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SENATE COMMITTEE ON ARMED SERVICES HOLDS A HEARING ON THE DEPARTMENT OF DEFENSE'S
"DON'T ASK/DON'T TELL" POLICY

DECEMBER 2, 2010

SPEAKERS: SEN. CARL LEVIN, D-MICH. CHAIRMAN SEN. JACK REED, D-R.I. SEN. DANIEL K. AKAKA, D-HAWAII SEN. BILL NELSON, D-FLA. SEN. BEN NELSON, D-NEB. SEN. EVAN BAYH, D-IND. SEN. JIM WEBB, D-VA. SEN. CLAIRE MCCASKILL, D-MO. SEN. KAY HAGAN, D-N.C. SEN. MARK UDALL, D-COLO. SEN. MARK BEGICH, D-ALASKA SEN. ROLAND BURRIS, D-ILL. SEN. JEFF BINGAMAN, D-N.M. SEN. CHRIS COONS, D-DEL. SEN. JOE MANCHIN III, D-W.VA.

SEN. JOSEPH I. LIEBERMAN, I-CONN.

SEN. JOHN MCCAIN, R-ARIZ. RANKING MEMBER SEN. JAMES M. INHOFE, R-OKLA. SEN. JEFF SESSIONS, R-ALA. SEN. SAXBY CHAMBLISS, R-GA. SEN. LINDSEY GRAHAM, R-S.C. SEN. JOHN THUNE, R-S.D. SEN. ROGER WICKER, R-MISS. SEN. RICHARD M. BURR, R-N.C. SEN. DAVID VITTER, R-LA. SEN. SUSAN COLLINS, R-MAINE SEN. SCOTT BROWN, R-MASS. SEN. GEORGE LEMIEUX, R-FLA.

WITNESSES: SECRETARY OF DEFENSE ROBERT M. GATES

ADMIRAL MIKE MULLEN (USN), CHAIRMAN, JOINT CHIEFS OF STAFF

LIEUTENANT GENERAL CARTER HAM (USA), DIRECTOR FOR OPERATIONS, J-3, JOINT CHIEFS OF STAFF

JEH JOHNSON, GENERAL COUNSEL, DEFENSE DEPARTMENT

[*] LEVIN: Good morning, everybody.

The committee meets this morning to receive testimony on the Department of Defense's comprehensive review of the issues associated with the repeal of "Don't Ask/Don't Tell."

We will hear from Defense Secretary Gates and chairman of the joint chiefs, Admiral Mullen, as well as the co-chairs of the department's working group on this issue, the Defense Department General Counsel Jeh Johnson and General Carter Ham.

Tomorrow we will hear from the vice chairman of the joint chiefs and the service chiefs on this report. To examine this issue, the department launched an unprecedented effort to seek the views of our troops and their families. Mr. Johnson, General Ham, your approach and the report that you have delivered are evenhanded and respectful. You were given a very tough job. Your performance is of great value to our country.

Yesterday's hearing -- excuse me -- today's hearing -- today's hearing is part of the committee's own review of this issue, which has been a force for nearly a year. Secretary Gates and Admiral Mullen testified at a hearing on this policy on February 2nd. Each of the service chiefs were asked for their views during annual hearings on the defense budget in February and March. And on March 18th, the committee heard testimony from outside experts in support of added opposition to the policy.

Both the House of Representatives and this committee have approved legislation that would repeal the statute underlying "Don't Ask/Don't Tell," if the president, the secretary of defense and the chairman of the joint chiefs certified of Congress that all of the following conditions have been met: A, they've considered the recommendations contained in the working group report and the report's proposed plan of action; B, second, the Department of Defense has prepared the necessary policies and regulations to implement a repeal of "Don't Ask/Don't Tell"; and third, the implementation of these policies and regulations is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention.

Upon such a certification, repeal would take effect after 60 days, a period during which Congress could review the department's action. This provision is included in the national defense authorization bill for fiscal year 2011 approved by this committee, and it is my hope that the Senate will shortly take up this legislation.

The requirement for the certification by the president, secretary of defense, and chairman of the joint chiefs is a key element of this legislation, as it ensures that a repeal of this policy would be conducted in an orderly manner with adequate opportunity to prepare for a change. This certification requirement, as well as the 60-day period before repeal takes effect, were included at the initiative of our late esteemed colleague, Senator Byrd.

Attitudes in the nation and our military have shifted in the years since the adoption of "Don't Ask/Don't Tell" in 1993. The report before us provides important new evidence that the time for a change has come.

It demonstrates that for the vast majority of our troops this change would be no big deal. They believe we can open our military to service by gay and lesbian servicemembers, who would no longer have to conceal their sexual orientation and that we can do so without reducing our military effectiveness.

A large percentage of troops say that they have already served with gay and lesbian co-workers, who were effective members of their units. Secretary Gates has spoken eloquently on why decisions such as this are not subject to a referendum of servicemembers.

And I would add that if for referenda were the basis for decisions on who can serve, President Truman would not have racially integrated the armed forces in 1948 when, as the working group's report points out, 80 percent or more of servicemembers opposed racial integration.

And in this case, while there has been no referendum, the working group's review gives us persuasive evidence that repeal is not a problem for most troops. As the co-chairs wrote to this report, quote, "If the impact of repeal was predominantly negative, that would have revealed itself in the course of our review."

A change in policy, while needed, will not be without its challenges. The report provides important and useful recommendations to interest those challenges. These recommendations focus on the importance of

leadership, training and education, and I support that focus.

But in my view one of the most striking findings of this report relates to the experiences of servicemembers themselves. An overwhelming 92 percent of troops, who have worked with the gay or lesbian co-worker, say there was no negative effect on their unit. The message here is that when the troops have actually worked with someone that they believe is gay or lesbian, they learn that those troops can get the job done.

As the report states, quote, "Both the survey results and our own engagement of the force convinced us that when servicemembers have the actual experience of serving with someone they believed to be gay, in general unit performance was not affected negatively by this added dimension."

The report also states that, quote, "Much of the concern about open service is driven by misperceptions and stereotypes about what it would mean if gay servicemembers were allowed to be open about their sexual orientation, and we conclude that these concerns about gay and lesbian servicemembers, who are permitted to be open about their sexual orientation, are exaggerated and not consistent with the reported experiences of many servicemembers."

LEVIN: In other words real-world experience is a powerful antidote to the stereotypes that are a major source of the discomfort that some feel about ending "Don't Ask/Don't Tell." Repeal of this policy would bring our military in line with some of our closest allies, including Great Britain and Canada.

The department's review found that resistance to openly gay and lesbian service members among troops in those countries was much higher at the time they changed their policies than it is in our military today, but they changed their policies.

And as the working group found, quote, "the actual implementation of change in those countries went much more smoothly than expected, with little or no disruption."

Most important, ending this discriminatory policy is the right thing to do. "Don't Ask/Don't Tell" is an injustice to thousands of patriotic Americans who seek only the chance to serve the country they love without having to conceal their sexual orientation.

Anyone who believes that maintaining this policy is necessary to preserve our military's fighting effectiveness should read this report. Time and time again throughout our history, our military has overcome obstacles to reflect the diversity of American society.

And in doing so, our military has helped strengthen the fabric of our society while keeping us safe. We can end "Don't Ask/Don't Tell" and maintain our military strength, respect our troops and their families, allow patriotic Americans to serve their country without regard to sexual orientation, and uphold the principle that service and advancement in our military are based on merit alone.

Again, I thank the witnesses for their impressive work, and I call upon Senator McCain.

MCCAIN: Thank you, Mr. Chairman, and let me also thank our distinguished witnesses for their service to our nation. I know that many people in our Defense Department and our Armed Services devoted countless hours in the preparation of this report, especially General Ham and Mr. Johnson. I'd like to thank them for their hard work.

Today's hearing will consider a complex and often emotional subject, the proposed repeal of the current law commonly referred to as "Don't Ask/Don't Tell," which promotes strongly held and legitimate differences of opinion among many Americans. It's no different among the U.S. Military, as the Pentagon's report demonstrates. However, I think we can all agree on a few facts as we begin this important hearing. We can all agree that our military today is the most effective, most professional and arguably the most experienced force that our nation has ever had.

We can all agree that we appreciate and honor the service of every American who wears the uniform of our country as well as their families, especially during this time of war, regardless of whether they are straight or gay.

And finally, I think we can all agree, and I certainly would, that this capable, professional force of ours could, and I emphasize could, implement a repeal of "Don't Ask/Don't Tell" if ordered to, just as they so ably and honorably do everything else that is asked of them.

What I want to know and what it is that Congress' duty to determine is not can our armed forces implement a repeal of this law, but whether the law should be repealed. Unfortunately, that key issue was not the focus of this study. It is, however, the fundamental question that must be answered by Congress -- not by the president or the courts, but by Congress.

And it is a question that must be answered carefully, deliberately and with proper consideration for the complexity of the issue and the gravity of the potential consequences for our military and the wars in which we are engaged.

The Defense Department has had 10 months to complete this report and the RAND Study that accompanies it. Together, these reports and supporting documentation contain over 1,500 pages of data, material and analysis. The members of this committee received it 36 hours ago, and my staff and I are still going through it and analyzing it carefully, including the more than 72,000 comments that our service members provided to the working group.

What I can say now, however, is that in addition to my concerns about what questions were not asked by this survey and considered in this report, I'm troubled by the fact that this report only represents the input of 28 percent of the force who received the questionnaire, including completely leaving out numerous members of the military in combat areas.

That's only 6 percent of the force at large. I find it hard to view that as a fully representative sample set, but I'm nonetheless weighing the contents of this report on their merits. What appears clear at this time, is that the survey and anecdotal data underlying this report did not lead to one unequivocal conclusion, which is no surprise considering the complex and difficult nature of this issue.

So for example, I recognize that if those surveyed who report having worked with a gay or service member, 92 percent said their unit's ability to work together was not negatively affected.

Among those in Army combat units, 89 percent of respondents felt that way, as did 84 percent of respondents in Marine combat units. However, we also learned that of those surveyed, 30 percent of the total, 43 percent of the Marines, 48 percent of Army combat units and 58 percent of Marine combat units believe that a repeal of the law would have a negative or very negative impact on their unit's ability to,

quote, "work together to get the job done."

Furthermore, 67 percent of Marines and nearly 58 percent of Army soldiers in combat units believe that repeal of the law would have negative consequences on unit cohesion in a field environment or out at sea.

This is supplemented by comments like these, quote, "I believe this is not the time for us to make this -- make huge changes in the military. We're at war, and our men and women overseas do not need any more distraction. This issue should be addressed at the appropriate time; that time is not now," unquote.

I remain concerned, as I have in the past and as demonstrated in this study, that the closer we get to service members in combat, the more we encounter concerns about whether "Don't Ask/Don't Tell" should be repealed and what impact that would have on the ability of these units to perform their mission.

These views should not be considered lightly, especially considering how much combat our force is facing. Additionally, I am concerned about the impact of a rush to repeal when even this survey has found that such a significant number of our service members feel that it would negatively impact military effectiveness.

As we move forward with our discussion on this matter, I hope that everyone will put aside political motives and agendas. I also hope that everyone on both sides will refrain from questioning people's integrity.

Finally, I hope that everyone will recognize that this debate is focused on our military and its effectiveness, not on broader social issues being debated in our society at large.

This is a complex and important issue that could have significant repercussions for our force, a force that is engaged in its tenth straight year of sustained combat -- but a force that is performing exceptionally well.

At this time, we should be inherently cautious about making any changes that would affect our military, and what changes we do make should be the product of careful and deliberate consideration.

I'm not saying that this law should never change. I am simply saying that it may be premature to make such a change at this time and in this manner, without further consideration of this report and further study of the issue by Congress.

For of all the people we serve, one of our highest responsibilities is to the men and women of our armed services, especially those risking their lives in combat.

Thank you, Mr. Chairman.

LEVIN: Thank you very much, Senator McCain.

Secretary Gates?

GATES: Mr. Chairman, Senator McCain, members of the committee. This past Tuesday, the Department of Defense released the report of the high level working group that reviewed the issues associated with a potential repeal of the "Don't Ask/Don't Tell" law, and based on those findings to develop recommendations for implementation.

The report's findings reflect nearly 10 months of research and analysis along several lines of study and represent the most thorough and objective review ever of this difficult policy issue and its impact on the American military.

First, the group reached out to the force to better understand their views and attitudes about the potential repeal of the "Don't Ask/Don't Tell" law. As I said on Tuesday, and it is worth repeating again today, this outreach was not a matter of taking a poll of the military to determine whether the law should be changed.

The president of the United States, the commander in chief of the armed forces under the Constitution made this position -- his position on this matter clear, a position I support.

Our job as the civilian and military leadership of the Department of Defense has been how best to prepare for such a change should the Congress change the law. Nonetheless, I thought it critically important to engage our troops and their families on this issue to learn the attitudes, obstacles and concerns needing attention, as ultimately, it will be they who will determine whether or not such a transition would be successful.

This outreach included a survey questionnaire answered by tens of thousands of troops and their families, which Mr. Johnson and General Ham can address in more detail.

In summary, a strong majority of those who answered the survey, more than two-thirds, do not object to gays and lesbians serving openly in uniform. The findings suggest that for large segments of the military, with the exception of some combat specialties, the repeal of "Don't Ask/Don't Tell" though potentially disruptive in the short term, would not be the wrenching, traumatic change that many have feared and predicted.

Second, the working group also examined thoroughly all the potential changes to the department's regulations and policies. As the co-chairs will explain, the majority of concerns often raised in association with the repeal, dealing with sexual conduct, fraternization, (inaudible) arrangements, marital or survivor benefits could be governed by existing laws and regulations.

GATES: Existing policies can and should be applied equally to homosexuals as well as heterosexuals.

The key to success, as with most things military, is training, education and, above all, strong and principled leadership up and down the chain of command.

Third, the working group examined the potential impact of a change in the law on military readiness, including the impact on unit cohesion, recruiting and retention and other issues critical to the performance of the force.

In my view, getting this category right is the most important thing we must do. The United States Armed Forces are in the middle of two major overseas campaigns, a complex and difference drawdown in Iraq and a war in Afghanistan.

The working group concluded that, overall and with thorough preparation, there is low risk from repealing "Don't Ask/Don't Tell."

However, as I mentioned earlier, the survey data show that a higher proportion, between 40 percent and 60 percent, of those troops serving in predominantly all-male combat specialties, mostly Army and Marines, but including special operations formations of the Navy and the Air Force, predicted a negative effect on unit cohesion from repealing the current law.

For this reason, the uniform service chiefs are less sanguine than the working group about the level of risk of repeal with regard to combat readiness.

The chiefs will have the opportunity to provide their expert military advice to the Congress tomorrow, as they have to me and to the president.

Their perspective deserves serious attention and consideration as it reflects the judgment of decades of experience and the sentiment of many senior officers.

In my view, the concerns of combat troops, as expressed in the survey, do not present an insurmountable barrier to a successful repeal of "Don't Ask/Don't Tell." This can be done, and it should be done, without posing a serious risk to military readiness.

However, these findings do lead me to conclude that an abundance of care and preparation is required if we are to avoid a disruptive and potentially dangerous impact on the performance of those who are serving at the tip of the spear in America's wars.

I would outline my recommendations for the way ahead. Earlier this year, the House passed legislation that would repeal "Don't Ask/Don't Tell" after a number of steps take place, the last step being certification by the president, Secretary of Defense and the Chairman of the Joint Chiefs, that the new policies and regulations were consistent with the U.S. military standards of readiness, effectiveness, unit cohesion and recruiting and retention.

Now that we have completed this review, I strongly urge the Senate to pass this legislation and send it to the president for signature before the end of the year.

I believe this has become a matter of some urgency because, as we have seen in the past few months, the judicial branch is becoming involved in this issue. And it is only a matter of time before the federal courts are drawn once more into the fray.

Should this happen, there is the very real possibility that this change would be imposed immediately by judicial fiat, by far the most disruptive and damaging scenario I can imagine, and the one most hazardous to military morale, readiness and battlefield performance.

Therefore, I believe it is important, as Senator McCain put it in his opening remarks, that the question of whether the law should be repealed is a matter for the Congress to decide.

I believe the change should come via legislative means, that is, legislation informed by the review just completed.

What is needed is a process that allows for a well prepared and well considered implementation, above all, a process that carries the imprimatur of the elected representatives of the people of the United States.

Given the present circumstances, those who choose not to act legislatively are rolling the dice that this policy will not be abruptly overturned by the courts.

I believe it would be unwise to push ahead with implementation of repeal before the force can be prepared for this change.

The working group's plan, with its strong emphasis on education, training and leader development, provides a solid road map for a successful, full implementation of the repeal.

The department has already made a number of changes to regulations that within existing law apply more exacting standards to procedures investigating or separating troops for suspected homosexual conduct, changes that have added a measure of common sense and decency to a legally and morally fraught process.

I would close on a personal note and a personal appeal. This is the second time that I have dealt with this issue as a leader in public life, the prior case being at CIA in 1992, when, as director, I ordered that openly gay applicants be treated like all other applicants, that is, whether as individuals they met our competitive standards.

That was and is a situation significantly different in circumstance and consequence than that confronting the U.S. Armed Forces today.

Views toward gay and lesbian Americans have changed considerably during this period and have grown more accepting since "Don't Ask/Don't Tell" was first enacted.

But feelings on this matter can still run deep and divide, often starkly, along demographic, cultural and generational lines, not only in society as a whole, but in the uniformed ranks as well.

For this reason, I would ask, as Congress takes on this debate, for all involved to resist the urge to lure our troops and their families into the politics of this issue.

What is called for is a careful and considered approach, an approach that, to the extent possible, welcomes all who are qualified and capable of serving their country in uniform, the one that does not undermine out of haste or dogmatism those attributes that make the U.S. military the finest fighting force in the world.

The stakes are too high for a nation under threat, for a military at war, to do any less.

Thank you.

LEVIN: Thank you very much, Secretary Gates.

Admiral Mullen?

MULLEN: Thank you, Mr. Chairman, Senator McCain, and distinguished members of this committee.

My personal views on this issue remain unchanged. I'm convinced that repeal of the law governing "Don't Ask/Don't Tell" is the right thing to do.

Back in February, when I testified to this sentiment, I also said that I believe the men and women of the Armed Forces could accommodate such a change. But I did not know it for a fact. Now I do.

And so what was my personal opinion is now my professional opinion. Repeal of the law will not prove an unacceptable risk to military readiness. Unit cohesion will not suffer if our units are well led. And families will not encourage their loved ones to leave the service in droves.

I do not discount for a moment the findings in the Johnson-Ham survey, which indicate resistance to repeal by those in the combat arms and our regular warfare communities.

I do not find these concerns trivial or inconsequential, nor do I believe we can afford to ignore them. Given that this reluctance arises from the ranks of the very troops upon which much of the burden of these wars has fallen, we would do well to pay heed and to move forward in a deliberate and measured manner.

Whatever risk there may be to repeal of this law, it is greatly mitigated by the thorough implementation plan included in the study, the time to carry out that plan and effective, inspirational leadership.

These are the things I know for a fact. These are the things the study tells us. Now, let me tell you what I believe.

I believe our troops and their families are ready for this. Most of them already believe they serve or have served alongside gays and lesbians. And knowing matters a lot.

Those who said they knew they were serving with a gay or lesbian were consistently more positive in their assessment of the impact of repeal across all dimensions, cohesion, effectiveness, retention, even privacy concerns.

Our families feel the same. Most of our spouses know at least one gay or lesbian and very few of them believe repeal of the law would have any effect on family readiness.

This tracks with my personal experience. I've been serving with gays and lesbians my whole career. I went to war with them aboard a destroyer off the coast of Vietnam. I knew they were there. They knew I knew it. And what's more, nearly everyone in the crew knew it. We never missed a mission, never failed to deliver ordnance on target.

Readiness was not impaired. What mattered most, what made us a crew, was teamwork and focus on our combat mission.

Back then, of course, it was a different time. Society on the whole wasn't as accepting or as tolerant as it is now. So we didn't speak of such things or of how little it really mattered that the sailor next to you was gay.

But America has moved on. And if you look closely at this study, I think you'll find that America's military is, by and large, ready to move on as well.

Should repeal occur, some soldiers and Marines may want separate shower facilities. Some may ask for different berthing. Some may even quit the service. We'll deal with that.

But I believe, and history tells us, that most of them will put aside personal proclivities for something larger than themselves and for each other.

There's a special warrior bond in combat, a bond formed not by common values, as some have claimed, but rather by the common threat of the enemy, hardship and peril.

"Numerous soldiers have died, more or less willingly," writes Jay Glenn Gray in his book "Reflections on Men in Battle," -- "not for country or honor or religious faith, or for any other abstract good, but because they realize that by fleeing their posts and rescuing themselves, they would expose their companions to greater danger."

It is those greater dangers that still motivate the heroism and comradeship our troops exemplify today. That's why I believe the end of "Don't Ask/Don't Tell" will pass with less turbulence, even in the combat arms world, than some predict.

In fact, it may be the combat arms community that proves the most effective at managing this change, disciplined as they are. It's not only because our young ones are more tolerant. It's because they've got far more important things to worry about.

The experiences of other militaries would seem to bear that out. Our study looked at 35 other militaries that chose to permit open service, including those of our staunchest allies. In no instance was there widespread panic or mass resignations or wholesale disregard for discipline and restraint.

Some will argue we are different, of course. None of these foreign armies face the unique global demands we do, and none are charged with the leadership roles we bear.

MULLEN: True enough, but many of them fight alongside us in Afghanistan today, and they fought with us in Iraq. Gay or straight, their troops patrolled with ours and bled with ours. They've certainly shared with ours the fear and the loneliness and the horror of combat.

I don't recall a single instance where the fact that one of them might be openly gay ever led to poor performance on the field. My sense is that good order and discipline, far from being cast to the winds when one of these governments change the policy was actually reinforced and reemphasized.

It's clear to me that our troops expect the same. They expect that whatever change we make to the current policy will be accompanied by rigorous training and high standards of conduct. In fact, the report indicates that one of the factors distressing to those who oppose repeal are fears that new policies will not be implemented fairly, evenly, and dispassionately.

Let me be clear -- nothing will change about our standards of conduct. Nothing will change about the dignity and the fairness and the equality with which we treat our people, and nothing will change about the manner in which we deal with those who cannot abide by these standards.

The military is a meritocracy, where success is based on what you do, not who you are. There are no special classes, no favored groups. We may wear different uniforms, but we are one.

There are some for whom this debate is all about gray areas. There is no gray area here. We treat each

other with respect, or we find another place to work, period. That's why I also believe leadership will prove vital. In fact, leadership matters most. The large majority of troops who believe they have served in a unit with gays and lesbians rate that unit's performance high across virtually all dimensions, but highest in those units that are well led.

Indeed, the practical differences between units in which there were troops believed to be gay or lesbian and those in which no one was believed to be so completely disappeared in effectively led commands.

My belief is, if and when the law changes, our people will lead that change in a manner consistent with the oath they took. As one Marine officer put it, "If that's what the president orders, I can tell you, by God, we're going to excel above and beyond the other services to make it happen."

And frankly, that's why I believe that, in the long run, repeal of this law makes us a stronger military and improves our readiness. It will make us more representative of the country we serve. It will restore to the institution the energy it must now expend in pursuing those who violate the policy. And it will better align those organizational values we claim with those we practice.

Now, as I said back in February, this is about integrity. Our people sacrifice a lot for their country, including their lives. None of them should have to sacrifice their integrity, as well. It is true there are no -- there is no constitutional right to serve in the armed forces, but the military serves all the people of this country no matter who they are or what they believe. And every one of those people, should they be fit and able, ought to be given the opportunity to defend it.

Finally, Mr. Chairman, I believe now is the time to act. I worry that unpredictable actions in the court could strike down the law at any time, precluding the orderly implementation plan we believe is necessary to mitigate risk. I also have no expectation that challenges to our national security are going to diminish in the near future such that a more convenient time will appear.

And I find the argument that war is not the time to change to be antithetical with our own experience since 2001. War does not stifle change, it demands it. It does not make change harder, it facilitates it. There is, to be sure, greater uncertainty today, and our forces are, indeed, under stress.

And I know the chiefs are concerned about this. So am I. But I do not believe the stressors currently manifesting themselves in the lives of our troops and their families -- lengthy deployments, suicides and health care -- are rendered insurmountable or any graver by this single policy change.

Nor do I believe that simply acknowledging what most of our troops already know to be true about some of their colleagues threatens our ability to fight and win this nation's wars. Quite the contrary -- today's young leaders are more attuned to combat effectiveness than any of the last three decades.

Tempered by war, bonded through hardship, the men and women of the United States armed forces are the finest and most capable they have ever been. If there is a better opportunity or a better generation to effect this sort of change, I don't know of it.

One final word -- and with all due respect, Mr. Chairman and Senator McCain, it is true that, as chairman, I am not in charge of troops. But I've commanded three ships, a carrier battle group, and two fleets. And I was most recently a service chief myself.

For more than 40 years, I have made decisions that affected, and even risked the lives, of young men and women. You do not have to agree with me on this issue, but don't think for one moment that I haven't carefully considered the impact of the advice I give on those who will have to live with the decisions that that advice informs. I would not recommend repeal of this law if I did not believe in my soul that it was the right thing to do for our military, for our nation, and for our collective honor.

Thank you.

LEVIN: Thank you very much, Admiral Mullen.

General Ham?

HAM: Thank you, Mr. Chairman.

Senator McCain and members of the committee, I must admit to you that, when Secretary Gates appointed me as co-chair of this review, I was not all that thrilled. But as I thought more about it, I felt honored and humbled to be able to participate in a review of a subject that is of great importance to our men and women in uniform. I anticipated the task would be complex, tough, sometimes unpleasant and uncomfortable. And now, I acknowledge that I underestimated those factors.

After nine months of study, I am convinced that, if the law changes, the United States military can do this even in a time of war. I do not underestimate the challenges in implementing a change in the law, but neither do I underestimate the ability of our extraordinarily dedicated service men and women to adapt to such change and continue to provide our nation with the military capability to accomplish any mission.

I came to this conclusion not only as a co-chair of the Department of Defense review, but, perhaps more importantly, as the commander of U.S. Army forces in Europe. I was cognizant every day of this review that I might have to actually lead the changes including in our report. As a serving commander, I'm confident that, if this law changes, I and the leaders with whom I serve can do just that.

Thank you.

LEVIN: Thank you very much, General Ham.

Mr. Johnson?

JOHNSON: Mr. Chairman, Senator McCain, thank you very much for the opportunity to testify here today.

By now, you have had the opportunity to read the report General Ham and I have co-authored. The report is voluminous and comprehensive, but we hope it speaks for itself. Our basic assessment is that our military can make this change provided we do so in an orderly and reasonable manner in accord with the recommendations for implementation we offer in our report.

This morning, I'd like to take a moment to talk to you not in my capacity as co-author of this report but as the lawyer for the Defense Department. I want to repeat and elaborate upon what Secretary Gates and Admiral Mullen have said and ask that the Congress not leave our military's fate on this issue in the hands of the courts.

I offer no view about the constitutionality of "Don't Ask/Don't Tell" or a prediction about the outcome of the litigation that is underway. But regardless of how you feel about "Don't Ask/Don't Tell", or gays serving openly in the military, the fact that there is increased litigation in the courts on matters of gay rights is undeniable.

Since 2003, when the Supreme Court decided *Lawrence v. Texas*, the courts have become increasingly receptive to gay rights claims. Within the last year alone, federal district courts have, for the first time, declared California's gay marriage ban, the Federal Defense of Marriage Act, and "Don't Ask/Don't Tell", all unconstitutional.

We have appealed the lower court decisions on "Don't Ask/Don't Tell", but after years in which "Don't Ask/Don't Tell" was upheld in the courts, the constitutionality of this law is now in litigation once again, and we in the Department of Defense face the possibility that we must repeal "Don't Ask/Don't Tell" not on the terms and timetable of the president, the Congress and the Department of Defense but on the terms and timetable of a court and a plaintiff.

We got a taste of that possible future in October and November in the Log Cabin Republicans case. On Monday, October 11, we had a law and a policy in place that required separation of members of the military who are found to have engaged in homosexual conduct. On Tuesday, October 12th, a federal district judge in California issued an order to the Secretary of Defense to suspend enforcement of that law on a worldwide basis. Eight days later, on October 20, the appellate court issued a temporary stay of the injunction while it considered whether to grant a more permanent stay.

On Monday, November 1, the Ninth Circuit agreed to keep the stay in place during the pendency of the appeal in that court. On Friday, November 5, the Log Cabin Republicans asked the Supreme Court to reverse the stay. On Friday, November 12, the Supreme Court denied that request. Thus, in the space of eight days, we had to shift course on the worldwide enforcement of the law twice and, in the space of a month, faced the possibility of shifting course four different times.

This legal uncertainty is not going away any time soon. The Log Cabin Republican case is on an expedited appeal schedule, and more lawsuits are being filed. Our plea to the Congress is to not leave the fate of this law to the courts.

As Secretary Gates has stated, if repeal of this law occurs, it should be done by the elected representatives in the political branches of government, not by the courts. Indeed, in the course of our review, we learned of other nations that acted to change their policies on gays in the military to head off adverse outcomes in court.

JOHNSON: From where I sit as the lawyer for the Department of Defense, the virtue of the legislation pending before the Senate is that, if passed, repeal of "Don't Ask/Don't Tell" will be done on our terms and our timetable upon the advice of our military leadership.

As working -- as the working group report makes clear, there are many issues that must be addressed in connection with any repeal of "Don't Ask/Don't Tell" -- education and training, the core messages to be delivered as part of education and training, same-sex partner benefits, berthing and billeting, a policy on re-accession, related changes to the USMJ, and others.

The secretary and chairman have both made it clear that they will not sign the certification contemplated by the current legislation until we've written new post-repeal policies and regulations and have at least begun our education and training of the force -- in other words that repeal is brought about in a responsible and orderly manner.

In all likelihood this will not be possible if repeal is imposed upon us by judicial fiat. For these reasons we urge that the Senate act now on the pending legislation. Thank you.

LEVIN: Thank you very much, Mr. Johnson.

We've got a very large number of senators here, and Secretary Gates has got to leave that 11:30, and the others are able to stay later than that. But in order that we would all have a chance while he's here, I think our first round will need to be limited to five minutes, and then we will have a...

MCCAIN: Mr. Chairman, I object to that.

LEVIN: OK. I've been trying to give...

MCCAIN: Five minutes is...

LEVIN: I agree. It's a very small time.

MCCAIN: Well, then I suggest we have another hearing or reconvene in the afternoon. Five minutes is not sufficient time for anything, frankly, but statements by the members.

LEVIN: All right. We've had rounds of five and six and seven minutes for many, many hearings. In fact, that's our tradition. But in any event, I'm trying to give every member here an opportunity while Secretary Gates is here. I'm not saying there's not going to be a second round. There will be a second round of the third round at the fourth round with Admiral Mullen and with...

MCCAIN: But he'll be gone.

LEVIN: ... General Ham and Mr. Johnson. And if we then need to Secretary Gates back for an additional hearing, we'll ask him them back. But I have to accommodate both his schedule, as well as give an opportunity to every member of this committee while he is here to ask him questions, so we will...

MCCAIN: My only response, Mr. Chairman, is this is obviously a transcendently important issue, and to allow our members five minutes with the secretary of defense is simply not adequate to have us have the much needed information that the secretary of defense can provide.

So all I -- all I can do is say you're not giving the members sufficient time to ask questions, which is maybe not the intent, but certainly the effect. And so maybe we could, in the lame-duck session that we are in, have another hearing as soon as possible, so that all members can have ample opportunity to get the information they need to make a very important decision.

LEVIN: If...

GATES: Mr. Chairman, if it would help, I can do some rearranging and stay until noon.

LEVIN: Thank you. We hope that helps and that we hope another hearing with you would not be necessary. We have our other witnesses here as long as we need them.

If we need a second hearing with Secretary Gates, we will consider that at that time, but at least for the first round we're going to have a five-minute round to give all of our members an opportunity while he's here. This is an important hearing, and it's important for all of our members to have that opportunity.

(UNKNOWN): Mr. Chairman?

LEVIN: Well, let me -- let me proceed here. I -- I think we just want to get going, unless there's something...

(UNKNOWN): Well, I'm just saying doing the math around here, since he extended it by 30 minutes, you could change that to six- minute rounds and still do the same thing.

LEVIN: Thank you. Very good. We will accept that recommendation. We will now have a six-minute first round.

(LAUGHTER)

Thank you very much for that recommendation. We accept it. We'll have a six-minute first round, given Secretary Gates' ability to stay an extra half-hour.

Let me start with you, Admiral Mullen. You have told us as -- that the nation should now change our policy and that we should allow gay and lesbian service members to serve in the military without having to conceal their sexual orientation. You've stated your position both personally and professionally now in a very eloquent way.

You've also urged us, as have the others, to carefully consider the use of the service chiefs, even where they might differ. Have you carefully and seriously considered the views of all of the service chiefs, even where they might differ, in reaching-year-old professional conclusion?

MULLEN: I have spent a great deal of time with the service chiefs on this issue since the beginning of the year. I couldn't tell you the number of sessions, but one of my goals, certainly, was -- throughout this process was not one of influence, but it was one of debate and discussion and making -- making sure that everybody understood where everybody else was on this and that we could take -- in particular, when we got the report, take the report, look at it, assess probably more than anything else the risk has associated with it, obviously, understand what's in the report, but assess the risk.

And each of us arrived at our own conclusions about that, not just from a service perspective. Certainly, the service chiefs have that obligation, but this is also the joint chiefs, and so I asked them for their views from the joint perspective as well. And we received that and, certainly, all of that was taken into consideration in arriving at where I am with respect to the risk level tied to potential implementation of this.

LEVIN: So do I understand from your answer, then, that you have carefully considered the views of the

service chiefs before you've owned -- you've reached your own professional opinion?

MULLEN: Very carefully. Yes, sir.

LEVIN: Secretary Gates, you've also urged us to consider the views carefully of the service chiefs, and I fully agree with you. Have you done that in reaching your own conclusion?

GATES: Yes, sir, I have.

LEVIN: And, General Ham, have you carefully considered the views of all the service chiefs before reaching that conclusion in this report?

HAM: Mr. Chairman, I have, but it is important to note that the report from Mr. Johnson and myself to the secretary is not reflective of the chiefs' views.

LEVIN: I understand, but before you've reached your views that you've transmitted -- we understand there'll be differences that the chiefs will have, and we'll hear from them tomorrow -- but I want to know that in considering your views, you've touched base with various stakeholders and people who have their own points of view inside the military. Have you touched base with the service chiefs, and have you considered their views?

HAM: Yes, Mr. Chairman.

LEVIN: Mr. Johnson?

JOHNSON: Yes, absolutely, Senator. And during the comment period leading up to the publication of the report, General Ham and I took account of what we heard and -- and in places revised our own assessment in response to views that were expressed to us by the chiefs.

LEVIN: So there's been in a number of places revision of this assessment based on the views of those chiefs?

JOHNSON: Yes, sir.

LEVIN: Now, General Ham, can you, assuming we changed the policy and repeal the policy of "Don't Ask/Don't Tell," can you as commander of the U.S. Army Europe effectively implement a new policy allowing gay and lesbian service members to serve in the military without concealing their sexual orientation, consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention in the Armed Forces?

HAM: Mr. Chairman, I am confident that I can.

LEVIN: Now, in terms of passing legislation now, the matter has been before this committee almost all for year. Starting, I guess, in February we've had hearing on this matter. We've raised questions with the service chiefs. They've testified on this before and will again tomorrow.

You've indicated, Secretary Gates, that it's important that we act now, this month, I believe, and you've

given us the reasons because the -- primarily because the courts are involved now in this matter. You've also said we should not act -- I believe your words were -- in haste.

Would you consider our acting this month, given the amount of time that we've already put into it and given the fact that we've had this report now just for a couple of days, would you consider our acting this month to be hasty?

GATES: Well, it certainly would be expeditious. I think that, as Senator McCain has said, this is a very important matter. And -- and frankly, my -- my sense of urgency would not be as great, were it not for what -- what we went through in October and November that Mr. Johnson described in his opening statement, which, frankly, was a very difficult period for us where, in essence, overnight we were told that the law had changed and that we couldn't enforce it.

We had done no training, no preparation, nothing whatsoever. And -- and it is my worry about the unpredictability of the situation with the courts, particularly this coming spring, that gives me a sense of urgency about this. But -- but the timetable, obviously, has to be at the -- based on the will of the Senate.

LEVIN: Would you consider that we have deliberated on this issue this year?

GATES: I would like to see -- I'm sorry.

LEVIN: Well, you know, you've urged us to be deliberative, and I agree. We need to be deliberative. We're deliberative body. We've had this matter in front of us now for a year, including testimony during that year, including a separate hearing on "Don't Ask/Don't Tell," including many hearings where we've asked the issue of service chiefs, where you've testified on this, I believe, as well.

On the other hand, so you've urged us to be delivered us, but you also have urged us to act this month, and I want to know whether or not your two urgings are consistent.

GATES: Well, as I say, I -- I am very worried about the courts. And -- and, frankly, I do think it needs to be deliberate. The reality is I had expressed the hope in February that there would be no legislation until after the review was done so that the review and what we learned could inform the legislative process.

Now, I think the report is pretty stark. It's pretty clear in its conclusions, agree or not with them. It's -- I think it's pretty straightforward. And therefore, I think that absorbing the lessons learned and the recommendations and the analysis of the report is doable within the timeframe that you have before the Congress adjourns.

So I believe that at least based on the information in the report, that the Congress is in a position to act because it now has this information in hand and frankly I don't think it's all that complicated to absorb.

I think the key issues frankly have been described quite clearly in your opening statement, in Senator McCain's opening statement and in the opening statement that the four -- statements that the four of us have made. Those are the critical issues.

LEVIN: Senator McCain? Thank you.

MCCAIN: General Ham, thank you for your hard work on the issue. Is it your personal opinion that this law should be repealed?

HAM: Senator McCain, I've given this a lot of thought. It is -- we certainly can. It is my personal view that I'm very concerned about the timing of the courts, and so it is my -- personally I think it is time to move from debate and discussion, to decision and implementation. So yes sir, I think it is time to change.

MCCAIN: Secretary Gates, this survey says nearly 60 percent of respondents in the Marine Corps and Army combat arm say they believe there would be a negative impact on their unit's effectiveness in this context. Among Marine combat arms, the number was 67 percent.

Nearly 60 percent of the Army combat armed soldiers and 66.5, two-thirds of the Marine Corps combat arm troops voiced these concerns about repeal. And you have said that you conclude that those concerns of numbers -- of service members about deterioration of the military unit cohesion are, quote, "exaggerated."

How are they exaggerated? GATES: I don't remember using the word exaggerated because I take those concerns very seriously, and frankly share the view of the chiefs that the report's evaluation of risk and particularly in the combat arms is perhaps too sanguine.

What I believe is that with the amount -- with proper time for preparation, for training, whether it's before deployments or after deployments, however it works out, if we are allowed to do this on our terms, I believe that those concerns can be mitigated, and I think to repeat one of the things that Admiral Mullen said in his opening statement, the experience of those who have served with someone they believe to be gay or lesbian was very different, even in combat arms, than those who had never done so.

And I would point out that for -- an example with the Marine Corps, you also have, and the most of the Marines who are in combat are 18 to 24-25 years old, most of them have never served with women either.

And so they've had a very focused, very limited experience in the military, and it's been a tough one. But I think that with time and adequate preparation, we can mitigate their concerns.

MCCAIN: Well, I couldn't disagree more. We send these young people into combat. We think they're mature enough to fight and die, I think they're mature enough to make a judgment on who they want to serve with and the impact on their battle effectiveness. Mr. Secretary, I speak from personal experience.

Within the combat units, the Army and Marine Corps the numbers are alarming. 12.6 percent of the overall military force responding to the survey say they'll leave the military sooner than they had planned. 21.4 percent of Army combat troops indicate that they will leave the force earlier. In the Marine Corps, that number jumps to 32 percent, nearly a third of all Marine Corp combat arms force, which is probably why the service chiefs, particularly the commandant of the Marine Corps is, quote, in your words, "less sanguine" than you are about this issue.

Also if they left the -- this 12.6 percent of the military left earlier, that translates into 264,600 men and women who would leave the military earlier than they had planned. Do you think that's a good idea to replace 265,000 troops across the force in time of war, that we should be undertaking that challenge at this time?

GATES (?): Well first of all, the experience of the British, the Canadians and some of the others has been that in their surveys prior to enacting a change in their laws and rules, there were substantial numbers who said that they would leave, and in the event, those numbers were far smaller than the surveys had indicated.

I think if we -- I think once -- again I go back to the point that people who have had experience have a different -- serving with gays or lesbians, have had a different view of these things, and I think that will be true of a lot of our force. Again, I think that the training and so on will help mitigate these consequences. And frankly I think that while there are some concerns that you will probably hear tomorrow about some of our special operations forces where there are limited numbers of people and where any loss is potentially of concern for the force as a whole, I don't think any of us expect that the numbers would be anything like what the survey suggests just based on experience.

Also you have the reality, they can't just up and leave. They have enlistment contracts. The officers have contracts in terms of the amount of time they have to serve and so it isn't like they can just say, "Well, I'm outta here." They are going to have to complete their obligation.

And I believe that during that period their concerns can be mitigated. I think one of the real encouraging aspects of this has been the relative -- the fairly positive responses of spouses because as the saying goes, you enlist the soldier, you reenlist the family. And so the positive responses of the spouses I think has been important.

MCCAIN: Mr. Secretary, finally, we are very deeply concerned about WikiLeaks, the impact that it has had on identifying people who were cooperating with us and Afghanistan and Iraq and some leaders who have said they have blood on their hands.

Who -- so far all we know is that one Private First Class was responsible for this. Have you held -- and you began investigation since July -- have you held any individual responsible for the WikiLeaks and punished anyone? Put anyone on leave? Had any -- taken any disciplinary action whatsoever with this incredible breach of national security?

GATES: Well, I would answer in two ways Senator. First, to a certain extent, our ability to go down that path is limited by the fact that we have criminal proceedings underway that limit our ability to conduct an independent investigation while that criminal investigation is going on.

By the same token, beginning in August, we directed a number of steps to take every possible...

MCCAIN: Time has expired. I asked you have you held...

(CROSSTALK)

GATES: ... this couldn't happen again...

MCCAIN: Have you held anyone responsible was my question.

GATES: Not yet.

MCCAIN: Thank you.

Thank you Mr. Chairman.

LEVIN: Thank you, Senator McCain.

Senator Lieberman?

LIEBERMAN: Thanks, Mr. Chairman. Thanks to all of you.

In his opening comment, Senator McCain said that the survey and report that you put out yesterday General Ham, Mr. Johnson, didn't answer the question of whether the law should be repealed.

It did answer the question, in my opinion, that if the "Don't Ask/Don't Tell" law is repealed that it will not compromise military effectiveness, unit cohesion and morale. That's a critically important element.

The question of whether the law should be repealed is for Congress, and I want to just very briefly say that to me, in reaching a judgment on that question, we're on the front lines of a turning point in American history.

We have these in every generation. This country from the beginning was defined not by its borders, but by our values. The Declaration of Independence says, you know, we're all endowed by God with those equal rights to life, liberty and the pursuit of happiness.

And every generation has realized those rights better because they weren't realized at the beginning in 1776 for women, for people of color et cetera, et cetera. In our time, one of the great transitions occurring is the growing readiness and understanding among the American people that you simply -- it's just wrong and un-American to discriminate against people based on their sexual orientation.

One of the great examples, and I think a heroic example of this change of public opinion, is the great man whose chair I'm occupying today who served on this committee until his death, Senator Robert C. Byrd, who strongly supported "Don't Ask/Don't Tell" in 1993 and then in our deliberations this year, played a critical role, offered legislation to guarantee real due process and a deliberative process in removing this law and basically said in voting for the change that it was wrong.

It was not consistent with our values, and it wasn't good for the military. The military, U.S. military has a proud tradition of leading and reflecting the best values of America. In this case, I think the U.S. military is behind the American people and behind the private sector.

LIEBERMAN: And it is because the law constrains you from reflecting our best values, the 1993 law says the commander in chief, the military don't have the latitude to end this discriminatory policy, and that's why I think it's so critically important that we do this as quickly as possible. And if we do it in this lame duck session, the deliberative process that the amendment and our law provides is really full of due process.

In fact, there was no time limit on the certification required from the president, secretary of defense and chairman of the joint chiefs of staff. That's up to those three honored individuals.

So I think that Admiral Mullen said it well, and to meet its success in America's -- in the military is based not on who you are, but what you do. And that's -- that's true of American life, generally, and this is our opportunity to change that.

I want to ask just a couple of questions. The first is this. Why do I say this policy has been that for the military? Because the record shows that almost 14,000 service members have been tossed out of the military over the last 17 years not because they were bad soldiers, not because they violated the code of conduct, but because they were gay -- who they were.

Admiral Mullen, in that sense do you think we've lost some critical military personnel, and in fact, some who are gay and lesbians may have not enlisted in the military because of fear of what that would mean to them personally?

MULLEN: I -- I don't think there's any question about that and -- and to the -- to the whole issue of both recruiting and retention. And -- and the report itself looks very specifically at the risk level with respect -- with respect to that. And -- and it also flags areas that -- that should this change, we need to focus on as leaders.

And one of the things I struggle with is that we have lost upwards of 13,000 to 14,000 individuals. Clearly, by implication alone there are those that choose not to come in, to have to go through that.

And in addition to that, and then this is -- it's very fundamental to me, which has been this whole issue of integrity, we're an institution that values integrity and then asks other people to join us, work with us, fight with us, die with us, and lie about who they are the whole time they're in the military. That's what just doesn't make any sense to me. And while they're here and able to do that, even in the policy that we have, they are actually individuals who goes through extraordinary pain to sustain that lie.

LIEBERMAN: Let me -- let me read you one of the more -- to me one of the more interesting and important statistics in the survey. Only 15 percent of gay and lesbian service members currently, who responded to the Rand survey, said that they would want their sexual orientation to be known in their unit -- only 15 percent.

Excuse me -- here's a quote from one -- one of those to the interviewer. "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 of whether you're gay or straight," end of quote, from a service member.

So just to make clear, Admiral, if "Don't Ask/Don't Tell" is repealed, the military code of conduct will apply to gay members of the military as well as straight members. And just as a straight member who -- a man who may harass, sexually harass a woman is subject to discipline, so, too, would a gay member of the military, who subjects another person of the same gender, be subject to disciplinary action.

MULLEN: Standards of conduct will not change one bit. Leadership requirements to enforce those won't change at all. So I fully agree with you.

LIEBERMAN: I just appreciate, I'd say, and finally, in your comment about the integrity of the military, we're going through a tough time in American life now. And it's a time in which the American people have

lost confidence in some of the great institutions of our society -- the government, right here, what we're part of, the business community.

Probably the one institution, central institution, in our country that the American people still have trust in is the American military, because it's committed to a cause larger than individuals, because they're -- they're committed to one another, and -- and they're -- they're mission focused. It's not who you are, but what you do.

And I think "Don't Ask/Don't Tell" is a stain on the honor of the U.S. military that we have the capacity to remove in this session of Congress, and I hope that we will.

Thank you, Mr. Chairman.

LEVIN: Thank you, Senator Lieberman.

Senator Inhofe?

INHOFE: Thank you, Mr. Chairman.

I'll make -- well, let me just state this. Back in 1993, 1994, under the Clinton administration when "Don't Ask/Don't Tell" was installed, I -- I was critical of that. I didn't think it would work.

And now that time has gone by and we've gone, what, 16 or 17 years, it's something that has -- there's no one saying now that I recall that I've used in the past, "if it ain't broke, don't fix it." It has worked. I really believe it has worked.

And let me just get into it, just ask the same question that Senator McCain asked in perhaps a -- a little different way. Right now, we have the best -- probably the best retention and recruitment percentages, over 100 percent everywhere except, I think, just the Army Guard. And there are some other reasons for that. And I -- this is something that has concerned me as to how this would affect that.

When you look at the report under question 71(b), and you take the positive and the very positive and the negative and very negatives, and the question is would it affect the -- your immediate unit effectiveness at competing -- completing its mission, its 2.5 to 1 -- 2.5 to 1 that they're stating that this would have a negative effect.

Then when you look at the -- the other figures, you -- you have to say, you have to ask the question how is this going to negatively impact the -- the recruitment or retention.

And I think that there is another figure that can be used, that 23.7 percent would either leave or think about leaving, Admiral Mullen, the -- the surface. This is from the report. And also, 27 percent of the military members surveyed said that repeal would not be -- the repeal -- would not be willing to recommend military service to someone else.

Now, I know there have been studies made. As I recall, it's about 50 percent of the people who go into the military do so at the recommendation of someone who's already in. Let's assume that that's right.

Do you -- are you concerned at all about what's going to happen to our retention and recruitment, Admiral Mullen?

MULLEN: Senator, the -- the report properly flagged these issues, and I think that's important. So -- so it's certainly something, if implemented, we've got to focus on.

I have not met a soldier, sailor, airman, Marine, Coast Guardsman in my whole life, man or woman, who didn't think at one point or another about whether they were going to stay or go. And then, from my point of view, that focuses on exposure and understanding. And the survey -- or the report, which indicates how many, once exposed, it did not affect at the 90 percent level, including the combat arms, the Marines as well, that it did not affect unit readiness.

Now, that's the reality of its exposure. And -- and there are, clearly, those, as the secretary of defense said, who have not been exposed.

INHOFE: I -- I understand your question, but it's taking up all my time -- or your answer.

Let me ask you this one further question. Do you believe that -- well, why do you think only two-thirds of the people responded to this -- to this survey?

MULLEN: Actually, by every indication, and you'd have to get somebody that does this for a living, it was an extraordinarily positive response when you talk about 28 percent of the -- of the 400,000 surveys that were sent out to the men and women in uniform at the 150,000 to our families -- more than statistically significant in all of the key categories.

INHOFE: Well, I certainly disagree with that, and I have talked to people in the field, who have said that we didn't respond because the decision was already made. I think Senator McCain already covered that, so I won't repeat that.

Let me real quickly get this in, because I know tomorrow is a hearing where we'll have the service chiefs. But I think it's important to get it in the record here.

General Schwartz of the Air Force -- "I believe it is important, a matter of keeping faith with those currently serving in the Armed Forces, that the secretary of defense commission review be completed before there is any legislation to repeal." Obviously, that didn't happen, because legislation came through in the form of amendment back on March 27th.

Admiral Roughead -- "We need to -- my concern is that legislative changes at this point, leading sailors to question whether their input matters." That's what I've heard in the field. If it doesn't really matter, why respond to it?

General Casey -- "I remain convinced that it's critically important to get a better understanding of where our soldiers and families are on the issue. I also believe that repealing the law before the completion of the review will be seen by men and women of the Army as a reversal of our commitment to hear their views (inaudible)."

Clearly, they believed last January that before any decision was made, that we would hear their reviews.

Then halfway through this, the legislation, the amendments came, I might say, right down party lines to go ahead and -- and do that. And this is what we hear in the field.

General Amos of the Marine Corps -- "Now is the wrong time to overturn 'Don't Ask/Don't Tell.' As U.S. troops remain in the thick of war in Afghanistan, there is risk involved. I'm trying to determine how to measure that risk. This is not a social thing. This is a combat effectiveness. That is what the country pays Marines to do."

Now, I know they're coming up tomorrow, and we'll have a chance to ask them. Let me just ask you for a brief answer. Do you think that they're -- they're right or wrong? MULLEN: I think there's an opportunity to hear them before the legislation passes, as they have asked in the past.

INHOFE: Secretary Gates?

GATES: Well, I would just say there is another person that said something along those lines in terms of the review, and that was me before this committee in February, when I urge that there be no legislation until the -- until the review had been completed.

INHOFE: All right.

Now, lastly, I've heard several times that that's all right. Whatever happens here and now is not all that significant, because there is a final step.

And the final step is that the repeal provision contained within both the House of Representatives and the Senate Armed Services Committee versions of NDAA would work as follows, once the law is enacted, repealed and so forth, and the president and the chairman of the joint chiefs and the secretary deliver to Congress their recommendation based on these assumptions that come out of this report and that that isn't going to happen until that takes place.

And yet halfway through this process, Secretary Gates and Chairman Mullen and, of course, the president has made it very clear, you've already made up your mind. So have you already made up your mind so that this step is not going to be necessary?

GATES: Absolutely not. The certification process, I think, is a critical piece of the legislation. And -- and seeking for myself, I would not sign any certification until I was satisfied, with the advice of the service chiefs, that we had in fact mitigated, if not eliminated to the extent possible, risks to combat readiness, to unit cohesion and effectiveness.

INHOFE: Even though you stated, "I fully support the president's decision. The question before us is not whether the military prepares to make the change, but how we're prepared for it."

GATES: That's exactly right.

INHOFE: All right.

Thank you, Mr. Chairman.

LEVIN: Thank you very much, Senator Inhofe.

And now Senator Reed.

REED: Thank you very much, Mr. Chairman. (Inaudible) and I think the questions and comments going back and forth. Let me put in a question this way.

You seem to be saying that there is a high correlation between those who have served with gay individuals and who believe that unit cohesion will not be affected and that there is a very low correlation between those that never served with them and the question of cohesion, i.e. they feel that it will be irreparably harmed.

Which leads to the conclusion I think you're getting at that this -- the results are if you have the opportunity to serve with individuals who you know, or suspect to be gay, that you don't have significant concerns about overall cohesion and the unit effectiveness. Is that your conclusion?

(UNKNOWN): True. Yes sir.

REED: And that is the conclusion of the study too ...

(UNKNOWN): Yeah.

REED: ... as you look at the correlation numbers?

(UNKNOWN): Yes sir. The study laid that out. Additionally, the study also found that should the law change, those who -- the difference between those who are actually deployed and in combat, their concerns were lower than those who are in combat arms, but not deployed. Because they're very specifically focused on the mission in combat at the time.

REED: I think that's important to emphasize again. Let me understand it fully. Those units that were surveyed that were deployed in combat, their responses were less concerned about unit cohesion with the introduction of gay personnel?

(UNKNOWN): What the working -- what the report showed specifically were those who were in combat situations, or had been in combat situations on this issue...

REED: Right.

(UNKNOWN): ... found themselves much more focused on combat and expressed less concern about the policy than those who were combat arms that were not deployed at the time. And so it's very clear that they were focused on succeeding in combat...

REED: Right.

(UNKNOWN): ... and succeeding in their mission.

REED: I think this survey data compliments what the best proxy we have for this question, which is

experience of our closest allies. And I don't know if you want comment, or Secretary Gates wants to comment on what you've heard from the British chiefs of service in terms of their combat arms, their Royal Marines, their special operations forces who are operating side by side with our forces?

HAM (?): I don't approach this from the perspective of, you know, one-to-one comparison because we are different countries ...

REED: Right.

HAM (?): ... and I understand that. But when I talk to my counterparts in the U.K. and in Australia specifically, the theme from both chiefs was an awful lot of resistance up front. An awful lot of hubbub before it changed, and then it virtually was implemented without an issue once the law changed in their own country.

REED: And you have had no comments from the field or our commanders who are working with these units questioning their combat efficiency? In fact my impression is when I go into Afghanistan, is that they -- they're eager for the support and quite impressed with their performance. Is that fair or...

HAM (?): They are focused on -- their priorities are just not focused on this issue very specifically.

REED: General Ham, and you have conducted 95 forums at 51 bases. You've conducted 140 smaller focus group sessions. You've handed out 400,000 questionnaires, received a significant number back.

But ultimately, there's a judgment about whether you feel that there is -- that the voice of the troops, the young men and women and their families have been heard. And I think you're ideally suited to make that judgment. Is that your judgment?

HAM: Senator, it is. Through the administration of the survey, that provided us statistically sound and analytically rigorous information across a wide spectrum of categories.

But it was the personal engagement face-to-face that Mr. Johnson and I and other members of our team conducted, the online inbox and other mechanisms that allowed service members and their families to voice their views that gave us great context and gave us frankly some of the themes that we addressed in the survey.

REED: Thank you.

And Mr. Johnson, again you stressed the impact -- the pending impact of court cases which are unpredictable and -- but it seems a growing willingness of courts to step in and make decisions based on the Constitutional theories about the inadequacy of "Don't Ask/Don't Tell."

And that issue you said in your remarks and just to reconfirm again, add another dimension that frankly didn't exist really last February when we started talking about how to we do this? Do we do it legislatively? Do we do it with a survey etc.? Is that -- and obviously that's another factor to consider.

JOHNSON: Yes absolutely Senator. All three branches of government are very actively involved in this issue right now.

REED: And final question Mr. Secretary. You mentioned in your opening remarks, you had the experience in 1992 in the Central Intelligence Agency, and my perception was that you faced some of the same issues, which were initially opposition within the ranks, within the public.

But you ensured that policy was carried out and that within the agency, that there are analysts who are removed from small unit activities in the field and in the field operation. Did you notice as we've had this policy in place now for over a decade, any significant difficulties in getting field operators to accept it? I mean the counterpart if you will to the combat forces of our military.

GATES: No, in fact the policy has -- the direction that I made in 1992 has now been in place a year longer than "Don't Ask/Don't Tell," and in talking to my successors, it has not presented a problem.

But I would say, just to be clear, as I said in my opening statement, the circumstances and the intimacy, particularly of those in combat compared with those working for CIA is very different.

REED: Thank you very much, Mr. Secretary.

LEVIN: Thank you, Senator Reed.

Senator Brown?

BROWN: Thank you, Mr. Chairman.

Mr. Secretary, I know we spoke privately. I appreciate that time in order to speed the process and get additional information.

I do just have a couple of follow ups to you and potentially the other members of the panel. In mirroring what Senator Inhofe said about the participation, I can tell you from firsthand conversations when I visited Afghanistan, speak to members of the guard and reserve, that halfway through the process when the committee took certain actions, they felt it was a done deal.

And as a result, they didn't participate in the survey. And 28 percent does not seem like a high number of participation regardless of the total number as it reflects to the nature and total amount of surveys that have gone forth.

Is there anything additionally you can shed in terms of your understanding whether it's anybody, General Ham or Admiral Mullen as well, as to why the participation still was only at 28 percent and not higher?

GATES (?): Let me ask General Ham or Mr. Johnson to address sort of the statistical significance of the numbers.

HAM (?): Senator, the 28 percent overall response rate is well within the normal range, the historical range of Department of Defense surveys of military personnel.

When we worked with the company which administered the survey, we wanted to make sure that the proportional number of surveys were distributed based on historical response rates by community.

Each service and in fact each community within services have historical response rates, and we tried to account for that in the distribution of the surveys. Having said that, there were some -- there was some concern about the slowness, if you will, of the response rates.

So the service chiefs, senior enlisted leaders of the services, Secretary of Defense and others, would send out reminders encouraging service members and family members to respond.

So I'm comfortable that the response rate overall was within norms and probably more importantly Senator, that each category that we analyzed had a statistically significant number of responses.

BROWN: Mr. Secretary, just for the benefit of the people that are listening and also for the committee, lets assume for argument's sake that we move forward, and we say OK, we're going to accept the report, and we're ready to move on and take that next step and repeal "Don't Ask/Don't Tell."

Could you explain what the process would be in your mind? Because a lot of concerns that I personally have as someone whose still serving in the military and others that have confided in me privately is that they want to make sure that the battle readiness and military effectiveness of our troops, men and women serving, is not affected.

Do you envision something like starting with the non-combat units, the guard and reserve? Moving up that way and implementing down the road? How will the certification process work? What's your thought process in actually moving forward with that while not jeopardizing retention, battle readiness and effectiveness?

GATES: First of all, I think that the key, as the report makes clear, is training. Both leadership training and training of the entire force. That's better than 2 million people.

Whether we would begin with one segment or not, I think we haven't addressed that issue yet. But I would tell you that my personal approach to this would be that until all the training has been completed, until the service chiefs are comfortable that the risks to unit cohesion and to combat effectiveness of the change had been addressed to their satisfaction and to my satisfaction, I would not sign the certification.

In other words, my view is that before the certification is signed, everything has to be done to get ready. It's not something that I would start, that I would certify while it was still in process as it were.

BROWN: So that could be four months or four years. It really -- you just want to make sure that they're at that point where you feel comfortable that those issues will be addressed?

GATES: That is exactly why I have been very careful not to talk about how long I think this will take to implement. I think that people will be watching to make sure we're not slow-rolling the process, but by the same token, I've said since February this process needs to be thorough and it needs to be very careful, and it needs to be completed before the certification is signed, in my view.

BROWN: Is it your testimony here today that you will not certify until you feel that the process can move forward without any damage to the safety and security of our men and women that are serving, number one, and that our battle effectiveness will not be jeopardized, number two?

GATES: Absolutely.

BROWN: Thank you. I have no further questions.

LEVIN: Senator Brown.

Senator Ben Nelson?

BEN NELSON: Thank you, Mr. Chairman.

And thank you, gentlemen, for being here today. To me, the issue seems to be not whether to allow gays to serve in the military but whether to allow them to serve openly. But permitting them to serve, but not openly, undermines the basic values of the military -- honesty, integrity and trust, and when that's undermined anywhere, it's undermined everywhere.

It also seems that our military is expected to say, "I don't want to lie, but you won't let me tell the truth." How do we square this circle? I think there are those who legitimately are concerned that this will adversely affect readiness and national security, and yet we have the report that seems to be somewhat overwhelming in certain areas saying that it's time to change the law. Can you help me understand how we move to something where it is now possible to tell the truth?

And I say that because I hear everyone saying in one -- to one degree or another you've served with people who are gay, but if you knew they were gay and you didn't turn them in, were you lying, or was honesty sort of a mobile commodity?

Admiral?

MULLEN: I think -- I think, Senator Nelson, I mean, you've hit at the -- from my perspective, you've hit at the core issue, and I can't square the circle, and certainly historically have not been able to. And I think it is -- your comment about, you know, if it exists anywhere, it exists everywhere, and that's been the case with respect to gay and lesbian service for my whole career, including under this law.

And I think it does fundamentally undermine who we are, because we're an institution that is so significantly founded and based on integrity, so I can't square it.

BEN NELSON: Secretary Gates, I think you've already said, and I've seen your public comments about the core values of the military, where honesty and integrity and honor need to prevail. Doesn't the current system undermine those values?

GATES: Yes, sir, it does.

BEN NELSON: That -- well, those are the only questions I had, Mr. Chairman. I yield back the time.

LEVIN: Thank you very much, Senator Nelson.

Who is next? I think it's Senator Burriss. After Senator Burriss, Senator Collins is next.

COLLINS: Thank you. Thank you, Mr. Chairman.

I apologize for my brief absence. I'm trying to do a Homeland Security hearing at the same time. But this is such a critical issue.

And I want to begin my remarks by thanking General Ham and Mr. Johnson for doing an excellent job on this report. And I want to thank you, Secretary Gates, for a thoughtful statement, and you, Admiral Mullen, for your very heartfelt and strong statement this morning.

I want to go through some of the objections that we've been hearing from those who argue that we should leave the current law in place. Critics of this report state that our troops were not asked whether they believe that "Don't Ask, Don't Tell" should be repealed. I would point out that our troops aren't asked whether they should be deployed to Afghanistan. They're not asked whether we should have a war in Iraq. They're generally not asked about policy decisions.

However, the fact is, given the extensive feedback that the authors of the report and the task force did and that they received from tens of thousands of service members in the forms of survey responses, e-mails and town hall meetings, the report, in fact, does convey a sense of what service members think about repealing the law even if a direct question was not included in the survey. I was struck by one observation by a special opportunities operator who said at a town hall meeting, quote, "We have a gay guy in the unit. He's big, he's mean, and he kills lots of bad guys. And no one cared that he was gay."

Mr. Johnson and General Ham, is it fair to conclude that your report does incorporate and fairly represent the views of our forces?

JOHNSON: Senator Collins, I believe it does. We were asked not to -- we were not supposed to ask the referendum question.

COLLINS: Right.

JOHNSON: However, we did put out a 103-question survey to 400,000 service members. We got back 115,000 responses. The survey was quite comprehensive in asking in a number of different places for service members to predict the consequences of repeal in a variety of contexts.

I would add to that that, in the 72,000 e-mails and in the 24,000 face-to-face interactions that we had, invariably, the discussion and the input we got was whether to repeal the current law or not. That was always the topic of discussion. And a lot of that is reflected in the report in the "What We Heard" section.

And so, we believe that, through this very comprehensive exercise we went through, we did hear the force on the question of whether we can do this. And our conclusion is as you see it.

COLLINS: And presumably, if there had been widespread and large percentages of service members expressing negative views, you would have reported that in the report, correct?

JOHNSON: As I stated -- as we stated in the report, if the answer we got back from this exercise was, in effect, "No, we can't do that," I would have had a professional and fiduciary obligation to my client to report that. And I know General Ham feels equally as strongly about that.

COLLINS: Admiral Mullen, the second objection that we hear over and over and over is that we cannot

implement this kind of change in the midst of a war. And I thought you made an excellent point that the opposite may be true, that wartime facilitates change in some ways. And in fact, wasn't President Truman's 1948 order to integrate our forces actually fully implemented during the Korean War?

MULLEN: It was. Actually, it was implemented throughout that, I don't think fully until 1953.

COLLINS: And in fact, on page 83 of the report, it says that, when the personnel shortages of the Korean War necessitated integrated units, Army field officers placed white and black soldiers side-by-side?

MULLEN: Right.

COLLINS: So...

MULLEN: Senator Collins, if I could, I...

COLLINS: Yes.

MULLEN: ... I think I find it, in my study of this, somewhat ironic that, in the year that this was passed -- and if you read the law in detail, there's a great deal of discussion in the law about combat, combat effectiveness at a time where we were not at war. We have been at war -- we're in our 10th year right now, and we understand what it takes in combat and what combat effectiveness is better than we did back then just by virtue of that experience.

We have changed dramatically as a military since 2001, which I would argue puts us in a good position to facilitate additional change. There couldn't be a better time to do it. We are better led, in my experience, at every level than we have ever been led.

So leaders can do this. We are able to take advantage of our ability to change and sustain that combat readiness, and I believe making a change like this makes us better. It doesn't make us worse.

COLLINS: Thank you.

LEVIN: Thank you, Senator Collins.

Senator Webb?

WEBB: Thank you, Mr. Chairman.

Secretary Gates, I'd like to begin by clarifying an exchange that you had with Senator Inhofe about the importance of this study in terms of moving forward into the law. I recalled an exchange that you and I had on February the 2nd of this year when you came into -- you and Admiral Mullen came in to testify on this, and I made it very clear at that time that this survey was going to be vital in terms of evaluating the -- whether we should move forward on this law.

And I have held firm on that position. In fact, Senator Inhofe is not correct. This was not a full committee vote that was strictly along party lines when we had the vote whether to move forward before this survey came in. I voted against moving forward on this legislation before we got the results of this survey because

I believe very strongly that it is important to listen to the people who are serving and to consider their views.

WEBB: And I -- as I mentioned, General Ham, when he came forward in his confirmation hearing not long ago, this is really, in my view, an incredible piece of work.

It -- I was privileged to be able to sit down with General Ham and Mr. Johnson on a couple of occasions to give my views about how important it is to listen to all -- not only all different services but the rank structure, the occupational structure.

And I believe you have really done the job here. It's a 343-page report, 160,000 respondents, and most importantly, this was done without politicizing the men and women in uniform, which is vitally important in our society.

So I would like to say that this report is probably the most crucial piece of information that we have in terms of really objectively moving forward in order to address the law.

I would like to ask, first of all, General Ham, I'd like to ask a question.

Do you -- of you, to begin with, do we have any idea what percentage of the United States military today is gay or lesbian?

HAM: Senator, we do. And obviously, it's imprecise, because we cannot ask that question under the -- under the current law.

But in its -- in RAND's update of their 1993 study, they did some work in this regard, and admittedly an estimate, but the -- but the estimate is that the military population as a whole is about the same as the general population, somewhere in the -- in the 2 to 3 percent.

It is RAND's assessment that gay men are probably a lower percentage in the military and lesbians are probably a higher percentage in the military than in the general population.

WEBB: Thank you.

Secretary Gates, I would like to follow on to a question that was asked earlier about the decision you made in 1992 at the CIA in order to eliminate this issue in recruitment and advancement in the CIA.

There are elements in the CIA who perform functions that are pretty similar to military functions, are there not?

GATES: Yes, sir, some. WEBB: Have you heard of any unforeseen circumstances, based on your decision in those units, taking place in those units?

GATES: Not one.

WEBB: OK.

Admiral Mullen, the question that occurs to me when we look at the disparity in the percentages with respect to ground combat units, Army and Marine Corps, I take your point, or the point in the study, about the percentage of people who have served alongside gay members and having a higher percentage of comfort -- your comfort -- higher comfort level.

But do you have a different leadership approach? What -- you know, what would be the leadership approach that you're contemplating in terms of those types of units?

MULLEN: Well, I think -- I think that, again, the report itself did a terrific job in flagging those areas that we really would need to focus on.

And it goes back to what Secretary of Defense said, and I agree completely, until we've mitigated that to an acceptable level, until we've done the training, and as, in my remarks, that the Marine who said, if this changes, you know, we'll do it better than anybody else.

So if -- this has to be -- more than anything else, should it change, it's got to be well led. We understand where that leadership needs to be applied.

And I would not certify until we had mitigated, to a point, where it was -- where we had -- where we were satisfied that we could move ahead.

So we would focus on those all-male combat units who didn't have exposure and certainly do it in a way from a training standpoint, from a leadership standpoint, that was intense enough to achieve the outcome that we wanted there.

WEBB: Thank you.

I'd just like to, again, conclude by expressing my respect and appreciation for the work that General Ham and Mr. Johnson, you did on the -- on this survey.

It's really a landmark piece of work, in my view.

Thank you, Mr. Chairman.

LEVIN: Thank you, Senator Webb.

We're going to take a five-minute recess.

(RECESS)

LEVIN: We all set?

OK. Senator Thune, you, I believe, are next.

THUNE: Thank you, Mr. Chairman.

Secretary Gates, you've said that the other day that service chiefs are -- and today -- less sanguine about

the working group, about the level of risk of repeal with regard to combat readiness.

And we've heard that in testimony in front of this committee from the service chiefs themselves, that they'd like to keep the current policy in place.

Of course, General Ham, as the commandant of the Marine Corps, told the committee a few months ago, in his view -- and I quote -- "the current law and associated policy has supported the unique requirements of the Marine Corps, and, thus, I do not recommend its repeal."

Let me ask you -- and then I'd like to get a comment from Admiral Mullen as well -- how should we weigh the fact that to date there's not a consensus among the service chiefs and yourselves with regard to the issue of repeal?

HAM: Well, first of all, I think you'll hear from the chiefs tomorrow, despite their differing views, that they do have high regard for the review and for the implementation plan that has been put together as part of the review.

To get to the heart of your question, Senator, I think that you have to take seriously the views of the chiefs, as I said in my opening statement.

And I think the key question is can the concerns that they have be mitigated? Can this be implemented without having an impact if we take the steps that are recommended and perhaps others as well, can the concerns that they have be addressed and the risks that they see be mitigated?

Our view clearly is that it can. You can hear directly from them tomorrow. I think that they will give you their honest judgment on this and, you know, the other piece of this that I think -- there are two pieces of this that I think need to be weighed and that I have discussed with the chiefs.

The first is the risk of the courts taking this out of our hands and having no time to prepare. And the second is if not now, when? You know, our -- when we're out of Afghanistan? But who's to say as I look ahead in the world, I don't see then world getting to be a safer, easier place to live in where our troops are necessarily under less stress.

So the question of if not now, when, I think is a worthwhile question to address to them as well.

THUNE: Let me ask you as a follow up to that. The current legislation on repeal requires yourself, Admiral Mullen and the president to certify that repeal is consistent with standards of military readiness.

Is there any reason why the service chiefs should not be also required to certify that repeal is consistent with military readiness and effectiveness?

GATES: Well, I think that you know, this question came up this summer, and frankly I think that, you know, you get to the point where you have eight or nine people. I mean, if the service chiefs, then how about the combatant commanders? If the chiefs, why not the vice chairman? So you all of the sudden end up with ten or a dozen people. The chairman's view -- I said in answer to an earlier question, my view of when I think I could certify will depend heavily on the advice of the chiefs of whether we have in fact mitigated the concerns that they have addressed.

THUNE: Would you be in favor of adding the chiefs to the list in terms of certifying officials when it comes to the proposed legislative language?

GATES: No, I would not.

THUNE: Let me if I might, ask a question. I direct this I think to General Amos (sic) and to Mr. Johnson. The survey report has a section which describes some of the main issues associated with repeal for service members.

The first one they list states that 44 percent of service members who have been deployed to a combat environment since September 11, 2001, said that effectiveness in a field environment or out to sea would be affected negatively or very negatively by a repeal.

And I guess my question has to do with the risk level that you attach to that. It seems the risk level is very low for repeal when you have 44 percent of the troops who have been deployed into combat who said it would have a negative or very negative effect.

And I guess the follow up question to that is, are you saying that you're willing to accept the negative impact this policy change could cause to nearly half of our combat troops when we're fighting two wars?

HAM: Senator, it is as all of this is, a pretty complex issue. We did see, as you cite, that was a very much concerning figure to us. But a subsequent question to that says under intense combat what would your sense be, and we saw the negative rates drop quite dramatically.

As with many of the other experiences or responses to the survey, when we asked the question have you served in combat or are you serving in combat with someone in your unit who you know or believe to be gay, the unit performance is rated very, very highly and the matter of a gay member being in the unit is assessed as having only a minimal impact, in most cases no impact on the unit's performance.

THUNE: Anything to add to that Mr. Johnson?

JOHNSON: I would echo what General Ham said. The other thing I would add to that Senator is as we note in the report, predictions in surveys of what will happen or what you will do in the event of something are valuable, but they're of limited value and predictions.

And this is reflected in social science data as well, predictions very often are reflective of attitudes, which is one of the reasons why in the report we also put a lot of emphasis on asking people about their actual experience of serving in a unit with people they believe to be gay or lesbian. And as you see in the report, even in the combat units, even in Marine combat units when people reported that they had had the experience of serving with somebody who was gay or lesbian, the experiences reflect pretty high numbers in terms of how the units function, 84 percent, 87 percent.

THUNE: Well, I just -- my time has expired, but would just again point out for the record that you have nearly half of those who have been deployed who say that there would be negatively or very negative effect.

And to me combat effectiveness and readiness is really the bottom line issue here.

Thank you, Mr. Chairman.

LEVIN: Thank you very much, Senator Thune.

Senator Manchin?

MANCHIN: Thank you very much for giving me the opportunity. I want to say as a West Virginian I'm very honored to be on this committee and to be here to hear the support and discussion, and I want to thank all of you for the work that you've done from Secretary Gates to Mr. Johnson, General Ham and to Admiral Mullen.

I appreciate so much, and I know you've put a lot of effort. I'm the new person on the block if you will, so I'm trying to get up to speed as quickly as possible.

Secretary Gates, I'd like to -- a couple of questions just directed toward you sir is that plans for implementation, if this were to be repealed, is it all universal at one time? Or would each branch have time to sequence in or use their best judgment if they thought that it would be appropriate for them or the readiness that I think the senator from South Dakota just asked about? Is there going to be a mandatory implementation all at one time?

GATES: I think that the question of whether there would be sequencing for different kinds of units, whether the services would proceed at the same pace and so on, this is something frankly where -- I think that the review offers a good implementation plan in terms of training and leadership training and what needs to be done in terms of regulations and so on.

But I think in terms of how it -- how those things are actually carried out, I would give great weight to the views of the service chiefs in terms of how to proceed in those -- in that respect.

MANCHIN: Also last week, the co-chairman of the Debt Reduction Commission issued a proposal that called for \$100 billion in reductions in defense expenditures. Does this -- do you have a cost associated to the implementation of this?

GATES: Well, I would say that first of all, probably minimal. There is one part of the report frankly that I disagree with and that is the idea of looking into a new benefit for single members of the services who have a significant other or a gay or lesbian partner.

And it would be for both heterosexuals and homosexuals and in terms of access of family counseling, in terms of a variety of benefits of this kind. I think you would find -- I think you might hear from the service chiefs tomorrow, their concern about this.

Partly because of the cost and the open-endedness of it, but also we're trying to deliver those services to our married members of the services today and the worry of diluting the quality of those services if we created a new benefit for all single people who had a special person in their life.

So that one recommendation I did have a problem with but -- and partly because of the cost.

MANCHIN: Thank you.

Mr. Johnson, the repeal of this, would it cause a chaplain to deliver a moral message in service about homosexuality -- would that cause a problem there or create a legal challenge?

JOHNSON: Senator, we spent a lot of time focused on the chaplain community and as reflected in the report, it's our view that if repeal is brought about, this would not require a chaplain to change what he preaches, what he counsels in the religious context.

The chaplain's duty is also to care for all, so if a chaplain did not feel it was appropriate that he could counsel a particular service member on the issue of homosexuality, he should refer that service member to someone else.

And we hear a lot of concern about, will this require me to change my religious beliefs or my religious counseling, and the answer to that is no.

MANCHIN: Did you have any inkling of how many of the religious order in this military would not continue to serve or wish to opt out early?

JOHNSON: I think it is -- there are definitely some pretty strong views within the chaplain community. I would not for a minute assume that if the law were repealed, every single chaplain would stay in the military.

I think we should assume that we may lose some of our chaplains. I also heard that -- from many chaplains that they take very seriously their obligation to care for all, and so I anticipate that we would have just as many that feel strongly that repeal is the right thing to do.

MANCHIN: General Ham, if I may, on the 40 percent to 60 percent that have been responding back concerning a combat readiness and the concerns of the combat units, in a military such as -- and I'll ask concerning the Israeli military, how do they handle this situation?

HAM: Senator, I think, first of all, they have -- -- they have a very, very different culture. They're a conscript force.

And I've found in my personal engagement with the -- with the Israeli leaders, they also have -- because they are a small force, they have the opportunity that if there is a servicemember who has different religious views with regard to homosexuality as perhaps their leader does, they can move that -- that servicemember from one unit to another without major disruption because of the size. That would be an impractical solution for us.

MANCHIN: What -- what I'm saying is that they're more or less combat ready continuously, and there on the front lines on a continuous basis. Do they have a "Don't Ask/Don't Tell"? Is anything such as that in -- in that type of a military, since they're on a combat alert at all times?

HAM: Senator, I -- I have the highest respect for -- for our Israeli counterparts, but -- but they don't have global responsibilities such as -- as our military does. They do not have a specific policy. They do allow servicemembers in the Israeli defense forces to have same-sex partners and continue to serve.

(UNKNOWN): Thank you, sir.

Thank all of you.

LEVIN: Thank you, Senator Manchin.

Senator Chambliss is next.

CHAMBLISS: Thank you, Mr. Chairman.

To all the gentleman, this has been a very difficult issue. I know you've put your heart and soul into it, and for that we say thank you for the work you've done. Whether we agree or disagree with -- with the end result, thanks for your service in this respect.

Admiral Mullen, you stated earlier in your comments that you served alongside gays. You knew they were gay. And I don't think there's any question in the minds of any of us, but we know we have gay and lesbian members or individuals serving in -- in every branch of the service, and certainly they serve with courage and valor. And that's what I heard you say. Is that correct?

MULLEN: Yes, sir.

CHAMBLISS: Now, you said they served under your command. When -- can you tell us a timeframe? When -- when would they have served under your command when you knew they were gay and lesbians under your command?

MULLEN: My first command was 1973, and then subsequently, about 10 years later in the mid-'80s, in the mid-'90s, in the late '90s, in the early 2000s and up through 2004, 2005.

CHAMBLISS: So in those first commands when you knew there were gay and lesbians serving under you, what was the law at that time?

MULLEN: It was -- homosexuals were gays and lesbians at that time -- at that time they're commands were all -- men were not allowed to serve. So if they were -- if the conduct was supposed, they were typically -- they were discharged.

CHAMBLISS: And were you responsible for discharging a number of those that you knew...

MULLEN: Absolutely.

CHAMBLISS: OK. Well, did you discharge everyone you knew was gay at that time?

MULLEN: I -- I discharged -- when essentially it was a conduct offense -- you know, this was before "Don't Ask/Don't Tell" -- and so if you were known to be gay or lesbian and -- and it was brought forward, it then had to be brought forward oftentimes in the conduct system, and they were discharged, every single one of them.

CHAMBLISS: Well.

MULLEN: I mean, I did this, and I also saw this.

CHAMBLISS: Did that have an impact on the morale of your sailors that were serving to do you?

MULLEN: At the time, no. I mean, not -- not noticeably.

CHAMBLISS: Well.

Secretary Gates, have you read the report, by the way?

GATES: Yes, sir.

CHAMBLISS: I want to quote from page 49's paragraph two, and it's Part VI, "What We Heard." And here's what it says.

"For this section of the report there's an important caveat. If the working group were to attempt 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."

Now, you're basing your opinion on a 28 percent response to surveys that were sent to 400,000 men and women. At the question wasn't even asked to them, do you think we ought to repeal this? The question was, can we implement it?

Looking at this section of the report, it's pretty clear that the authors of the report say that a majority of those that they interviewed across the spectrum were opposed to repeal. Knowing that, does that change your opinion as to whether or not this law ought to be repealed?

GATES: Well, what the co-chairs have told me, Senator, is that particularly when it comes to the e-mail inbox and the -- and those who came to many of the forums that they held, that these were clearly folks motivated to express an opinion.

And while those opinions were important, because they were basically self-motivated to show up and offer their opinion, but I was told was that it -- it was important, but it wasn't statistically significant in terms of representing the views of the force and that the survey, which was done anonymously, was more reliable in terms of gauging the overall views of the force.

CHAMBLISS: Well, Mr. Secretary, I'll have to tell you I am really bothered by your response to that alongside of the response you gave to Senator McCain when he said, "What if you had 265,000 members of the military leave tomorrow or within a short period of time?" Your response there was basically the same. "I really don't think that's important, and that's not going to happen."

What if it does happen? What if we -- if those 265,000 resigned from the military over the next short period of time? What are you going to do?

GATES: Well, first of all, I didn't say it was not important. But first of all, as I said in response to an earlier question, very few people can leave immediately. And -- and so people would be around for the rest of their enlistment, for the rest of their contract if there were officers.

And -- and our expectation is that, as you've heard from the authors of the report and from Admiral Mullen, that experience -- based on the survey itself, the experience would dramatically lower those numbers.

If I -- if I believed that a quarter of a million people would leave the military immediately, if given the opportunity, I would certainly have second thoughts about this. But I don't believe that.

CHAMBLISS: OK. But you do believe the rest of the survey is correct. GATES: Well, what I just described to you was the difference between what I've been told was to statistically significant and the importance of the individual views that were expressed by people who showed up or who bothered to send in e-mails.

CHAMBLISS: OK.

Thank you, Mr. Chairman.

LEVIN: Thank you, Senator Chambliss.

Senator Coons?

COONS: Thank you, Mr. Chairman.

Add that like to thank, obviously, Secretary Gates and Admiral Mullen for very compelling testimony and the authors of the study, Counsel Johnson and General Ham, for your very hard work and your important contributions here today.

One of the issues that was raised by several of the members of the panel today was concerned that if this issue is instead forced by the courts, you will not have the opportunity to thoughtfully and responsibly and professionally implement a change in policy, but will instead be compelled to do so brusquely and that there might be really negative consequences to that having been done.

In response to a -- a question from the Senator from Massachusetts, I got a -- a more detailed understanding, Mr. Secretary, of how that process might work forward. Would you share with us, perhaps, Mr. Secretary, what harm might be caused by having a court ordered repeal of this policy and this law, and what kind of differences in timeline that might produce, and what sort of negative impacts that might cause?

GATES: Well, if -- if the court decision were to be similar to the district court order that was handed down in October, we would have zero time to prepare, that if that order took effect immediately and it was global. So no time to train, no time to prepare, and -- and as I said in my prepared testimony, that is the worst imaginable outcome, as far as I'm concerned, and has -- and has very high risk for us.

COONS: Admiral Mullen, any further comments on the potential negative consequences of a court-ordered implementation as opposed to a more phased-in and responsible or timely implementation through the leadership of the armed forces?

MULLEN: Well, I would endorse what the secretary said in terms of having time to be able to implement, put in place the training, the leadership focus, all of those things, before we implement, which through the implementation plan that's in the report is there, and certainly in an overnight decision from the court, I

think, significantly raises the risk of being able to mitigate that in a way, and it would be much more disturbing to the force. COONS: Admiral Mullen, I found part of your testimony very compelling that many of our allies -- I think it was 35 -- currently allow the service in their armed forces of those who are openly gay or lesbian, including Australia, Canada, the U.K., Germany, France, and that in fact many of those nations have troops currently serving in the field with us today.

What could we learn from their experiences? Are there concerns that maybe haven't been addressed, based on their experiences, or do you think that the implementation of a change in policy, should we vote and move in that direction, can be better informed by the experience of our allies?

MULLEN: Well, I think that's certainly an important part as we would look to, if the law changed, implementation -- certainly, the lessons learned from countries who've already been through this -- and at the same time recognize that these, you know, these countries are not the United States of America.

And so I -- I don't correlate one-to-one an experience of another country with ours. That said, certainly, from the field, from the combat areas, we've -- I've -- I've gotten no feedback that this was an issue in countries who allow openly gays and lesbians to serve and -- and are fighting alongside us.

COONS: My last question, I found very compelling the testimony from several of you that this really is at the end about values and about integrity and allowing our men and women in the armed forces to serve openly and with honor, who are currently by this policy required to conceal aspects of who they really are and to serve in some way with some tension between their personal being and with their desire to serve our nation.

Are there any other parallels or lessons to be learned from racial integration and from a very different period where the Armed Forces were asked to undertake what was initially perceived to be a very difficult socially driven change, but ultimately has been, I think, from what I've read in this report, a very positive impact on unit cohesion, military professionalism in service and its broader impact on our society.

Mr. Secretary?

GATES: Well, first of all, I think, as Admiral Mullen said, it's worth noting that most of the implementation of integration took place during the Korean War, during a -- during a period of combat.

I think that, you know, we have to be honest and straightforward about this. These social changes in the military have not been particularly easy.

The integration was -- integration of the forces took place over a period of five years, from 1948 to 1953, but the reality is we had serious racial problems within the services at least through the end of the Vietnam War.

It's been a number of years since we have admitted women into the Armed Forces. And the reality is, as everybody on this committee knows, we have a continuing problem with sexual assault.

So these are human beings we're dealing with. And I think the report is honest in saying that there will be some disruption. And we will have -- this is a matter of leadership. It's a matter of training. It's a matter of discipline in terms of how we implement this.

COONS: Thank you very much, Mr. Secretary. I just -- I want to close by saying that I draw great confidence from today's testimony in the ability of you as leaders of our armed forces to implement professionally, responsibly and thoroughly any change we might recommend in policy. Thank you, Mr. Chairman.

LEVIN: Thank you very much, Senator Coons.

Senator Wicker?

WICKER: Thank you, Mr. Chairman.

Mr. Secretary, let me ask you about a couple of statements you made in your prepared statement to this committee.

On the first page, third paragraph, you comment on why we didn't ask the question to the military members, do you think changing this law would be a good idea? Do you support this change?

Say we didn't -- this is a not a matter of taking the poll of the military to determine whether the law should be changed.

And in justification of that decision, you say the president of the United States, the commander in chief of the Armed Forces, has made his position on this matter clear.

Now, on the second page, when discussing the various forms of litigation that are occurring about this, you say, therefore, it is important that this change come via legislative means, that is, legislation informed by the review just completed.

Would you understand it if I said that it seems that you're saying that the other two branches of the federal government have sort of painted this Congress into a corner on this?

On the one hand, the president has made a decision. Therefore, we didn't take a full survey of military attitudes.

We assumed in the survey that the decision was going to be made, and we asked the members how they would respond to that. And then, on the other hand, we'll be -- we're saying although this is really technically a legislative decision, the court is closing in on you.

And so you really don't have much choice there. Would you understand it if I saw a contradiction in your testimony there?

GATES: Well, let me -- let me make a couple of things clear, Senator.

First of all, the president can't change this law.

(CROSSTALK)

WICKER: That's absolutely correct.

GATES: And what the president did, in his State of the Union, was say that he would like to see this law repealed.

Now, you -- there aren't enough fingers and toes in this room to count all the times that the president has said that he wanted to see a law changed. So he expressed his view that he wanted this law changed. But he can't do anything about it. The only way the law can change is if Congress acts or if the courts overturn it.

So the executive branch, for all practical purposes, in changing this law, is the odd man out. The action is either in the courts or in the Congress.

And with respect to polling the services, you know, I didn't spend a career in the military. But I've read a lot of history, and I can't think of a single precedent in American history of doing a referendum of the American Armed Forces on a policy issue.

Are you going to ask them if they want 15-month tours? You going to ask them if they want to be part of the surge in Iraq? That's not the way our civilian led military has ever worked in our entire history.

This question needs to be decided by the Congress or the courts, as far as I'm concerned.

WICKER: Were you troubled at the answer we might have received if we had simply asked them, in addition to all the other questions that were being asked, do you think the law should be changed?

If there -- if the service members are so accepting of this, as members of the panel have suggested today, what would have been the harm in giving that information to the body, which you acknowledge in your statement, is the ultimate decision making forum?

GATES: I think, in effect, doing a referendum of the service -- of the members of the armed forces on a policy matter is a very dangerous path.

WICKER: Do you think the answers to the questions would have been different had we asked them outright?

GATES: Well, I think that as Mr. Johnson and General Ham have testified earlier, through the many questions in the -- in the survey, you get a pretty clear view of the views of the force in terms of this change.

And I think what the review has highlighted is those areas of the force that are clearly going to need the greatest attention and focus in terms of training, in terms of leadership effectiveness and so on.

And I would say, you know, part of my considerations, going back to Senator Chambliss's question, one of the considerations, in terms of my certification, would be what we learned during the preparation period with respect to recruitment and retention and what additional steps we need to take to mitigate whatever consequences there are there.

WICKER: Mr. Chairman, I don't have a clock in front of me. Do I have time for an additional follow-up question?

LEVIN: I haven't been given notes (ph), so take advantage of that.

WICKER: All right. Let me ask you this, then, to Secretary Gates, and to Mr. Johnson, will you acknowledge -- and I'll ask Mr. Johnson to answer first -- will you acknowledge that there is considerable difference of opinion out there as to what the lower courts have actually said about "Don't Ask/Don't Tell" in regard to Supreme Court precedence?

And Mr. Johnson, will you commit to this Congress that until such time as the law is indeed changed, that you intend to do your job, which is, I mean, in this respect, which is to fully and zealously defend the government's position in this litigation?

JOHNSON: It is my job to enforce, defend the law as the Congress gives it to us, which is why I and the department of defense recommended that we appeal the Log Cabin Republicans' case and the Witt case, where we got adverse rulings on the constitutionality of this law.

It is our obligation to continue to defend the law as it is given to us by the Congress. There is a difference of opinion within the courts on the constitutionality of "Don't Ask/Don't Tell," but part of what I was saying in my opening statement is, there is definitely more litigation activity -- we used to win all these cases.

And there is, I suspect, a trend that is taking place after the Lawrence decision in 2003 that we all need to be mindful of.

WICKER: Mr. Secretary, do you -- do you acknowledge that the role of the legal department within DOD is still to fully and zealously defend the "Don't Ask/Don't Tell" statute until -- if and until it is repealed?

GATES: Absolutely.

WICKER: Thank you, sir.

Thank you, Mr. Chairman.

LEVIN: Thank you, Senator Wicker.

Senator McCaskill?

MCCASKILL: Thank you, Mr. Chairman.

I have an awful lot of confidence in our military. And the longer I have served on this committee, the more confidence I have.

Men and women that serve our military in every capacity, we are the best in the world because of professionalism, because of honor, integrity and the utmost respect for the chain of command.

I have been disappointed at some of the rhetoric surrounding this issue because I think it impugns some of the military leadership in this country, especially, frankly, some of the civilian leadership. And I would like to remind, for the record, this country that Secretary Gates, you were selected by President Bush to lead the department of defense.

And I'll be honest with you, at the point in time you were selected, I wasn't a member of the Senate and I probably have had, you know, some of those partisan tendencies that have a tendency to invade all of our thought processes around here.

I assumed that you were going to maybe not call them balls and strikes. And I watched you, under President Bush, and I think you called it balls and strikes.

And now you serve President Obama. I think you represent the highest tradition of civilian leadership of our military that we may have ever had in this country.

And I want to congratulate you for that because I think you've set a great example for all that will follow you, that you can serve two parties. You can serve two presidents and always stay focused on what your function is, and that is to defend this country and to promote the professionalism, the integrity and the honor of America's military.

And I want to congratulate you for that. And I think this issue, particularly, has been a challenging one because, obviously, there's not unanimity of opinion about this very controversial subject.

MCCASKILL: I want to remind everyone also about the timeline of the integration of our services. And my recollection is that President Truman did something that was beyond controversial when he integrated the armed services in 1948. And it was more than a decade later that this Congress began to seriously look at the Civil Rights Act.

I would ask anybody on the panel that can comment on this what the acceptance is of changing this policy compared to the acceptance that was within the military at the time that President Truman integrated the troops.

JOHNSON: Senator, let me try to answer that. I spent a considerable amount of time, in the work on this report, looking at that period of racial integration. I was surprised to find out that there actually were surveys done of the military back then. The sample sizes were much, much smaller, like three or 4,000 service members then, but the opposition to racial integration ran very high. It was like, 70 or 80 percent number, and that's reflected in the report.

In addition, we were dealing with much larger numbers. The military then was about eight million. By 1945, black soldiers were about 700,000. And this was at a period of time before integration had been accepted in civilian society. And so, my...

MCCASKILL: I mean, I don't -- I think at the time that the armed services was integrated, a black person couldn't stay in the same hotel in the South with white people. Isn't that correct?

JOHNSON: As we say in the report, by 1953, 95 percent of Army units were integrated, but buses in Montgomery were not. And so my assessment is that the opposition to racial integration then was much more intense than the opposition to gays serving openly today in the military.

MCCASKILL: I understand that one of the common concern of some of the members that were surveyed in this on the repeal of this policy was a fear that some people would be getting special treatment in the implementation. Secretary Gates, if this policy is repealed, would it lead to a special set of benefits or

entitlements for any gay or lesbian members of the military?

GATES: I think one of the important contributions of the -- of the report, and in its recommendations, is that there not be any special class, or special protected class, that everybody be treated the same. Everybody would be subject to the same discipline, the same standards. Admiral Mullen addressed this earlier.

MCCASKILL: And what about on the recruitment process? Is there going to be any questions asked about sexual orientation?

GATES: No. There would be no need for that.

MCCASKILL: And would there be any special diversity programs or tracking in terms of us trying to have some kind of quota or any attempt to distinguish from one member to the other based on sexual orientation?

GATES: No. There would be -- people would be evaluated and promoted on the same basis that people are evaluated and promoted today. And that is their competence, their fitness for duty, their talents as a military officer. But I -- let me ask Admiral Mullen to say a word about that.

MULLEN: Well, I mean, I would only echo that. I -- there's absolutely no consideration for any changes along the lines that you would suggest.

The other comment I would make, and this is -- there've been a couple questions about integration of African -- integration of the military, integration of women, and yes, we have had our challenges. There's no question about that. But categorically for the last 40 years, from my experience, we are in a much better place as a military because of those steps taken when they were taken.

MCCASKILL: My time is up. Thank you all for your service.

LEVIN: Thank you, Senator McCaskill.

Senator Sessions?

SESSIONS: Thank you, Mr. Chairman.

Well, this is a difficult discussion. It was predicted that it would have some disruptive effect on the military. I believe it probably has. It's probably not been good for morale and the problems that have arisen from it. And I'm inclined to the personal view that "Don't Ask/Don't Tell" has been pretty effective. And I'm dubious about the change, although I fully recognize that good people could disagree on that subject.

I would say that I think the courts are quite clear that, on matters like sex or race, you can't have discrimination on those bases, but this deals more with actions of an individual rather than who they are as a person.

With regard to your statement, Mr. Gates, you say that the concerns arising from the legislation do not present -- quote, "Present an insurmountable barrier," close quote, to repeal, and that you believe it could

be done without posing, quote, "A serious risk to military readiness." So this is a bit uneasy.

Now, we have an uneasy situation. We're here because, as Senator Wicker suggested, the president made a commitment in a campaign, and he's delivering on that. I'm sure he believes it, but he made a political campaign commitment, and it -- there's been a lack of understanding when he made that commitment, I believe, of the serious ramifications and problems that might arise from it.

I do believe that each of you serve at the pleasure of the president, pretty much. You've been appointed by him, or serve at his pleasure. And so I think we have a right to ask questions about this matter and raise questions when we have, as the report itself stated, half the people in the United States military, if being -- if passed, would say they don't want to change this policy.

Mr. Johnson, several references have been made, including by General Ham and Secretary Gates, that the courts are about maybe on the way to overturning this law. I have done some research on that, not as a result of this hearing but as a result of the Kagan hearing. She was solicitor general of the United States who ardently opposed this policy blocking the military from even going on the Harvard campus.

And isn't it a fact that the First Circuit Court of Appeals, sitting in Boston, the First Circuit rendered an opinion -- I think it was 14 defendants challenging the "Don't Ask/Don't Tell" law just a little over a year ago -- that it was constitutional? And one -- and the ACLU, who represented the plaintiffs in that case, did not want to appeal a case they lost, did not want to appeal it to the Supreme Court?

Now, I conclude from that that Supreme Court, they believed, would likely to uphold the statute. One of the members in that case asked to have the case appealed, and Ms. Kagan I think, after consulting with the Defense Department before you got there, she said no, the California case, the Witt case, would be a better one. Don't take it, Supreme Court, and they agreed to wait until the California case came along.

And you wrote a letter in the Witt case in California that acquiesced in the Court of Appeals a remand of the Witt case to the lower court to take hearings on how that individual Witt decision would impact the military personnel affected by it, there in a process that would clearly, clearly be unacceptable, would eliminate the ability to enforce the statute nationwide, but you went along with that. You said, quote, "A remand will allow the Department of Defense develop a factual record in the case which will, we believe, demonstrate that the discharge was appropriate."

But it was not the right legal opinion, in my view. Why did not you take -- well, it's a long matter. I asked Solicitor General Kagan. I gave her 20 minutes to answer that question, and we don't have 20 minutes today to go for.

So I guess what I'm saying to you is I believe that the record is crystal-clear that the Department of Justice and you acquiescing as counsel for the Defense Department did not take the Witt case up to the Supreme Court and did not take the first circuit case to the Supreme Court because you wanted to remain -- have a cloud over the legality of this matter and did not want a clear decision from the Supreme Court and, therefore, would have an additional argument to this Congress to overturn the statute because there's a legal cloud over it. That's my best judgment.

And you have -- Mr. Johnson, you're now the co-chairman of the commission. Have you -- what was your vision about this issue? It's pretty clear, I think, that you are clearly for repeal of the law when you took

this position, were you not?

JOHNSON: I have two responses, Senator, if I may. First, on the Witt case, we spent a lot of time thinking about whether or not to recommend that the Department of Justice petition for cert in that case. And ultimately, we reached the judgment, along with the Department of Justice, not to petition for cert for two reasons. One, we did not think it was a good idea to push this issue to the Supreme Court then at that point in time on that factual record because the factual record, as it existed then, was basically her own allegations. It was on her own pleading.

Second, we recognized then that we would have the opportunity to revisit the issue on appeal after the trial. And so, I recommended appeal. Now that we've had the trial and the Department of Justice is going along with that, and we've appealed that decision.

SESSIONS: In the Witt case?

JOHNSON: In the Witt case, yes, sir.

SESSIONS: And...

JOHNSON: The other -- if I may, Senator, the...

SESSIONS: ... but it was delayed -- we -- that case, or the First Circuit case, could already have possibly been decided by now had you taken what I would consider to be the appropriate position, which would be to have appealed them and supported the appeal in those cases.

JOHNSON: Well, the 1st Circuit case, it was for the plaintiff in the case to decide whether or not to appeal to the Supreme Court and they declined to do that. I would not note...

SESSIONS: ... as the ACLU favored, because they did not want -- why did not they choose to appeal the case they lost?

JOHNSON: Well, I would note about the 1st Circuit case that in that case, the court decided to hold us to an intermediate level of Constitutional scrutiny which was, just as in the Witt case, the first time the courts had ever done that.

So in both the 1st Circuit and the 9th Circuit, the appellate courts have held that we now be held to an intermediate level, versus the lower rational basis level of scrutiny that we typically got in these level -- in these matters of the military

The other thing I'd like to add, Senator, is that at the outset of this review, it was clear to me -- first of all I work for the secretary of defense. He is my client. I have a professional obligation to my client.

It was very clear to me from the outset that if we felt that doing this would be bad, I could report that and should report that to the Secretary of Defense and he would fully support that point of view to the president.

SESSIONS: Well, thank you for sharing those thoughts. I would just say that clearly to me, the Witt case

should have been appealed (inaudible), and I believe you could have gotten an opinion from the Supreme Court that would have affirmed this statute.

And there's no history legally that would suggest otherwise, but it has been allowed to be under a cloud and have some of our top military leaders today say one of the reasons for changing this policy is a likelihood of a Supreme Court or a legal decision that would undermine the statute.

I believe had it been vigorously defended, we would not have that cloud today.

LEVIN: Thank you, Senator Sessions.

Senator Udall?

UDALL: Thank you, Mr. Chairman. Let me just begin by thanking all four of you for the thorough and the thoughtful way in which you've conducted this review and the way in which you've explained the conclusions that have been drawn.

Particularly General Ham and Mr. Johnson, you took on an important task. General Ham, your comments were very heartfelt and will be remembered as we move forward.

The study, I believe confirms what many of us have heard for years and that's that "Don't Ask/Don't Tell" can be overturned without disruption our nation's military readiness, particularly in the medium and in the long term.

And I think even those that have concerns about repeal, we've heard about those today, have agreed that "Don't Ask/Don't Tell" forces our gay service members to live a lie. They have to lie to their fellow service members about their lives, their activities, their families or what they care about.

And I think we've learned increasingly that those lies can destroy morale and good military order. Then I listen to Admiral Mullen and others who have served, those lies don't just affect the gay service members, they affect straight service members as well who have knowledge about their fellow service members that they are in effect also called upon to hold close.

So it's very, very clear to me that we're on the right track. This is the 21st Century. A vast majority of Americans believe that we ought to repeal what's increasingly, we know is a harmful law, and we have now learned that our service members in large part support moving forward.

I'm not a statistician. I don't think many Senators are statisticians, and it's easy to cut at some of the percentages in the reports, but again General Ham and Mr. Johnson, you have shared with us the breadth and width of this study.

You've compared it to previous surveys that for example surrounded the integration of the armed services some 50-plus years ago, and these numbers I think when you're objective and you honestly consider the facts, are very, very powerful. So again my congratulations to all of you.

And I did want to end my comments before I move to a question or two on this note; I think we should listen to Secretary Gates. He said this week and he said it here on numerous occasions in this hearing that

a repeal by a federal judge would be much more disruptive and damaging to morale than a conscious, thorough, stepped approach to repealing this legislation that Congress has put in place.

The best way to move forward is for the Senate of the United States to make it clear that this is the will of the Senate, therefore the will of the American people, and I would just end by saying, and Secretary Gates you and Admiral Mullen you also eluded to this earlier today, that this not a done deal once we act.

The process has to be certified. Secretary Gates you would sign off, Admiral Mullen and the president of the United States as well and you've made it clear that this would be done in a way that takes into account all that we've learned in the survey.

So again my congratulations and my gratitude to you all for the very professional way in which you have taken on a very difficult, emotional, sensitive subject.

The question I'd like to direct to you that's specific -- I know that -- I'll direct this to Secretary Gates and to Admiral Mullen, that someone said that "Don't Ask/Don't Tell" is not a failed policy, and if there's any failure, it's on the part of gay service members to not keep their sexual orientation a secret.

And we had Major Mike Almy testify earlier this year, I think you may be familiar with his case. And he testified to the committee that he never told, that his personal e-mails were searched without his knowledge and then they were used against him.

In my opinion, the policy clearly failed Major Almy. Would you agree that the Air Force would have retained him if not for these events, where in effect he was outed against his own will? And would you agree that the Air Force suffered a loss with his discharge?

MULLEN: Senator, I actually, I'm not familiar with the details of the case, but just in general as you describe it, certainly it's I think very important that we retain anybody who has talent and in fact is contributing despite their sexual orientation.

And to the degree that that case represents the action that is associated with the current law as you describe it, certainly I consider that to be both action and energy and leadership and direction focused on the wrong thing.

Now, I know that there have been adjustments to the policy -- execution policy, Secretary Gates has made over the course of the last year to get at specifically the kinds of things that you just described, so that they would be executed in what I -- that the current law would be executed in a more balanced and fair way and that's what it sounds like you're speaking to.

So that kind of action wouldn't be taken now based on the changes that have (ph) made, even in the current law. It wouldn't stand out for discharge.

UDALL: If I might, Admiral Mullen, I'd direct an additional question to you. I know that despite your long years of experience, it's been suggested on a number of occasions and even here this morning that somehow the views of the service chiefs on the repeal of "Don't Ask/Don't Tell" are somehow more informed and valuable than your own.

Would you speak to that point of view one more time as my time expires?

MULLEN: Well, I think certainly I agree with the secretary of defense that the consideration of the service chiefs in all of this is absolutely critical and done so in an independent fashion. I was asked this question earlier. I've spent a lot of time with the service chiefs on this and have incorporated their inputs into my advice to both the secretary and the president.

And I will say, and they can certainly speak for themselves tomorrow, I will say that all of us, all six of us, the vice chairman and the four service chiefs actually and the head of the Coast Guard, the chief of the Coast Guard, agree that the implementation plan is -- that's laid out in the report is a very, very solid way ahead specifically.

And they will also say that if the law changes, they will lead the way in implementing this. I also, having grown up in the military where unanimity amongst us is something that we seek in order to execute a policy. We do what we're told to do.

UDALL: Yes. Yes. Thank you, Admiral Mullen.

If I might make a personal comment, I would note for the record that your testimony earlier this year and your testimony this morning and the very thoughtfully crafted and well delivered and passionately delivered remarks will long be remembered.

Thank you for your leadership.

LEVIN: Thank you very much Senator Udall.

Senator Hagan?

HAGAN: Thank you, Mr. Chairman and I just want to tell all of you here today thank you for your time and your testimony and in particular Mr. Johnson, General Ham, the work that you've done in compiling and presenting this report.

The commander in chief has stated explicitly that he would like "Don't Ask/Don't Tell" repealed, and Secretary Gates you and Admiral Mullen have both gone on record in support of repeal. Constitutionally it is the role and responsibility of Congress to make this change to the law.

And I support moving forward with repeal because I personally believe that it is the right thing to do and that the discharge of highly qualified service members is unnecessary.

And I wanted to go over a question having to do with the professionalism in our armed forces. The oath of enlistment and the oath of office that our men and women take as they enter the armed forces, is not to a specific political ideology or party, rather that office is taken to support and defend the Constitution of the United States.

And my question is, are there any findings from the surveys to suggest that there would be a departure from that commitment once the statute concerning "Don't Ask/Don't Tell" has been repealed?

HAM (?): Senator, no, in fact we heard loud and clear from the force, from the most junior service members to the most senior, that if the law changes, they will make that happen.

HAGAN: Since the implementation of "Don't Ask/Don't Tell" back in 1993, over 13,000 service members have been -- have separated due to their sexual orientation. And will the service members that have been discharged under that provision of "Don't Ask/Don't Tell" be allowed to return to their respective services without prejudice to their separation code?

HAGAN: And I understand that although most service members have been discharged, they have received an honorable discharge, but they also have what I understand is a reenlist code of RE4, which makes it extremely unlikely that they would be accepted back into the service by recruiter.

I understand that this separation code of RE4 means not suitable or desired for continued service, even if this separation is under honorable circumstances. And the working group recommended that service members discharged under "Don't Ask/Don't Tell" be allowed to reapply for re-accession. But I'm just curious about what that reenlistment code actually would mean in this case.

JOHNSON: Well, what we're recommending, Senator, is that service members who were separated pursuant to the policy be permitted to seek reenlistment like anybody else. And if there is an indication that they were separated for reasons of homosexual conduct, that that be set aside and they be considered for reenlistment in all other respects -- they meet the right age, weight, you know, physical requirements, and so forth in all other respects.

HAGAN: Do you think any people will?

JOHNSON: I believe we...

HAGAN: If this policy got changed.

JOHNSON: We believe -- we spoke to a number of former service members who were gay and lesbian, who said they would welcome the opportunity to seek reenlistment.

HAGAN: Well, as I've said, I think that this policy is discriminatory in nature and unnecessarily create an institutional barrier that impedes our service members from rising to the highest levels of responsibility.

And I think Senator McCaskill mentioned some of this, too, but what steps will be taken in the implementation of repeal to ensure that gay and lesbian service members are treated under the same general principles of military equal opportunity policy, while at the same time not elevating those service members into a special status as a protected class that would receive special treatment?

MULLEN: There's -- there's no indication. I mean, there is no plan at all to put -- to create any kind of special class and that our standards of conduct and how this is led would be enforced exactly as they are today. So I would not expect anything along the lines -- along those lines to change at all.

HAGAN: Mr. Chairman, I just again want to say I -- I thank you for the -- I know the hard work that all of you have put into this, and I appreciate your -- your being forthright in your testimony. Thank you.

LEVIN: Senator Graham?

Thank you, Senator Hagan.

Senator Graham?

GRAHAM: Thank you.

Thank you, gentlemen. Thank you all for -- for what you're trying to do for the country here and present to us opinions from the military. And there are some -- some strong opinions in this study.

The -- the numbers are pretty astounding to me in terms of the people who say they would feel comfortable with the policy change. But when you look at combat units, the numbers are pretty -- pretty strong that the -- the policy change may be disruptive, so we all have to balance what to do here.

Jeh, if you could, in a one or two-pager send to the committee how the system actually works in the Army, Navy, Air Force and Marine Corps about what kind of evidence is used to discharge someone, what type events that would lead to discharge. And I think there have been some substantial regulatory changes.

I've looked at the Air Force regulations -- pretty impressed with them -- to make sure that we're making rational decisions. And I think it would be helpful to the committee to know exactly what kind of event would lead to discharge, because the regulatory changes you- all guys have made, I think, have sort of cleaned up some of the abuses of the past. So that would be helpful, if you could.

JOHNSON: I would -- I would be happy to do that, Senator. I -- I note, as we noted in the report, that approximately 85 percent of separations under this law are what we call statements cases, where the member himself makes a statement one way or another, "I'm gay."

GRAHAM: Right.

JOHNSON: And if the law is repealed, obviously, if somebody says, "I'm gay," then irrelevant.

GRAHAM: Yes, and what I'm trying to point out to the committee that generally speaking it's not a situation where people are hounded day-in and day-out, that we're trying to prevent that, quite frankly. And the regulatory changes you-all guys have made, I think, has limited discharges to situations where you just described.

And we can debate among ourselves as to whether you want to take that final step, but the regulatory changes have been substantial in terms of the type evidence you would choose to bring formal discharge. From 1973 to 2010 it's a sea change.

Admiral Mullen, what has led to your change in thinking, if you could share with the committee just a bit about supporting policy change?

MULLEN: Well, I mean, fundamentally for -- for me, Senator Graham, it has -- it has been the issue, this mismatch of an institution that I've been raised in my whole life that values integrity in many ways across everything we do, and then we've got a -- thousands of men and women who were willing to die for their

country, that -- that we ask them to lie about who they are every single day. And that -- and, I mean, I just fundamentally think that is wrong.

GRAHAM: I understand.

MULLEN: And I worry, Senator Graham, that it is corrosive over time. It's not one of these things that's going to -- you know, a light switch isn't going to go and it's going to be a disaster, but it is corrosive over time.

And it is particularly during a time of war, where we are focused so heavily on our combat mission, that the -- it -- it undermines in ways our ability to do what we need to do because of the people side of this, because of the leadership focus it takes.

GRAHAM: Right.

MULLEN: And that's fundamentally what's led me to the -- to my beliefs or -- and conclusions with respect to where we are.

GRAHAM: I'm going to ask a question that is staff for Navy guy to answer. Why do the Marines think the way they do? I say that jokingly, and I'm not joking. I respect you very much.

The commandant of the Marine Corps is in a different place. We'll have him come up and answer for himself here later on, but there is a difference of opinion on this issue between yourself and the commandant of the Marine Corps and some other service chiefs. And I think that fact needs to be known and understood. And I'll give you 30 seconds to take a shot at it.

MULLEN: I think -- well, I mean, the Navy and Marine Corps grew up together in many ways, so it's not like I haven't been around Marines...

GRAHAM: Well, I know you have.

MULLEN: ... for significant...

(CROSSTALK)

MULLEN: And I think the way it's been described both in the report -- and it's not just the Marines, it's in the Army as well, the combat arms piece. They're unique. Typically, they haven't been -- they haven't fought with -- they're integrated with women. They're 18 to 24, trying to figure out their -- their own, you know, their own selves at that particular age. And it's that combination of things and the focus right now, obviously, with an awful lot of Marines in -- in Afghanistan.

So it is that -- for me it is that focus. I'm not sure it's that much different per se than it is that -- that exposure or that lack of exposure because of who the Marine Corps is.

GRAHAM: Fair enough.

Now, you worry about court challenges, Mr. Johnson and Secretary Gates. I don't know how the courts are

going to come out on this. I'd be surprised, quite frankly, if they strike the statue down, but you never know with courts.

Could you maybe supply to the committee, in the event that the courts did strike this policy down, some of the things that you would like to see Congress to do in that event to make this more orderly, because you're worried about getting a court order on Monday, and Tuesday you don't know what the heck to do?

So if that day ever comes, I would suggest that maybe you send us some information as a game plan where Congress could weigh in, and maybe the courts would be sympathetic to -- to a way for Congress to get involved to handle that transition, if it ever did happen. So I would just make that invitation to you to think ahead. Like I say, I don't think we're going to lose, but who knows?

The last thing -- and I think this is the most important thing for me -- I've been in the military for a very long time, and you all have served longer and more sacrificially than I have, so I certainly defer to -- to our leadership. I just haven't heard a lot of people saying in the ranks themselves, "I wish this policy would change."

And I understand that civilian leadership in our country makes policy, and that's the way it should be. If you asked the question, and this was the only question you asked, "Are you comfortable with the 'Don't Ask/Don't Tell' policy and should it be changed," what kind of response do you think you would get, if that were the only question you asked?

MULLEN: I mean, it's -- it's hard to know. I mean, one of the reasons -- I think you'd get answers on both sides. And one of the reasons this work is so important, because six months ago or eight months ago we were just talking about anecdotal evidence -- I mean, we just didn't have anything that was comprehensively done, and we do now, and I think we're much better informed...

GRAHAM: But you agree with me that question wasn't asked that way.

MULLEN: No, sir, but, I mean, I haven't...

GRAHAM: No, I understand.

MULLEN: I haven't asked soldiers if they'd like to deploy for 16 months at a crack. I mean...

GRAHAM: Don't -- don't get me wrong. We're not asking for you to turn the war into a referendum -- "Would you like to go to Afghanistan and fight?" That's never going to be asked of the service. You do what you're told.

But this is a change, a pretty significant change. And the one thing, to my Democratic colleagues, passing the statute, repealing during the study, I think, was a -- was a bad mistake. We should be listening, not dictating on this.

And I'm not asking the country to allow the military to make its own rules and take away public policy decisions from elected leaders, but I am asking us to listen a little bit better and ask better questions. And so I'll leave it with that. Thank you.

LEVIN: Thank you very much.

Now, we promised the secretary. I stated that he'd be out of here by noon. It's -- that was an extension of a half hour. We are going to have a second round for the remaining members of the panel.

Senator Bayh is here now, and if you -- he is willing to just put any questions that he has for you, Secretary, first in his round so that you could leave, and then he'll ask questions of the other members of the panel.

Thank you.

BAYH: Thank you, Mr. Chairman.

And thank you, Mr. Secretary. I just have one or two minutes of kind of preamble, and then I'll just ask one or two questions of you and then -- I appreciate your courtesy in staying for just a couple of moments.

I'd like to begin by thanking all of you for your service to our country. One of the personal joys for me has - over the last eight years has been serving on this committee, the last two as chairman of the Readiness Subcommittee, and working with you to try and ensure our nation's security at a pretty difficult time. So I want to thank you for that.

I also want to say to my colleagues on the other side of the aisle, while I may have a difference of opinion with some of them on this issue, I know their concerns are heartfelt and are premised upon trying to do what's right for our country, and I certainly respect that, even though I may end up at a different place at the end of the day.

BAYH: I come from a state that honors our military. The American Legion is headquartered in Indianapolis, Indiana. My capital city, Indianapolis, was designed by Pierre L'Enfant, and the -- there's a north-south axis of streets radiating off of a circle at the middle of our city. There's a huge war memorial on that circle.

There's an American Legion Mall north of the circle where we have memorials honoring our war dead from every conflict we've fought as a nation. Honoring our military, caring about our national security interest is part of Hoosier's DNA. It's part of my DNA.

We tend to come from a place where national security has to come first, and if you have competing values, well you take care of your national security first and if some other considerations, cultural or otherwise have to wait, well, that's just the way it is.

But as I understand your testimony, Mr. Secretary, and your colleague's testimony, we can make this change without impairing our nation's security. Is that a correct reading of this study in your professional opinion?

GATES: The way I would answer that question Senator is that I would say that I would not sign the certification if I did not think we were safeguarding national security.

BAYH: In fact as I understand your testimony, other nations have made this change, and some of the concerns that my colleagues sincerely hold did not come to fruition in terms of retention or morale or

effectiveness in combat and that kind of thing.

Is that also a correct reading of your testimony?

GATES: I think so.

BAYH: In fact, when we integrated the armed forces in the 1950s some of these concerns had been raised, but were not realized following the integration of the armed forces along racial lines. Isn't that correct gentleman?

GATES: Well, as I indicated earlier, the organizational integration took place between 1948 and 1953. We did have problems, racial problems inside the armed forces for a number of years after that.

Ultimately, through discipline and training and professionalism, I think they've largely been eliminated.

BAYH: (Inaudible) Our national security has not been harmed by the integration of the armed forces, I'm sure you agree -- I know you agree with that.

GATES: They've been enhanced.

BAYH: Correct. And Admiral Mullen in your exchange with my friend Senator Graham, I couldn't help but thing that, you know if we'd done polling back in the day, 1948-1949, you would have found a diversity of opinion about the racial integration of the armed forces.

And if a minority of people had objected, following that line of logic, we would not have integrated the armed forces. And so here's the point that I'm trying to make and then, Secretary, I'll let you go.

I've always felt that our nation is strongest and most secure when we pursue our nation's security consistent with our values to the extent that we can.

I find that, Admiral Mullen, I associate myself with your comments and I assume, and I apologize I wasn't here for all the hearings, the thinking of your colleagues.

There just seems to be something fundamentally wrong when we ask men and women to lay down their lives for our country and yet they cannot be honest about who they are. There's something fundamentally wrong about that. And if we can pursue our nation's security without putting them or us as a country, institutionalizing hypocrisy, I think America is stronger. We are a more just and secure country.

That's where I kind of come from this issue on. General and Mr. Secretary, that's just what I need to say. If you need to go, thank you and again, it's been an honor working with you.

General Ham, in your testimony to my colleague, Senator Webb, you indicated to the extent that we know, about two to three percent of the people who serve in the armed forces are gays and lesbians, is that correct?

HAM: Yes, sir it is.

BAYH: There's no reason to believe that that figure has changed over time is there? There's no way of

knowing, but I assume that's kind of constant over time?

HAM: I don't know sir, and the best we could do is try to get an assessment of where are we today.

BAYH: Sure. I guess the point I want to make, in all likelihood, there were gay Americans serving at Valley Forge. There were gay Americans at Gettysburg. There were gay Americans on Normandy Beach. There are gay Americans serving in Iraq and Afghanistan today.

In all likelihood, that's probably true wouldn't you say? HAM: Yes, sir. I think it's a very reasonable assumption.

BAYH: There are probably gay Americans buried at Arlington Cemetery and at Normandy Beach where I took my young sons a couple of years ago. One of the most inspiring things you can possibly see, those rows of crosses and the American flag flying in the breeze, people who laid down their lives for our country.

There are probably gay Americans buried there aren't there?

HAM: I think it would be a reasonable assumption.

BAYH: How do we say to them or to their families that we've honored their sacrifice of laying down their life, and yet if we knew who they were, not only would they not be buried there, they would have been drummed out of the armed forces.

HAM: Senator, my response to that would be based on the oath that we took, that all of us in uniform take, and that is that we support and defend the Constitution of the United States. That means that we follow the law. And so we have to do that.

BAYH: Well, I guess my point once again is if there are Americans who are willing to lay down their lives for our country and make that kind of sacrifice, and we can enable them to be that kind of patriot without harming our national security, not only is it better for them, it is better for us and our country. We are stronger and more noble and more just with a policy like that.

Gentleman, I want to thank you for your service. It's been a pleasure serving with you, and I think our country is in good -- in your capable hands.

Thank you. Thank you, Mr. Chair.

LEVIN: Thank you, Senator Bayh.

Getting a second round, I don't have any additional questions. I just though want to comment as to why I'm here. The suggestion was made by one of our colleagues that we're here because the president made a campaign promise.

That's not why I'm here. That's not why I believe the majority of us are here. I'm here because we passed a law in 1993 which I believe is discriminatory. Times have changed since then, and it seems to me we should respond to those changes -- in the attitude of our people, the acceptance of gays and lesbians in the workplace.

And I'm here because we have men and women now serving, men and women who have died for this country who are gay and lesbian, and we should not discriminate against them.

We should honor that service, honor that patriotism the way we do the service and patriotism of any American who is willing to put on the uniform of this country. Now, that's why I'm here. It's not because of some campaign promise of President Obama. It's because my conscience tells me it's time now to allow men and women to serve their country and to do so without having to conceal their sexual orientation. I don't have further questions.

Senator McCain?

MCCAIN: Thank you, Mr. Chairman, and I of course regret that I could not ask additional questions of the Secretary of Defense.

I would like to point out that in 1993, at the time of the enactment of "Don't Ask/Don't Tell," General Colin Powell was asked and he now supports repeal of "Don't Ask/Don't Tell," but at the time he was asked about the issue and comparing it to the racial integration of the military.

And he said that sexual orientation is different from the pigmentation of ones' skin. I think that that was an important statement.

You know, Admiral, I'm really kind of taken aback at yours and the secretary's statement that we won't have a, quote, "referendum" by the men and women in the military and that you base this survey, which had 28 percent return, on how best to implement repeal rather than asking them their views.

Everything I ever learned about leadership, everything I ever practiced about leadership, every great leader I've ever known, always consulted with the subordinates for their views, no matter what the issue. And certainly an issue of this magnitude deserves that leaders take into consideration the views of their subordinates. It doesn't mean that they are dictated by the views of their subordinates.

But I never made a major decision in the military without going around and talking to the enlisted people, the ones that would be tasked to carry out whatever the mission it is.

So I'm almost incredulous to see that on an issue of this magnitude, we wouldn't at least solicit the views of the military about whether it should be changed or not. Now, those views may be rejected. Those opinions and for the sake of the security of the country, may be discounted.

But to somehow say well we're not going to have a referendum. It's not a referendum, that's not what leadership is. Leadership is soliciting the views of your subordinates and their way -- and thereby you're able to carry out your mission because you have to rely on them to do so.

So to say, well, we didn't need to ask their opinion on whether it should be repealed or not, violates in my view, one of the fundamental principles of leadership.

Now, the secretary said that he had concerns about the benefits that would be allotted to, or that people would be eligible for if -- I'd be glad to -- Admiral, I'd be glad to hear your response to my comment.

MULLEN: Sir, I mean I've grown up on the deck plates my whole life and certainly one of the things that I pay attention to -- have paid attention to in every leadership position I've been in are my people.

And what motivates them, how they think, what they think and clearly they are the reason any of us is able to accomplish any mission, small or big. And that's a fundamental principle with me. What, and I think the report has spoken to in great part, their views of whether this can be successfully done or not. And from my perspective, very much by implication, where they are on this.

MCCAIN: Why wouldn't we just ask the question?

MULLEN: Because I -- fundamentally sir, think it's an incredibly bad precedent to ask them about, you know to essentially vote on a policy.

MCCAIN: It's not voting, sir. It's asking their views.

(CROSSTALK)

MCCAIN: It's asking their views and whether they would agree or disagree with a change. I mean, the same way you would ask whenever any policy or any course of action were contemplated, you would ask the views of others. You wouldn't necessarily accept them.

But for you to sit there and say, well we wouldn't want to ask them their views. I mean, that to me is -- makes this, this whole exercise here that took so much time and effort and money, a bit of an unrealistic situation here.

MULLEN: Sir well I -- I mean I just -- I mean I just disagree with you with...

MCCAIN: ... you disagree with asking them...

MULLEN: ... I just disagree with the approach...

(CROSSTALK)

MULLEN: ... that we would go out and ask them...

MCCAIN: ... hey (ph).

MULLEN: ... for their views on this specifically.

MCCAIN: OK.

MULLEN: ... although I think ...

MCCAIN: ... we've got ...

MULLEN: (inaudible) MCCAIN: ... and I understand your answer is, we would not ask them their views on whether this policy would be -- should be changed or not as the first question.

MULLEN: We've gotten, in great part, their views as a result of this survey.

MCCAIN: Well, obviously, we'll go around and around...

MULLEN: Sure.

MCCAIN: ... but why we didn't just simply ask them whether -- how they felt about it, just as you would about any other course of action. I'd go around -- well, every -- again, every great leader I've known has said, "What are your views on this issue."

And finally, I guess, it'd be important to include, for the record, this survey, "Those Who Served In Combat With A Service Member Believed To Be Homosexual: Affect On Unit's Combat Performance," Army, Combat - mostly negative, Army, Combat Arms, 58 percent; Marine, Combat Arms, 57 percent. Next question, "Those deployed in a combat environment since 9/11, effect on unit effectiveness at completing its mission in a field environment or at sea if Don't Ask, Don't Tell is repealed in working with a gay service member in your unit, very negatively or negatively. Army, Combat Arms, 57 percent; Marine, Combat Arms, 66.5 percent.

Those deployed in a combat environment since 9/11 effect on unit effectiveness at completing its mission in intense combat situation if Don't Ask, Don't Tell is repealed in working with a gay service member in your unit, Army, Combat Arms, very negatively or negatively 40.9, Marine, Combat Arms, 47.8. So it probably should not surprise us to hear the views of the commandant of the Marine Corps in his testimony tomorrow, and perhaps the other service chiefs.

Mr. Chairman, can I continue, or we'll just go -- another third round?

LEVIN: We'll have a third round.

(UNKNOWN): OK, thank you.

LEVIN: Senator Lieberman?

LIEBERMAN: Thanks, Mr. Chairman, and thanks again to the witnesses.

On the -- on the survey, I just want to get a few things on the record by Mr. Johnson or General Ham. As I understand it, you had an independent group send out a survey to a large -- over 400,000 members of the military. Is that right?

HAM: Yes, sir.

LIEBERMAN: And the -- so therefore, the 28 percent was more than 100,000 responded to -- that have sent their surveys back in. Is that...

JOHNSON: It was 115,000. And to just put that in context, there was, two days ago, a poll from Pew nationwide on civilian attitudes of gays in the military, and the sample size there was 1,200 people.

LIEBERMAN: For the whole country?

JOHNSON: For the whole country, right. This was a sample size of 115,000.

LIEBERMAN: Let me just say that we base a lot of our decisions, probably too many, on samples about political questions and our standing that are a lot smaller than the number that you had responding here.

But (inaudible), my understanding is I don't -- the folks who did the survey indicated this to you -- that 28 percent is actually a pretty high percentage response to a survey questionnaire sent out.

JOHNSON: It's average.

LIEBERMAN: It's average, OK.

JOHNSON: It's average, but it's very -- it was very large.

LIEBERMAN: Did they give you any indication of margin of error in reflecting the views of the military generally?

JOHNSON: Given the size of the respondent pool, the margin of error was less than 1 percent, which is far lower than what you'd normally get in any kind of survey or poll.

LIEBERMAN: OK. Second, admiral, there've been a couple of -- I want to go now to this question that you've been asked about -- I did earlier about the negative impact of Don't Ask, Don't Tell on military effectiveness apart from whether we think it's right or wrong.

One of the things that we lost or wasted when we -- when the military had to evict 14,000 people from the military because they were gay or lesbian is the money we invested in training them. I saw one estimate that said it was as high as \$500 million. I don't know whether you have a credible estimate of that, but do you agree that the implementation of this policy over the last 17 years has meant that we've lost the services of a lot of troops who we invested a lot of money to train to do what we need them to do?

MULLEN: Yes. I think the number is about right, between 13 and 14,000, and I just don't have a financial impact. But clearly, we do invest in every service an extraordinary amount of effort, time, money, resources into people that we train to carry out these missions.

LIEBERMAN: Right. And in a related matter, I assume it's correct, I've seen some estimates that -- not of numbers, but that among the 14,000 were a significant number of troops that we'd call mission -- with mission-critical skills.

MULLEN: Yes.

LIEBERMAN: Translators, intelligence analysts, perhaps health care personnel. Is that right?

MULLEN: Yes, sir. I agree.

LIEBERMAN: Mr. Johnson, let me just go back to President Truman on this -- for a couple of question. I know you said you studied this period.

When he ended racial segregation in the military, he did so, am I right, by executive action, by presidential decision.

JOHNSON: That is correct.

LIEBERMAN: And he was able to do so because there was no law, as there is in this case regarding Don't Ask, Don't Tell, that prohibited him from doing so.

JOHNSON: That is correct.

LIEBERMAN: So that -- I'm picking up for what Chairman Levin had to say. While it's true that President Obama made clear in his campaign that he would act to end the Don't Ask, Don't Tell policy in the military, the fact is he cannot do it himself. We -- Congress has to take action to give the president essentially the same latitude for executive action that President Truman had during his time.

JOHNSON: Yes. I agree with that -- way of looking at it, yes.

LIEBERMAN: I wonder whether, in terms of the question of what impact, one of my colleagues asked you, projecting from some of the numbers about potential hundreds of thousands of resignations, during Truman's time, obviously it was a -- it was an army that was there because, as you said earlier, that they were conscripted, they were drafted. And so, I suppose that any impact would have been seen in reenlistment rates. Is there any evidence on the impact of the racial desegregation order by President Truman on reenlistments in the military?

JOHNSON: We -- there may be evidence to that effect in the report. I don't recall any offhand. I do know that, as integration was occurring -- and this is reflected in the report -- there were studies that indicated that the combat effectiveness of integrated units in the Korean War was just as good as it was for segregated units.

And if I could add, I happen to agree with Senator McCain that matters of sexual orientation and race are fundamentally different, which is why in this report we didn't push the racial integration chapter too hard. I do think it was relevant in that, in the 1940s, some of our most revered heroes from the World War II period, Admiral Nimitz, General Eisenhower, General Marshall, predicted negative consequences for unit cohesion if there was racial integration.

LIEBERMAN: Right.

JOHNSON: And the limited surveys that were done indicated very strong opposition within the force to racial integration, but we did it. It took some time. It was not without incidents, but we did it, and I think the chairman said that our military is stronger as a result.

LIEBERMAN: Amen. Thank you. My time is up.

LEVIN: Thank you, Senator Lieberman. Senator Brown?

BROWN: Thank you, Mr. Chairman.

Just had a couple of follow-up questions, and I'm looking forward to tomorrow's testimony, as well. I also agree with Senator McCain that, you know, we should have asked the question, "Do you favor repeal of Don't Ask, Don't Tell" as one -- as one of the questions, because you asked virtually everything else, but it almost -- I think you were right there. You never kind of went right for the jugular.

And as somebody who's served, and continues to serve for 31 years -- I started as an enlisted man when I was 19. I'm a lieutenant colonel. I'm a JAG. You know, I find sometimes in the military we kind of beat around the bush too much. We don't go and ask the real question. So I think we missed a good -- a good opportunity. Doesn't mean you needed to follow it, but it certainly would be nice to see where everyone's heads are at. I think you would have gotten more of a response, potentially.

That being said, you know, I visited -- since this time, my years in the military and since being in this position, I've had the opportunity to visit Walter Reed. And, you know, I still can't get out of my mind the one time I saw a soldier who lost both his legs, lost an arm and lost most of another arm, doing crunches, you know, to try to get his mid -- his torso strengthened enough so he could still have a viable, you know, and fulfilling life, and seeing many other injured men and women, you know, who've not only given their lives -- their limbs, but their lives.

And I've been to many funerals, unfortunately, in my home state for those soldiers. And one thing I never asked was, "Are they gay or straight." It never even crossed my mind, to be honest with you. I just wanted to know if they gave their limb or their life, you know, with pride and with honor for our country.

So that being said, you know, this is very uncomfortable, this whole, you know, situation. And -- but I know for a fact that there are good people on both sides of these issues. I see it each and every day, whether they're straight or gay. And that being said, I'm a little -- I want to kind of zero in for our viewers, I guess, and for the people who are in the audience, a couple of things regarding the legal part of it. first of all, there -- has there been any instance -- and maybe, General Ham, you can point on this -- where a soldier - - or actually, Mr. Johnson, too -- where a soldier has said, for the purposes only of getting out of the military, "Hey, I'm gay," you know? Do you have any records or documentation of people trying to void their service as a result of that action?

HAM: Yes. There are very strong indications, particularly during a period of time when the economy happens to be strong, that service members would make statements, "I'm gay." And when I was Air Force general counsel, we had a litigation where a service member had, right after we had paid for his medical education, declared he was gay. And we separated him, and then we sued him to get the money back. And that -- I think that was in the 1999-2000 time period.

So, very often, there are cases where, just given where the service member is in his tour of duty, you know, the completion of training, completion of an education where he makes such a statement, and the indication is a pretty strong one that they're making the statement so they can get out of the military. Obviously, if the law is repealed, they can't do that.

BROWN: And someone who's -- who is a JAG, I know that, once you sign on that contract -- I know there was a question about what if 250,000, give or take, decided that they want to get out.

Well, they can't get out. I mean, let's be real. They can't get out because they have an obligation, a contractual obligation where, unless they do something that warrants them being discharged for conduct or

otherwise, you know, they have to fulfill their military contract, whether it's four, six, in an officer's case, sometimes it -- in my case, it's unlimited. What -- is that an accurate statement?

JOHNSON: Yes. That is correct.

BROWN: And when you're -- who do you actually work for, just so that people know? I mean, your role here, I know -- I'm somewhat new, but who do you work for? Who's your boss?

JOHNSON: I am a Senate-confirmed, presidential appointee. I serve at the pleasure of the president. But I am the lawyer for the secretary of defense.

And so -- and I take this very seriously. My political loyalty, obviously, is to the president and the Obama administration. But my professional and fiduciary duty is to the secretary of defense.

And to me, that is a higher obligation.

BROWN: So if he, in fact, says, hey, I want to do away with this policy, do you, in fact, are you zealously representing him in those actions to do that?

Because I know there was a line of questioning from a couple of senators, saying, you know, I don't feel you -- that you were zealous enough in actually defending the position of the -- of the present law right now.

Do you have any comment on that?

JOHNSON: Well, at the outset of this assignment, the secretary made it very clear to both of us that he was very concerned that, before we moved forward, we have this comprehensive assessment to know what the views of the force were, to systematically engage the force.

That's in our terms of reference. And so he wanted to be informed by our review before he came to the views that he's expressed today. He expressed support for repeal in February, with the huge caveat -- and I believe Admiral Mullen said the same thing -- that he wanted to know the views of the force and to have this report done.

In terms of the defensive litigation, we have made -- we made, in the Witt case, for example, the strategic judgment not to push the case to the Supreme Court back then on that record.

I believe that was in the best interest of the Department of Defense.

BROWN: Mr. Chairman, since it's just us three, may I have the courtesy of one final question?

LEVIN: Absolutely. We're going to have a third round anyway. Sure, if it's all right with Senator McCain, that would be fine.

BROWN: Thank you.

Just on the legal part of it, just so -- and Senator McCain and others have kind of touched on this. I just --

you know, being an attorney, I just want to make sure I understand.

Is it your professional opinion that if, in fact, we don't do something, that there is imminent fear or concern that the courts will, in fact, act and as a result, we will in turn not be able to implement it in the manner that the military and the Department of Defense does?

That's my first part of my question. The second part is, do you have a professional opinion as to what the timing is with regard to that? Is it next week? Is it next year? I mean, what's your gut?

JOHNSON: Well, I'm not here to express an opinion on the constitutionality of the law. I have not gone through that exercise.

That, frankly, is for the courts, the solicitor general and our office of legal counsel of DOJ, should they be asked. In terms of timing, I think we are in a very unpredictable environment.

And we got a taste of that in October, where all of a sudden, we had a court order that required the Secretary of Defense to shut down this policy worldwide, every corner of the globe.

And we were faced with a situation, first to our JAG community and then to our P&R community, where we had to get the word out.

And then immediately what came back were a barrage of questions that we deal with in this report about what do we do at recruitment centers, what do we do with people who declare that they are gay in this period of time while the appeal is pending, and so forth.

And so that was a very uncertain situation, which I'd like to never repeat. The Log Cabin Republicans case, right now, is on an expedited appeal track.

BROWN: What does that mean, expedited?

JOHNSON: It means...

(CROSSTALK)

JOHNSON: ... briefing will be -- the briefing to the 9th Circuit will be done, I believe, by March. And they have not told us when they will have oral argument in the case.

But I suspect -- I highly suspect it'll be sometime in the first half of 2011, and we could have a decision very shortly after that.

BROWN: Great.

Thank you, Mr. Chairman.

LEVIN: Appreciate it.

Senator McCain?

MCCAIN: Thank you, Mr. Chairman.

Again, I'm sorry that the Secretary of Defense isn't here. And we're in a lame duck session. I don't know what our schedule will be.

I and most Americans remain concerned, Admiral Mullen, about the WikiLeaks issue. General Petraeus said this is beyond unfortunate. This is a betrayal of trust.

There are source names and, in some cases, there are actual names of individuals with whom we have partnered in difficult missions, in difficult places, and, obviously, that is very reprehensible.

In response to my question, the Secretary of Defense said that no one so far has been held responsible except for the private first class who is presently incarcerated.

Can you give us additional -- is that -- that's correct?

MULLEN: Yes, sir. That is it.

I am -- it is reprehensible, and I have been very clear that I think it did and continues to put lives at stake and that, so far, the criminal -- the limits of the criminal investigation, there has been no one else held accountable.

MCCAIN: Can't you carry out an investigation at the same time that the criminal investigation is going on?

MULLEN: Yes, sir, on certain kinds of incidents, there's certainly -- that's certainly possible.

MCCAIN: At least maybe to hold someone responsible for this besides a private first class.

MULLEN: Well, I think, sir, the -- I mean, clearly what the secretary said and what we have done is taken significant steps to limit the possibility in the future.

We just have not gotten to the point yet -- and I don't -- I don't know how this -- obviously how this turns out. We have not gotten to the point where that action has been taken.

MCCAIN: Well, it's been since July.

Let me ask you, Admiral, would you encourage Congress to take any punitive action against the leadership and personnel of the WikiLeaks, including asset freezes, travel bans, banking and financial sanctions or any other such measures?

Would you encourage Congress to act in that fashion? Or is that maybe out of your area of...

MULLEN: Well, it's out of my lane, but I feel pretty strongly that this is an individual that should be held accountable for his actions.

MCCAIN: And the people who've facilitated...

MULLEN: Yes, sir. The -- yes, sir.

MCCAIN: So you would support some kind of Congressional action or legislative action, obviously, in coordination with the administration, to try to see that not only does it not happen again, but those who committed this -- what reprehensible act as you and General Petraeus describe it, are somehow held accountable?

And I understand that foreign nationalities and all those things are aspects of it, this are hard to -- hard to pursue.

MULLEN: I believe we, as a country, should do all we possibly can to make sure something like this doesn't happen again because it does put lives at stake.

How that -- how to do that, modalities and all that, is obviously a very complex issue. But in my world, when I've got men and women in harm's way, and they are now exposed because of this, I think we, as a country, should do all we can to make sure that it can't happen again.

MCCAIN: Mr. Johnson, you got any thoughts from a legal standpoint?

JOHNSON: Yes, I do, Senator.

I don't -- I don't view WikiLeaks as journalism. I don't -- my personal opinion is the activity of WikiLeaks is not media. At least several months ago, when this first broke, if you look on their web page, it is an open solicitation for classified evidence. It's an open solicitation to break the law and a materially false and misleading representation that there will be no legal consequences to that.

And so I think WikiLeaks is on a different level from conventional journalism. And there is, as you've seen in the newspaper, an open criminal investigation, which I am briefed on on a regular basis by the Department of Justice.

I have some private views, which I'd be happy to share with you in private, about what I think is going on here. But it is very troubling and I worry that this organization is out trying to solicit others right now for additional information.

MCCAIN: Well, I thank you.

Mr. Chairman, I think it's worthy of our attention, along with judiciary and intelligence, and even maybe Homeland Security, but this is of the utmost seriousness. And apparently, it's not stopping.

I thank you, Mr. Chairman.

LEVIN: Our understanding is we are -- we do have a briefing, I believe, this afternoon -- at 3:00?

Anyway, this afternoon...

(UNKNOWN): Four-thirty.

LEVIN: ... 4:30 on the WikiLeaks. I happen to share Senator McCain's feeling that it's not only reprehensible but the people, whoever is accountable, aiding and abetting or otherwise accountable, should be held accountable.

Anyone who has been involved should be held accountable to the extent of the law. If the laws aren't strong enough, we ought to strengthen them.

Admiral, I share yours and Mr. Johnson's statements relative to these leaks. This is not journalism. This is a threat to our security and we should act to make sure it doesn't happen again, and to hold those who have been involved in what has happened, who have broken the law, accountable for that.

And to the extent that it's consistent with criminal investigation, I happen to agree with Senator McCain, that the investigation -- and non-criminal investigation -- that it can take place at the same time. It should take place at the same time.

We thank all of our witnesses, our panel, and we will stand adjourned.

END

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