sup>52</sup> It was part of a bill that had already passed the House,<sup>53</sup> but didn’t get out of the Senate, so the issue was whether it would pass the Senate. In the backdrop of all of this was the *Log Cabin Republicans*<sup>54</sup> case, which had a huge influence on Secretary Gates.

The district court in the *Log Cabins Republicans* case had determined that the “Don’t Ask, Don’t Tell” law was unconstitutional and issued a worldwide injunction to stop the

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<sup>49</sup> *Id.* app. C, at 185, question 47a.

<sup>50</sup> *See, e.g., id.* app. C, at 202, question 71a.

<sup>51</sup> *Id.* at 185, app. C, question 47a.

<sup>52</sup> *The Report of the Dep’t of Defense Working Group That Conducted a Comprehensive Review of the Issues Associated with a Repeal of Section 654 of Title 10, U.S.C., “Policy Concerning Homosexuality in the Armed Forces” Before the S. Comm. On Armed Services, 111th Cong. (2010) [hereinafter *Armed Services Report*]* (statement of Robert Gates, Sec’y of Def., Dec. 2, 2010).

<sup>53</sup> National Defense Authorization Act for Fiscal Year 2011, H.R. 5136, 111th Cong. § 536 (2d Sess. 2010) (as passed by House, May 28, 2010). The Act was amended by Rep. Patrick Murphy to include repeal of “Don’t Ask, Don’t Tell.” H. Amdt. 672, 156 CONG REC. H4055–56 (daily ed. May 27, 2010).

<sup>54</sup> *Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884 (C.D. Cal. 2010), *vacated and remanded by* 658 F.3d 1162 (9th Cir. 2011).

enforcement of the “Don’t Ask, Don’t Tell” law and policy in every respect,<sup>55</sup> which in a force of more than two million people worldwide is not easy to do on a moment’s notice. So, we went to the Ninth Circuit. On October 11, 2010, “Don’t Ask, Don’t Tell” was in effect. October 12, we had to cease enforcing the law. On October 20, we got a stay, so the light was switched on and off twice in the course of a couple of days, then the attorneys for the Log Cabins Republicans went to the Supreme Court to try to get the stay lifted.<sup>56</sup> There was the potential of the law switching on and off multiple times over the course of weeks. That, I know, had a huge impact on our leadership who believed that if the law was going to be repealed, it should not be by judicial fiat. Rather, repeal should occur in an orderly manner through the political branches of government, through the democratic process, Congress, the executive branch, with training, and with education. A large part of the Secretary of Defense’s appeal to Congress for immediate repeal in the lame duck session was to spare us from judicial fiat. I know that also had a huge impact on a number of members of Congress that I spoke to, both Republicans and Democrats.

The Senate bill actually did not get out of the Senate<sup>57</sup> and someone had the idea: what about a freestanding “Don’t Ask, Don’t Tell” Repeal Act 2010. Forget trying to include it in the defense authorization bill—what about a free-standing bill? Sure enough, the free-standing bill made it through the Congress,<sup>58</sup> I suspect at least in part because the report really did change the political landscape in terms of the attitude in Congress toward repealing this law. I was gratified with a number of positive editorials we received right after the report became public, like this one from the *Washington Post*:

The report is remarkable, not just for its conclusions but for its honest, thorough and respectful handling of a delicate subject. It offers a clear-eyed, careful, conservative approach to implementing policy change. It doesn’t play down the hurdles or denigrate the opposition. It is in short a document to be taken seriously,

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<sup>55</sup> *Id.* at 888.

<sup>56</sup> *Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 21651 (9th Cir. Oct. 20, 2010), *motion granted, stay granted* by 2010 U.S. App. LEXIS 22655, *application to vacate stay denied* by 131 S.Ct. 589 (2010).

<sup>57</sup> National Defense Authorization Act for Fiscal Year 2011, S. 3454 111th Cong. § 591 (2d Sess. 2010). The bill was filibustered twice. 156 CONG. REC. S7246 (daily ed. Sept. 21, 2010); 156 CONG. REC. S8683 (daily ed. Dec. 9, 2010).

<sup>58</sup> H.R. 2965, 111th Cong. (2010) (passed both chambers on Dec. 18, 2010).

especially by those that may have lingering doubts about allowing gays and lesbians to serve openly.<sup>59</sup>

This was published one day after Secretary Gates, the Joint Chiefs, and I all testified. It is public record that the Joint Chiefs still had reservations about repealing “Don’t Ask, Don’t Tell.”<sup>60</sup> The Chief of Naval Operations was probably most forward leaning, and said the Navy could do it. The Air Force Chief of Staff and the Army Chief of Staff, essentially said “not now, can we wait” and the Commandant of the Marine Corps was the most pessimistic, I would say, in terms of the impact of repeal on the Marine Corps.

The Congress voted and repeal passed the Senate on December 18.<sup>61</sup> It was signed into law on December 22.<sup>62</sup> We had sixty-five votes in the Senate.<sup>63</sup> The way the law worked, repeal was not going to take effect until the President, the Secretary of Defense, and the Chairman of the Joint Chiefs all delivered a certification to Congress that said the following things: (a) that they had read the report, (b) that we had written new policies and regulations supporting a post-repeal environment, and (c) most importantly, that the new policies and regulations were consistent with military readiness, effectiveness, unit cohesion, and recruiting and retention of the armed forces.<sup>64</sup> We had an implementation phase to get ready for repeal. That certification was delivered to the Congress on July 22, 2011, and the law took effect, repealing “Don’t Ask, Don’t Tell” sixty days after that, which is how you get to September 20, 2011.

I think there has been a remarkable change of attitude. I believe, and I think that this is where Secretary Gates showed great wisdom, that in the course of that ten-month review, attitudes shifted just by having this conversation with the entire U.S. military. We got people thinking about the issue and stirred the pot getting people to think about their preconceptions and realizing, “hey, we are the U.S. military, we can do this.” I think

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<sup>59</sup> Editorial, *Ready for Change*, WASH. POST, Dec. 1, 2010, at A16.

<sup>60</sup> See *Armed Services Report*, *supra* note 52 (statement of Senator Carl Levin, Dec. 3, 2010).

<sup>61</sup> H.R. 2965, 111th Cong. (2010) (House amendment passed Senate, Dec. 18, 2010).

<sup>62</sup> Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (2010) (repealing 10 U.S.C. § 654).

<sup>63</sup> 156 CONG. REC. S10684 (daily ed. Dec. 18, 2010) (Roll Call Vote No. 281).

<sup>64</sup> *Armed Services Report*, *supra* note 52 (statement of Sen. Carl Levin, Dec. 2, 2010).

we saw attitudes change over the course of the review, culminating in those survey results that we got in the late summer 2010. To take the Marine Corps as an example, even though the Commandant in December 2010 predicted negative consequences for the Marine Corps if the law were repealed, at the same time Jim Amos said, “give me my orders and the Marines will salute smartly and get the job done,” to the point where the Marine Corps was the first to educate and train its force on the post-repeal environment.<sup>65</sup> The Sergeant Major of the Marine Corps is now travelling around the world giving talks like this, which was reported in the press in June:

“Article 1, Section 8 of the Constitution is pretty simple,” he told a group of Marines at a base in South Korea. “It says ‘Raise an army.’ It says absolutely nothing about race, color, creed, sexual orientation.

You all joined for a reason: to serve. . . . To protect our nation, right?”

“Yes, sergeant major,” Marines replied.

“How dare we, then, exclude a group of people who want to do the same thing you do right now, something that is honorable and noble? . . . Right?”

. . . .

“Get over it. . . . We’re magnificent, we’re going to continue to be. . . . Let’s just move on, treat everybody with firmness, fairness, dignity, compassion and respect. Let’s be Marines.”<sup>66</sup>

This is where we are now. The nearly two years that I recounted for you since February 2010 was quite a remarkable experience and I think quite a remarkable chapter in history.

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<sup>65</sup> See Nate Rawlings, *Firsthand Experience of “Don’t Ask, Don’t Tell,”* TIME BATTLELAND BLOG (Sept. 20, 2011), <http://battleland.blogs.time.com/2011/09/20/the-firsthand-experience-of-dont-ask-dont-tell>.

<sup>66</sup> *Straight Talk From Top Enlisted Marine on “Don’t Ask” Repeal*, WALL ST. J. WASH. WIRE (Jun. 21, 2011, 7:00 AM), <http://blogs.wsj.com/washwire/2011/06/21/straight-talk-from-top-enlisted-marine-on-dont-ask-repeal>.