

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS,)	CASE NO: CV 04-8425-VAP(Ex)
)	
Plaintiff,)	CIVIL
)	
vs.)	Los Angeles, California
)	
UNITED STATES OF AMERICA,)	Monday, March 15, 2010
ET AL.,)	
)	(9:54 a.m. to 12:04 p.m.)
Defendants.)	

HEARING RE:

- (1) PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS;
- (2) HEARING ON PLAINTIFF'S EX PARTE APPLICATION FOR ORDER COMPELLING DEFENDANTS TO COMPLY WITH LOG CABIN REPUBLICANS' NOTICE OF DEPOSITION OF USA AND ROBERT M. GATES;
- (3) HEARING ON PLAINTIFF'S EX PARTE APPLICATION FOR AN ORDER THAT CERTAIN REQUESTS FOR ADMISSIONS BE DEEMED ADMITTED OR FOR FURTHER RESPONSES

BEFORE THE HONORABLE CHARLES F. EICK,
UNITED STATES MAGISTRATE JUDGE

Appearances:	See next page
Court Reporter:	Recorded; CourtSmart
Courtroom Deputy:	Stacey Pierson
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APPEARANCES FOR:

Plaintiff: DANIEL J. WOODS, ESQ.
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Defendants: PAUL G. FREEBORNE, ESQ.
U.S. Department of Justice
P.O. Box 883
Washington, DC 20044

1 Los Angeles, California; Monday, March 15, 2010, 9:54 a.m.

2 (Call to Order)

3 **THE CLERK:** Calling Civil-04-8425-VAP-EX, *Log Cabin*
4 *Republicans versus United States of America, et al.*

5 **MR. WOODS:** Good morning, your Honor; Dan Woods of
6 White & Case for Plaintiff, Log Cabin Republicans.

7 **THE COURT:** Thank you.

8 **MR. FREEBORNE:** Good morning, your Honor; Paul
9 Freeborne from the Department of Justice representing the
10 United States, as well as Secretary Gates.

11 **THE COURT:** Thank you.

12 This matter is before the Court for hearings on one
13 motion and two ex parte applications. The motion is
14 Plaintiff's Motion to Compel Production of Documents and the ex
15 parte applications are Plaintiff's Application for an Order
16 Compelling Defendants to Comply with Log Cabin Republicans'
17 Notice of Deposition, et cetera, and Plaintiff's Ex Parte
18 Application for an Order That Certain Requests for Admissions
19 be Deemed Admitted, et cetera.

20 I've read all of the papers filed in connection with
21 each of these matters and I have a number of questions for
22 counsel.

23 First, for the moving party, Plaintiff, Mr. Woods.

24 **MR. WOODS:** Yes, your Honor.

25 **THE COURT:** With reference to what point in time will

1 the Court evaluate whether there exists a rational basis for
2 the policy? At the time of the statute's enactment? At the
3 time of the regulation's issuance? At the time of the
4 regulation's instructions reissuance? At some other time? At
5 all of those times? What's your position on that?

6 **MR. WOODS:** Our position on that, your Honor, is that
7 Judge Phillips at the trial will be asked to review the
8 constitutionality of the statute and the policy both at the
9 time it was enacted and today. We argued about that at a
10 status conference before her in July, July 6th, to be precise,
11 and the transcript of that I believe is in the materials before
12 you.

13 **THE COURT:** I've read it.

14 **MR. WOODS:** And following the -- most of the
15 discussion at that hearing took place on the subject of whether
16 we ought to be entitled to conduct discovery at both or all
17 time periods and the Judge's Order following that status
18 conference was that we would be allowed to do discovery.

19 **THE COURT:** She didn't indicate you would be allowed
20 to do discovery with respect to a particular timeframe?

21 **MR. WOODS:** Well, I think, your Honor, in the
22 transcript it's clear.

23 **THE COURT:** In her Order she didn't so state,
24 correct?

25 **MR. WOODS:** The Order, which I do have here, goes on

1 to discuss both sides' positions and says that, "Plaintiff is
2 entitled to conduct discovery in this case." Now, I agree with
3 you --

4 **THE COURT:** No, that's not the exact words. But the
5 answer to my question is she did not indicate a specific
6 timeframe with regard to discovery relevance in her Order --

7 **MR. WOODS:** Not in that --

8 **THE COURT:** -- correct?

9 **MR. WOODS:** Correct, your Honor, not in that written
10 Order. But I believe --

11 **THE COURT:** All right.

12 **MR. WOODS:** -- the transcript makes her --

13 **THE COURT:** So your position is that you're entitled
14 to ask the Court to evaluate whether there existed a rational
15 basis at the time of enactment and whether there continues to
16 be any rational basis in light of experience between then and
17 now?

18 **MR. WOODS:** Both experience and subsequent case law
19 developments, yes.

20 **THE COURT:** Let me ask you about that issue, and this
21 may require something of a preamble. But in United States v.
22 Jackson the Ninth Circuit dealt with the issue of whether the
23 one hundred to one ratio between sentencing for crack cocaine
24 and powder cocaine had a rational basis and the party
25 challenging that disparity argued that the rational basis had

1 eroded over time, that the Sentencing Commission more recently
2 had recommended to Congress to repeal the disparity, and the
3 Ninth Circuit rejected that argument. In Small v. Ashcraft the
4 Second Circuit said that a Congressional decision that a
5 statute is unfair, outdated, and in need of improvement does
6 not mean that the statute when enacted was wholly irrational or
7 for purposes of rational basis review unconstitutional. In
8 Howard v. United States the Federal Circuit indicated that even
9 a Congressional repeal of a statute wouldn't mean that the
10 statute prior to appeal lacked any rational basis.

11 So if you put all of those authorities together and
12 what difference does it make what is happening now in terms of
13 whether people within or without the government are in public
14 statements or otherwise condemning the "Don't Ask, Don't Tell"
15 policy as misguided, irrational, unwise, unfair, unnecessary,
16 what difference does it make from a constitutional standpoint?

17 **MR. WOODS:** Well, your Honor, the constitutional law
18 issues governing this case have changed since the statute was
19 passed. Since the United States Supreme Court decided the
20 Lawrence v. Texas case the constitutional framework of the case
21 has changed. The Ninth Circuit recognized that --

22 **THE COURT:** That's change in the law and I understand
23 that that may affect the constitutional analysis. But what
24 would changes of facts, how would they matter?

25 **MR. WOODS:** Well, in the Lawrence case, your Honor,

1 the Court did address events that had occurred since Texas had
2 passed its sodomy or anti-sodomy statute. That's one example
3 of cases -- of a case where information after the enactment of
4 a statute was considered. In other words, the Supreme Court in
5 that case didn't just decide that the Texas statute was
6 unconstitutional when it was enacted; it decided that it was
7 unconstitutional at the time of the decision.

8 Similarly, we have cited to Judge Phillips a case
9 called United States v. Carolene Products, which is a 1938
10 United States Supreme Court decision which --

11 **THE COURT:** Let me interrupt you for a second. In
12 Lawrence the Supreme Court didn't say that the Bowers case --
13 is that Bowers v. Hardwick?

14 **MR. WOODS:** Yes.

15 **THE COURT:** That that case was correct when it was
16 decided, but it would be incorrect if it were decided that way
17 today. That's not what they decided.

18 **MR. WOODS:** Well, some of the information in the
19 Supreme Court decision in Lawrence was information that had
20 developed after both the Texas statute and the Bowers case.
21 Part of it had to do with changing morays in society, things of
22 that sort.

23 As I was saying, in this Carolene Products case the
24 Supreme Court said, "A statute predicated upon the existence of
25 a particular state of facts may be challenged upon showing to

1 the Court that those facts have ceased to exist." That case
2 also cited another United States Supreme Court case, Chastleton
3 v. Sinclair, which again, on a similar point, in challenge to a
4 law enacted in response to a housing crisis was no longer
5 rational when the crisis ceased to exist.

6 We also cited another case to Judge Phillips, Dias,
7 D-i-a-s, against City and County of Denver.

8 **THE COURT:** Right, that's the pit bull case.

9 **MR. WOODS:** So there is at least, your Honor, a
10 substantial disagreement on this issue in the various Courts
11 that have considered it, but we believe the Supreme Court
12 decisions on this point make it clear, if not at least possible
13 for us, that we can challenge the constitutionality of the
14 statute using information, facts, developments that have
15 happened since the law was passed in 1993. Otherwise, it would
16 be impossible ever to overturn a statute of Congress.

17 **THE COURT:** Are you seeking discovery into the
18 motives of Congress and the Department of Defense in
19 authorizing and implementing the policy?

20 **MR. WOODS:** What we're asking for, your Honor, are
21 documents and the documents aren't -- the document requests
22 aren't described in those terms. We're also asking in the --

23 **THE COURT:** I understand. Is your contention that
24 the motives are relevant and therefore you're seeking documents
25 that would reflect the motives?

1 **MR. WOODS:** It is possible that the documents would
2 reveal motives. The motive would be animus or prejudice
3 towards homosexuals. Another --

4 **THE COURT:** Is that relevant to a rational basis
5 analysis? Assuming that the real basis for the policy was some
6 religion-based animus against homosexuality, the policy still
7 could have a rational basis in terms of a speculative rational
8 basis that might be sufficient to uphold the statute in terms
9 of the nature in which the policy arguably serves military
10 discipline in order to prevent sexual tension and all of the
11 things you hear from the Defense side.

12 **MR. WOODS:** Well, we've seen a moving target about
13 what the basis for the policy is, your Honor. We --

14 **THE COURT:** Well, it doesn't have to be static. My
15 point is that fortunately or unfortunately, depending on how
16 you look at it from the standpoint of constitutional, law you
17 have to negative all conceivable rational bases regardless of
18 the original intention.

19 **MR. WOODS:** I may not disagree with that statement,
20 your Honor, and that's why we need this discovery.

21 For example, we believe that the discovery will show
22 that the government had in its possession reports that --
23 studies and reports on this issue that indicated there would be
24 no negative or adverse impact on the military if gays were
25 allowed to serve openly, but that those studies and reports

1 were concealed from Congress. We believe that the evidence
2 will show that some of the decision makers involved in the
3 enactment of this policy were biased and prejudiced against
4 homosexuals and that the stated policy of the purpose of the
5 statute was just camouflage for the animus towards homosexuals.
6 We believe, your Honor, that the stated purposes of the policy
7 in this statute are just the latest buzzwords used to
8 camouflage animus against homosexuals that have changed over
9 time.

10 **THE COURT:** Much of what you just said seems to go to
11 the wisdom of the policy, rather than its constitutionality.

12 **MR. WOODS:** Well, no, your Honor. Obviously we're
13 not here to debate the wisdom of the policy. But, as you
14 pointed out, it may be our burden to negative every possible
15 rational basis for the policy and that's what I was trying to
16 suggest that we were going to be able to do.

17 **THE COURT:** All right, let me ask you about a few
18 procedurals, and that is you argue that because you didn't
19 receive a formal timely response to your Rule 34 request that
20 the Defendants have waived all of their potential objections.
21 But you did receive before the expiration of the deadline for a
22 Rule 34 response a motion by the Defendants seeking an order
23 permitting them to take an interlocutory appeal and in that
24 motion they argued objections to the outstanding discovery
25 requests. So why wouldn't it just be elevating form over

1 substance for the Court to discern a waiver when had the
2 Defendants just lifted their opposition out of their motion and
3 re-titled it in a separate document Rule 34 response you
4 wouldn't have that waiver argument?

5 **MR. WOODS:** Your Honor, I don't happen to have the
6 Government's Motion for Interlocutory Appeal handy, but the
7 motion only generally addressed the fact that the Government
8 objected to our discovery requests. It didn't address them
9 category by category. It didn't specify each of the objections
10 that we now find in the late objections to our requests for
11 production of documents.

12 **THE COURT:** It specified some, but not others.

13 **MR. WOODS:** And --

14 **THE COURT:** Do you think the Burlington case has any
15 application here with regard to waiver or non-waiver?

16 **MR. WOODS:** No, your Honor, we don't, for the reasons
17 we indicated in our papers. The Burlington case is largely
18 about a privilege log, not about timely or untimely objections
19 to a request for production of documents. And I think you saw
20 from the transcript we provided you what Judge Phillips thought
21 about the Government's argument about the Burlington case.

22 **THE COURT:** Yes, she didn't appear to think much of
23 it.

24 If Burlington does apply, not just when there's a
25 late submitted privilege log but also when there's a late

1 submitted Rule 34 response or perhaps when there was arguably a
2 timely submitted response in the wrong form, then the Court
3 would have to examine the Burlington factors, including the
4 magnitude of the production sought, the particular
5 circumstances of the litigation with respect to whether
6 discovery is unusually easy or unusually hard. If the Court
7 were to apply those factors, wouldn't those factors weigh in
8 favor of not finding a waiver, particular because of how you
9 construe some of your requests as being so broad as to
10 encompass documents from outside the Department of Defense?

11 **MR. WOODS:** Well, first of all, your Honor, in the
12 Burlington case, if I'm not mistaken, the Court did find a
13 waiver to have occurred. But, second, the Government in this
14 case --

15 **THE COURT:** That's true, but the facts were a little
16 different there.

17 **MR. WOODS:** Right. In this case, your Honor, the
18 United States of America has yet to articulate why its response
19 to the document requests was not timely filed -- served.
20 There's never been any explanation of that, even in the motion
21 papers before you now. So I don't know how, you know, the
22 Government can ask you --

23 **THE COURT:** What difference does subjective intent
24 make on that issue?

25 **MR. WOODS:** Well, it --

1 **THE COURT:** Whether they thought they had adequately
2 responded through their motion or whether they mis-calendared
3 the date, or whatever, what difference does it make?

4 **MR. WOODS:** Well, I think it is relevant to
5 understand what would be reasonable, which seems to be what the
6 Burlington case examined.

7 There's also, your Honor, no attempt in the
8 Government's papers after it cites and tries to rely on the
9 Burlington case to explain to you how this holistic analysis
10 ought to be resolved in its favor. We have, in this case --

11 **THE COURT:** Which is why I asked you about the
12 factors in Burlington.

13 **MR. WOODS:** Okay. So our discovery -- our document
14 requests in this case are far less than what was going on in
15 the Burlington case. We had, I believe, 79 requests for
16 production of documents. You know, despite the fact that we
17 contend the Government's objections were waived by the untimely
18 response, we did meet and confer with the Government and we did
19 agree to narrow many of the requests and many of the requests
20 have now been resolved, so that we're left with a motion to
21 compel further responses to 17 out of the original 79
22 categories.

23 We don't think that the documents that have been
24 withheld are anything like the magnitude in the Burlington
25 case. In fact, your Honor, in the declaration that was

1 submitted with the Government's supplemental papers in
2 connection with this motion the documents that have not been
3 withheld have been apparently Bates stamped and identified. We
4 haven't seen them. We don't know what they are.

5 **THE COURT:** Aren't they talking there only about the
6 documents withheld under claim of deliberative process
7 privilege?

8 **MR. WOODS:** I think that's right, but I believe,
9 your Honor, the Government's position is that is all that has
10 been withheld in those categories, that would be the first two
11 categories of the motion, so that the Burlington factors
12 wouldn't support the Government's position as to the
13 deliberative process documents.

14 Similarly, we have the last three requests in
15 Category Four are just about some of the internal documents
16 that the Government has identified, to itself at least, already
17 as privileged that it is now withholding. Again I don't think
18 that there is anything like the kind of Burlington problem
19 here.

20 **THE COURT:** When you say Category Four, you're
21 talking about Requests Number 38, 39, and 40?

22 **MR. WOODS:** Correct. In other words, the Government
23 knows what it has in those categories.

24 **THE COURT:** I'm not sure at all, given your
25 interpretation of the scope of, for example, Request 39, which

1 would seek essentially all documents prepared by any attorney
2 for any employee of the Department of Defense or the Department
3 of Justice concerning homosexual conduct or orientation. I
4 suspect that read literally that would encompass a tremendous
5 volume of probably attorney-client privileged and work product
6 privileged documents.

7 **(Pause)**

8 **MR. WOODS:** That would be the biggest of those three,
9 your Honor, agreed.

10 **THE COURT:** Let me -- we'll come back to some of the
11 document requests. I want to ask you about some more
12 procedural matters in connection with the ex parte application.

13 It appears that, as to the ex parte application
14 concerning the deposition, you knew after you didn't get a
15 response by February 17 that the Government was not going to
16 follow your proposal with regard to a briefing schedule and
17 then you waited until March 5 to file your ex parte
18 application. Similarly, with respect to the request for
19 admissions, you didn't get any response by your February 17th
20 deadline and so you waited another almost three weeks to file
21 your ex parte application. Why the delays?

22 **MR. WOODS:** Well, I think, your Honor, the fact of
23 the matter is that it takes some time to prepare such motions,
24 but at the same time I think we were all acting under the now
25 mistaken impression that both the trial date and the discovery

1 cutoff date were going to be continued. We had, as you know, a
2 status conference before Judge Phillips on February 18 and at
3 that status conference she said:

4 "What I'm inclined to do is probably to continue the
5 trial date for a short period of time and continue
6 the discovery cutoff date; because I foresee that
7 what's probably really necessary here is more time to
8 resolve the issues that I have identified about
9 discovery, but not necessarily to issue a stay at
10 this time. So I will issue a written Order."

11 And then we received the Court's written Order on
12 March 4th, in which we were advised that the Court was not
13 continuing the trial and not continuing the discovery cutoff
14 date. So I appreciate that we perhaps could have moved a
15 little faster, but that's what was going on in the case.

16 And in that regard, your Honor, I want to be clear
17 with you that these are the only discovery motions that will be
18 brought. We are not contemplating any other discovery motions.
19 We have no other discovery disputes to bring to you. It is
20 also the case that these --

21 **THE COURT:** Let me interrupt you for a second,
22 because I'm not sure that's necessarily accurate.

23 For example, what if the Court were to grant all or
24 part of the ex parte application concerning the deposition and
25 then the Government were to show up at the deposition with a

1 wholly unprepared Rule 30(b)(6) witness? Would you do nothing
2 in response to that situation or would you come back into court
3 with a motion or an application seeking a discovery order?

4 **MR. WOODS:** I suppose I can't predict exactly the
5 future, your Honor, but I can tell you that we are not planning
6 to come back to you with any discovery motions or issues on the
7 other discovery issues that we have with opposing counsel in
8 this case. In other words, there are other discovery requests
9 and responses to discovery requests --

10 **THE COURT:** So apart from the Rule 30(b)(6)
11 deposition and request for admissions, you know, the document
12 requests, there aren't any other outstanding discovery disputes
13 in the pipeline that you're going to bring to the Court, that's
14 what you're saying?

15 **MR. WOODS:** Yes, your Honor.

16 **THE COURT:** All right.

17 **MR. WOODS:** And I would also tell your Honor that I
18 do not believe that these disputes before you today and their
19 resolution will in any way delay the progress of the case
20 towards its currently scheduled June 14th trial date.

21 I will also tell you that I believe that we, not only
22 are entitled to the discovery that we're asking for in the
23 motion and in the ex partes, but that it will be important for
24 us to have that discovery in order to respond to an anticipated
25 motion for summary judgment by the Government which we expect

1 to be filed March 29th and we would expect to have to file our
2 opposition to it by April 5th.

3 In this regard, your Honor, we have not been dilatory
4 throughout this case and have pursued discovery reasonably and
5 in good faith. I mean --

6 **THE COURT:** On the surface of it that's a difficult
7 proposition to accept, given the fact that the case was filed
8 in 2004.

9 **MR. WOODS:** Your Honor, we --

10 **THE COURT:** And we're here on the last day of the
11 discovery period.

12 **MR. WOODS:** Well, your Honor, I'm sorry that it
13 appears that way, but that is not the case.

14 **THE COURT:** I understand that there were some delays
15 outside of your control.

16 **MR. WOODS:** Your Honor, we didn't have a ruling on a
17 Motion to Dismiss in this case until January 2009. Okay, that
18 is the first thing. But a little --

19 **THE COURT:** January 2009?

20 **MR. WOODS:** Yes, your Honor. The case was before
21 Judge Schiavelli, who took over a year to decide the first
22 Motion to Dismiss and, frankly, never decided the second Motion
23 to Dismiss before he resigned from the bench, after sitting on
24 it for approximately another year.

25 **THE COURT:** I understand that there's been --

1 **MR. WOODS:** Okay, so --

2 **THE COURT:** -- a tremendous amount of delay.

3 **MR. WOODS:** -- those delays were beyond our control,
4 your Honor, and I don't want us to be painted with the brush of
5 dilatory behavior, because we have not been dilatory.

6 **THE COURT:** But yet between January 2009 and now is
7 more than a year.

8 **MR. WOODS:** And we sent the discovery -- the requests
9 for production of documents, your Honor, some months ago.

10 Anyway, but --

11 **THE COURT:** In September.

12 **MR. WOODS:** Yes. But on the subject, your Honor, of
13 our conduct of discovery, let us be clear, I mean we did meet
14 and confer with the Government about its objections, even
15 though we contended they were untimely. We gave the
16 Government --

17 **THE COURT:** In February?

18 **MR. WOODS:** Pardon?

19 **THE COURT:** In February of 2010?

20 **MR. WOODS:** Yes. We gave -- after we gave the
21 Government an extension of time to respond to other discovery
22 requests. We have given the Government extensions of time to
23 submit its portion of the joint stipulation on the Motion to
24 Compel and additional time to respond to -- to submit its
25 supplemental statement. We just gave the Government an

1 additional 30 days to conduct the depositions of three experts
2 after the discovery cutoff, even though two of the depositions
3 were not taken because of the Government's problems, not ours.
4 We also stipulated to a protective order by the request of the
5 Government that has delayed the production of documents to us,
6 which maybe are arriving today. We have throughout this case,
7 your Honor, behaved reasonably and in good faith and have not
8 at all been dilatory.

9 **THE COURT:** I'm a little unclear on the scope of some
10 of the document requests in terms of whether you're seeking
11 documents from the Department of Defense, beyond the Department
12 of Defense to the whole of the Federal Government, to just the
13 Executive Branch of the Federal Government. Can you clarify
14 that? I see in your supplemental memorandum that you at one
15 time maybe agreed to limit the scope of the requested documents
16 to those housed at the Pentagon. And other times it appears as
17 if you're arguing for an order that would relate to -- that
18 would be directed to the Executive Branch in whole and at other
19 times you're talking about getting documents from Congressional
20 staffers. So what are you seeking?

21 **MR. WOODS:** Well, at a minimum, your Honor, we are
22 entitled to documents from the Defense Department, and it's not
23 just documents that the Defense Department has itself created.
24 I think you saw in the Defendants' objections to some of our
25 discovery requests that -- I think these were the requests for

1 admissions -- where the Government was contending that it
2 didn't have to respond to our requests for admissions because
3 the Defense Department itself hadn't done a study of a certain
4 issue. That doesn't mean that the Government doesn't have --
5 the Defense Department doesn't have possession of such studies.
6 In fact, in some of those situations we believe that the
7 Defense Department commissioned a study by someone else on that
8 exact issue where the Government is now claiming it did not
9 itself conduct the study.

10 **THE COURT:** My question is just this: Ordinarily a
11 party would be entitled to documents within the possession,
12 custody, or control of the responding party. Here are you
13 arguing that you're entitled to the documents that are
14 responsive that are in the possession, custody, or control of
15 the Department of Defense, regardless of whether the Department
16 of Defense generated those documents or not? Or are you asking
17 for something broader, you're asking for documents within the
18 possession, custody, or control of the Federal Government of
19 the United States, regardless of the branch, regardless of the
20 agency? Or is it something between those two? Or is it for
21 documents housed at the Pentagon?

22 **MR. WOODS:** Well, as you saw, your Honor, from the
23 supplemental brief that you read, that we were at one point
24 happy to have documents at the Pentagon which we understood to
25 be documents in the possession, custody, or control of the

1 Department of Defense.

2 **THE COURT:** Oh, so it's not just documents that
3 happen to be in that building?

4 **MR. WOODS:** I believe that is correct, your Honor.

5 **THE COURT:** Okay. You said at one time, are you no
6 longer willing to restrict your requests to --

7 **MR. WOODS:** Well --

8 **THE COURT:** -- to that focus?

9 **MR. WOODS:** -- I think it would be reasonable to do
10 that, your Honor. The problem we have is that even after we,
11 you know, made that agreement in November of last year the
12 Government didn't produce all of the documents. In other
13 words, that was something that we agreed to in a meet and
14 confer in November of last year and we still don't have all the
15 documents.

16 So rather than, your Honor, looking at us as possibly
17 being dilatory, I think the shoe is on the other foot. It is
18 the Government in this case that has dragged its feet and
19 objected to every one of our discovery requests. Which is why
20 we are here today, both because the Government has refused to
21 produce the documents that we expected it would have produced
22 by now, it refused to produce any witness for a 30(b)(6)
23 deposition notice that was properly noticed, and again no
24 motion for a protective order, no objections prior to the date
25 of the deposition, and nobody showed up at the deposition.

1 **THE COURT:** Was it a surprise to you that no witness
2 showed up at the --

3 **MR. WOODS:** No.

4 **THE COURT:** -- deposition?

5 **MR. WOODS:** No.

6 **THE COURT:** You knew that they weren't going to show
7 up.

8 **MR. WOODS:** Right. But at the same time, your Honor,
9 there was prior to --

10 **THE COURT:** And when did you learn that they weren't
11 going to show up?

12 **MR. WOODS:** When we contacted the Defendants' counsel
13 to confirm that we were on for that particular date for that
14 deposition.

15 **THE COURT:** And that happened a few days before --

16 **MR. WOODS:** Yes.

17 **THE COURT:** -- January 25? Do you remember what
18 date?

19 **MR. WOODS:** I do not offhand remember, your Honor,
20 but before we got on the airplane to go to Washington, D.C. for
21 the deposition we contacted opposing counsel.

22 **THE COURT:** And they said deposition, what
23 deposition, we never got the notice? Is that what they said?

24 **MR. WOODS:** At some point they said that they had not
25 received the notice, even though it was mailed to the correct

1 address.

2 **THE COURT:** Okay.

3 **MR. WOODS:** I don't remember the exact sequence of
4 events.

5 **THE COURT:** So after the deposition didn't happen on
6 the 25th you had a meet and confer on the 29th? No, I'm sorry.

7 **MR. WOODS:** Yes. Yes.

8 **THE COURT:** They filed their objections on the 29th,
9 you had a meet and confer February 9th.

10 **MR. WOODS:** Right.

11 **THE COURT:** And did you argue at that time to them
12 that they've waived everything and they just need to show up
13 and there was nothing to meet and confer about?

14 **MR. WOODS:** No, we were -- no, we were trying to be
15 reasonable about this, your Honor, and trying to get the
16 deposition taken care of. So we met and conferred with them on
17 the 9th of February. We actually withdrew one of the
18 categories in the 30(b)(6) notice. We sent them a letter on
19 February 11th, we asked for a response, and, you know, we ended
20 up in the same position at the status conference with
21 Judge Phillips.

22 **THE COURT:** Let me ask you something about your
23 deposition notice. Excuse me just a moment.

24 **(Pause)**

25 Your deposition notice at Page 2, Line 14, says,

1 "This notice names a government agency as the deponent." What
2 is the government agency it names, the Department of Defense,
3 was that your intent?

4 **MR. WOODS:** Yes, your Honor.

5 **THE COURT:** All right, so you're asking for a
6 Rule 30(b)(6) deposition of the Department of Defense?

7 **MR. WOODS:** Yes, the person most qualified at the
8 Department of Defense to testify on these subjects. It may be
9 one or more than one person. That's the Defendants' choice.

10 **THE COURT:** And your notice mentions Robert Gates,
11 but he is just named in his official capacity, so you're not
12 asking for a deposition of Robert M. Gates as an individual?

13 **MR. WOODS:** That is correct.

14 **THE COURT:** Let me ask you about a few of the items
15 in the notice. Some of the items in the notice, frankly,
16 appear to focus on legal opinions or legal argument. Item
17 Number 5 for example, the effect or lack of effect of
18 Lawrence v. Texas on the policy, the application of the policy,
19 or the legality of the policy, that sounds like the deposition
20 would involve a legal argument between you and the deponent on
21 the effect of Lawrence on the legality of the policy.

22 **MR. WOODS:** You're correct and that is the category
23 of the notice that we withdrew in the meet and confer process,
24 your honor.

25 **THE COURT:** All right. I must have missed that in

1 the briefing. What about Item 8, Defendant's contention that
2 the policy is rationally related to a legitimate purpose?

3 **MR. WOODS:** Yes.

4 **THE COURT:** That sounds like the legal issue in this
5 case.

6 **MR. WOODS:** Well, I think the category is there so
7 that we can examine the person most qualified at the Defense
8 Department about the facts supporting the Defendant's
9 contention in this regard.

10 **THE COURT:** But a Rule 30(b)(6) deposition notice is
11 supposed to describe with reasonable particularity the matters
12 for examination. Ordinarily it's not proper to say in a Rule
13 30(b)(6) deposition, put forward a witness who knows the most
14 about your defense in this case. Is this any different from
15 that?

16 **MR. WOODS:** Well, I think it is, your honor. I think
17 by asking what is rationally related to a legitimate purpose,
18 we're asking the Government to tell us what the alleged
19 legitimate purpose is.

20 **THE COURT:** Let me ask you about a few others, as to
21 what you meant. Numbers 9 and 10, I'm not clear on what you
22 mean by those --

23 **MR. WOODS:** Yes.

24 **THE COURT:** -- items.

25 **MR. WOODS:** Nine and ten, your honor, go to one of

1 the issues in the case that I can describe as follows. Despite
2 the fact that the Government bars openly gay and lesbian
3 members of the Armed Forces from serving, if the Government
4 believes that someone who is in the process of being deployed
5 abroad to fight in a war is gay or lesbian, the Government will
6 not stop the deployment. The Government will allow the person
7 -- or in fact require the person to go to Iraq or Afghanistan,
8 even though the Government would otherwise be investigating the
9 individual.

10 **THE COURT:** That relates to Number 10. Number 9
11 looks a little broader than that; deployment of anyone who is
12 suspected rather than deployment of anyone who is in the
13 process of discharge proceedings or under investigation.

14 **MR. WOODS:** Yeah, it is admittedly a little broader
15 and what we're trying to find out in that one, your honor, are
16 what are the policies or procedures or handbooks or rules about
17 such deployments? In other words, we understand, your honor,
18 that there is a written policy that says, for the United States
19 Army at least, that people may be deployed even though they are
20 suspected of being gay or lesbian. Even though --

21 **THE COURT:** Suspected by whom?

22 **MR. WOODS:** Even though there's been a report that
23 the person is a gay or lesbian individual --

24 **THE COURT:** So suspected by anyone?

25 **MR. WOODS:** I -- again, I don't have that particular

1 Government regulation --

2 **THE COURT:** Oh, I'm sorry.

3 **MR. WOODS:** -- here, but there's a Government
4 regulation about this.

5 **THE COURT:** My question now that I'm asking about
6 Number 9, not about the --

7 **MR. WOODS:** Okay.

8 **THE COURT:** -- Government regulation you mentioned.

9 **MR. WOODS:** Well, what I'm trying to get -- what --

10 **THE COURT:** Suspected by whom?

11 **MR. WOODS:** Suspected by -- I presume by an officer.

12 **THE COURT:** It's your request, so that was your
13 intent to mean known or suspected by some --

14 **MR. WOODS:** Yes. In other words --

15 **THE COURT:** -- officer.

16 **MR. WOODS:** Yes. In other words, not just some other
17 fellow member of the Armed Forces who has a secret suspicion.
18 Clearly, that's not what we're asking for.

19 **THE COURT:** Would you look at Number 12, please?
20 Number 12 is an example of an item that it would appear to the
21 Court would be much more efficiently the subject of some
22 different kind of discovery than a Rule 30(b)(6) deposition.

23 **MR. WOODS:** As to that one, your honor, we did have a
24 request for admission -- or several requests for admissions to
25 be more precise, that asked for similar information. And we

1 have received responses to those requests for admissions. So I
2 -- so if -- so this one is, I believe, less critical than some
3 of the others. The numbers are hard to determine, your honor,
4 and we want this request because in response to some of the
5 requests for admissions we did not get clear answers. For
6 example, in request for Admission 48, we asked the Government
7 to admit that between 1994 and 2003 service women accounted for
8 27 percent of all separations pursuant to don't ask, don't
9 tell. The response was, "Defendants are unable to admit or
10 deny this request." So we did receive a lot of information in
11 response to requests for admission on this subject, but it
12 wasn't perfect. So having said that, 12 is less critical than
13 some of the others, your honor.

14 **THE COURT:** Let me ask you about Number 15, because
15 the Court doesn't see that one as critical. Polls conducted by
16 or on behalf of Defendants measuring public opinion regarding
17 service by gay or lesbian individuals et cetera. There's not a
18 very close correlation between the popularity of a law and its
19 constitutionality, so I'm not sure what difference that makes?

20 **MR. WOODS:** It makes a difference, your honor, only
21 because in the Congressional Hearings lead to the enactment of
22 the statute polls were utilized as a factor supporting the
23 policies --

24 **THE COURT:** No question, but Congress is not trying
25 to determine the constitutionality of its enactments; it's

1 trying to determine the wisdom of it. And if your discovery
2 goes towards trying to refute the wisdom of it, I think the
3 discovery is misguided.

4 Let me ask you about Number 16, which in my mind is a
5 -- is somewhat similar. This one goes to studies concerning
6 the costs of recruiting additional personnel to replace service
7 members discharged pursuant to the policy costs expended
8 training service members discharged pursuant to the policy.
9 Again, I don't think there's much of a correlation between the
10 constitutionality of a policy and how much it costs to
11 implement, so I question whether this item is valid.

12 **MR. WOODS:** Again, your honor, I would only point out
13 that there are a variety of studies of the costs. The
14 differing studies come to different results as to the estimates
15 of the millions -- hundreds of millions of dollars of costs.
16 And whether it's ultimately admissible at trial or not, I'm not
17 sure, but I thought we were entitled to discover the facts upon
18 which we could evaluate that better.

19 **THE COURT:** What I'm trying to understand is, why is
20 the fact of the expensive nature of the policy fiscally for --

21 **MR. WOODS:** Again, your honor --

22 **THE COURT:** -- or fact of the unpopularity of the
23 policy --

24 **MR. WOODS:** Again -- again, let me try to explain --

25 **THE COURT:** -- material to the constitution analysis?

1 **MR. WOODS:** Again, it's part of what may be our
2 burden to negative any possible rational basis. Again, in the
3 testimony, particularly that of I believe General Powell, which
4 the Government relies to support the constitutionality of the
5 enactment of the statute, polls are the subject of discussion.
6 And so again, since we may have to negative every possible
7 alleged rational basis for the statute, we ought to be allowed
8 to at least conduct discovery on those subjects that did arise
9 during the Congressional testimony leading to the enactment of
10 the statute.

11 **THE COURT:** I won't belabor the point any further,
12 but it doesn't appear to the Court that as a rational basis the
13 Defendants are putting forward the suggestion the A, the policy
14 is popular or B, the policy doesn't cost very much. Those are
15 our rational bases for constitutionality of it.

16 **MR. WOODS:** No, it's not the popularity, your honor.
17 It is the -- I'm sorry if I didn't make this clear. The
18 Congressional testimony has to do with the fact that the
19 majority of Americans do not want to serve with openly gay
20 individuals. It's not that it's popular. The idea is that the
21 majority of Americans, according to the polls at that time
22 cited by Colin Powell and others in the Congressional hearings,
23 was that they did not wish to serve with openly gay
24 individuals. We believe the evidence will show that as of
25 today there is an entirely different outcome from those polls

1 and that the polls of both public opinion and even military
2 opinion have changed dramatically since 1993, such that both
3 the general public and the military itself is currently not
4 opposed on a majority basis to open gay service.

5 **THE COURT:** And if they're not opposed to open gay
6 service then where is the sexual tension, where is the lack of
7 good order -- the threat to good order and discipline? That's
8 your argument.

9 **MR. WOODS:** Yes, your honor.

10 **THE COURT:** Let me ask you about some of the requests
11 for admission, please. You make an interesting argument and
12 sometimes interesting is a euphemism for not very persuasive, I
13 guess, but you make an argument that certain terms in your
14 request for admissions were borrowed from President Obama's
15 speech, and therefore those terms can't be subject to objection
16 as being vague and ambiguous. That argument doesn't appear to
17 the Court to be very persuasive; if the terms are vague and
18 ambiguous, then they're vague and ambiguous, whether they come
19 out of the mouth of the President or somebody else. And --
20 anyway, let me stop there.

21 **MR. WOODS:** Well, let me address that. I think if
22 you look at requests for Admissions 3, 4, 5, and 10, there
23 isn't any ambiguous term, despite the Government's objections.

24 **THE COURT:** I'm not saying that all of their vague
25 and ambiguous terms are well taken, but --

1 **MR. WOODS:** Okay.

2 **THE COURT:** -- for example, let's see, you mention
3 10. Ten, I would think, does contain a vague or ambiguous
4 term, the term is "essential". I'm not sure what "essential"
5 means. Does it mean that, but for reversing the policy, our
6 national security is going to be so compromised that there will
7 be an invasion and takeover within the next year? What does
8 essential mean?

9 **MR. WOODS:** Well, our intent obviously, your honor,
10 was to use those terms in the same sense as the Commander in
11 Chief used them.

12 **THE COURT:** And --

13 **MR. WOODS:** We're not trying to redefine the terms.

14 **THE COURT:** And the Commander in Chief, like many
15 statesman and many other people, use terms in speeches that are
16 general, vague, ambiguous. Then you're left with an
17 objectionable request for admission.

18 **MR. WOODS:** Well, I -- the words to which the
19 Government objects as vague and ambiguous, your honor, are
20 contribute. I don't see how that can be --

21 **THE COURT:** Well, right now I'm on essential.

22 **MR. WOODS:** Okay.

23 **THE COURT:** Let me go to another one that seems to me
24 to be glaringly vague and ambiguous. Thirteen and fourteen and
25 fifteen use "cannot afford" -- the United States cannot afford

1 this, it cannot afford that. The United States, what does that
2 mean? Does that mean that we'll go into more debt than we are
3 already in?

4 **MR. WOODS:** I -- there's -- you've correctly seized
5 on 13, 14, and 15, which are less clear than 3, 4, 5 and 10.
6 Three, for example --

7 **THE COURT:** I seized on 10; we just have a
8 disagreement on the word essential, I guess. What do you mean
9 by essential?

10 **MR. WOODS:** Well --

11 **THE COURT:** Or perhaps I should ask you what you
12 believe President Obama meant when he used the word essential?

13 **MR. WOODS:** I don't believe he intended the word to
14 be used in anything other than its normal, dictionary
15 definition sense.

16 **THE COURT:** Which would probably mean that Request
17 Number 10 is asking, admit that reversing the policy is
18 necessary, in the sense that without it we would have no
19 national security.

20 **MR. WOODS:** I think that's right. I think that's
21 exactly what he said. And under the circumstances of -- that
22 we're in today, I think that's right.

23 **THE COURT:** So without reversing the policy, we will
24 have no national security? It is a necessary and essential
25 prerequisite to our future national security.

1 **MR. WOODS:** That's right, because we are short-
2 handed, we are arming felons with guns as -- in the military
3 and we are eliminating hundreds of patriotic, gay Americans who
4 are willing to serve and are serving.

5 **THE COURT:** A couple more things I wanted to ask you.
6 And I'm skipping around in my prepared questions, but you
7 haven't gotten the privilege log listing documents withheld
8 under claim of attorney/client or work product privilege; is
9 that correct?

10 **MR. WOODS:** I think we do, your honor.

11 **THE COURT:** Oh, you do have one? Is that in the
12 papers?

13 **MR. WOODS:** I don't believe so.

14 **THE COURT:** All right. When did you get it?

15 **MR. WOODS:** I don't recall. It was only, if I
16 remember this correctly, only about the attorney/client
17 privileged materials. Well, I'm sorry, there was a category of
18 documents the Government contended were withheld on the grounds
19 of privacy and following a receipt of that privilege log, we
20 stipulated with the Government that the Government could redact
21 certain identifying information from those documents. The
22 Government agreed to produce those documents and my
23 understanding is those were sent to us on Friday.

24 **THE COURT:** Okay. So that was a privacy log, not an
25 attorney/client privilege?

1 **MR. WOODS:** That was part of the log. And then, if
2 I'm not mistaken, there was also another part of the log that
3 identified some attorney/client material too.

4 **MR. FREEBORNE:** Your honor, if I may, can I be heard
5 on this?

6 **THE COURT:** When you argue you can tell me.

7 **MR. FREEBORNE:** Okay.

8 **THE COURT:** Thank you. Well, what I'm trying to
9 understand is it sounded like in your papers with respect to
10 the documents motion, you, the Plaintiff, were arguing that
11 failure to provide a privilege log was something that the Court
12 ought to consider.

13 **MR. WOODS:** Well, that was the case with respect to
14 the documents that were allegedly withheld on this deliberative
15 process privilege.

16 **THE COURT:** But not the attorney/client --

17 **MR. WOODS:** Right. We have not received any listing
18 or log of the documents withheld under the deliberative process
19 privilege.

20 **THE COURT:** All right. All right, there's one other
21 thing I wanted to mention to you, and it's a small point, but I
22 thought it was such that I wanted to tell you about it, even
23 though it probably doesn't matter much. In the joint
24 stipulation, with regard to the documents motion, I had some
25 trouble following your discussion of the Hopkins case on Page

1 22 and 23. And I didn't have a problem following the gist of
2 the discussion, but when I read the *Hopkins* case, I noticed
3 that quotations you attribute to the *Hopkins* case at Page 22,
4 Lines 5 to 8, Page 22, Lines 21 to 22, and Page 23, Line 14,
5 don't appear in the *Hopkins* case. So I think something got
6 messed up, either you were pulling quotes from a different
7 case, but citing *Hopkins* for those quotes, or there was
8 misquoting. Like I said, it's not material, but for what it's
9 worth I wanted to call it to your attention.

10 **MR. WOODS:** Well, I appreciate that, your honor, and
11 I do apologize for any inconvenience.

12 **THE COURT:** I've been asking questions and not
13 allowing you to speak too much in argument. Is there anything
14 you'd like to talk about that we haven't covered in the
15 questioning before I hear from Mr. Freeborne?

16 **MR. WOODS:** Just a few things, your honor. With
17 respect to the motion to compel the production of documents,
18 one development that has occurred with the Government's filing
19 of its supplemental memorandum and the declaration that
20 accompanied it was an identification of the documents currently
21 being withheld under the deliberative process privilege. As
22 you recall, one of our concerns was whether the Government was
23 interpreting the scope or breadth of that privilege too broadly
24 to include documents that were not reflective of a deliberative
25 process, but were merely reflecting facts and such. So a

1 possible suggestion would be for the Court to review the
2 documents identified by the Government in-camera to allow the
3 Court to determine whether those documents are or are not
4 covered by the deliberative process privilege.

5 Again, your honor, I do not believe that the
6 Government has adequately addressed the waiver issue, in that
7 we continue to believe that the Government waived all of its
8 objections to all of the document requests and that the
9 objections should not be considered. Although I, again, would
10 urge the Court to consider this in-camera review of the
11 documents.

12 With respect to the deposition, the 30(b)(6)
13 deposition, I believe, your honor, that while we've talked
14 about some of the categories, we ought to be entitled to depose
15 the person most qualified at the Department of Defense on at
16 least some of these categories so that we can understand what
17 the Defense is saying on these issues. In the Government's --

18 **THE COURT:** Let me --

19 **MR. WOODS:** -- supplemental --

20 **THE COURT:** -- interrupt you for a second, because if
21 the purpose is to understand the Government's legal arguments,
22 I'm not sure whether the Rule 30(b)(6) deposition procedure
23 would be appropriate. If it's to ascertain specific facts
24 within the possession, custody or control of the Department of
25 Defense, then the deposition procedure might be appropriate if

1 -- or would be appropriate if A, the facts are material with
2 the legal issues in the case and relevant to the subject
3 matter, and B, if they're the type of facts that are not more
4 properly obtained or obtainable through other forms of
5 discovery.

6 **MR. WOODS:** Well, we're -- I certainly have better
7 things to do than go to Washington D.C. to argue with some
8 witness at a deposition. We do not intend to get into the
9 arguments. We only intend to find out the facts. And, you
10 know, when you -- when the Government argues in its opposition
11 to this particular motion that it's -- would be easier for the
12 Plaintiff to get this information from other discovery means, I
13 think the three motions before you tell us -- tell you and tell
14 us how difficult it has been to get information from the
15 Government, how difficult it has been to get documents from the
16 Government and how difficult it has been to get adequate
17 responses to Request for Admissions.

18 So the Government is simply, in all of its responses
19 to all of our discovery requests, trying to prevent us from
20 getting the information that we want. So if I'm allowed to
21 take a deposition of a person most qualified at the Department
22 of Defense, I think I'm entitled, your Honor, to ask questions
23 about what studies have been done, what reports have been done
24 on some of the issues involved in this case and to find out
25 just the facts about these things.

1 You know, for example, the Government objects to, you
2 know, one category of the requests and the one category of the
3 deposition notice about how the policy has had a
4 disproportionate impact on women and that is a part of our
5 case. It's not rational for the Government to have enacted
6 this policy in the first place, vis a vis women, because all of
7 the stated reasons are really about men not women.

8 **THE COURT:** They argue that you haven't identified
9 any female members of your association and that should limit
10 discovery to the male related issues.

11 **MR. WOODS:** They have -- there's no requirement in
12 this case that we do that, your Honor. No ruling has ever made
13 on standing in this case that requires us to specify a female
14 member of our group. Our group has female members, in fact it
15 has thousands of female members as the national chairman
16 testified at his deposition on Saturday. But the real issue
17 here is the disproportionate impact on women that this policy
18 has because it evidences the fact that the stated purpose of
19 the policy is untrue and nothing more than camouflage for
20 animus against homosexuals.

21 And with respect to the Request for Admissions, your
22 Honor, you may be right that say 13, 14 and 15 are vague but I
23 don't think 3, 4, 5 and 10 are. And we should be entitled to
24 those. And we ought to be able to get a better response to 81
25 through 104, which simply asks the Government to admit that

1 certain countries permit openly gay individuals to enlist and
2 service in their armed forces. And the Government is trying to
3 answer these requests by saying -- or evade answering them by
4 saying they don't know what they mean or that they haven't
5 conducted an independent study. But your Honor, I have to
6 believe that the United States of America knows whether the
7 United Kingdom permits openly gay people to serve. And what we
8 would like to have are these requests for admissions answered
9 to greatly simplify our presentation at trial.

10 **THE COURT:** Because you can't easily prove it
11 otherwise?

12 **MR. WOODS:** Well it will be much easier to simply
13 have it admitted than to bring in foreign law or experts on the
14 subject.

15 **THE COURT:** You reminded me. I wanted to ask you a
16 question about the Request for Admission 106. It seems to me
17 it may be one thing to ask the Government to admit that other
18 countries have the policy of permitting service -- military
19 service by openly gay and lesbian service members and it's
20 quite another to ask this series of questions that begins with
21 106. Admit that, fill in the blank of the name of the country,
22 this one's Australia, abandoned its prohibition of military
23 service by openly gay and lesbian service members without any
24 documented adverse impact on unit cohesion.

25 I'm not sure what a documented adverse impact would

1 be. Would it be anything more than somebody making a written
2 complaint and would it be something that the United States
3 Department of Defense would know?

4 **MR. WOODS:** Well, your Honor, there are studies and
5 reports of the experience of these other countries. We have
6 been able to locate some of them but the United States Defense
7 Department is in a much better position than we are to know
8 what reports and studies exist and what reports and studies do
9 not exist. In this regard, your Honor, the Government is again
10 simply trying to evade its obligations when the Chairman of the
11 Joint Chiefs of Staff discussed this very issue at a Senate
12 Hearing on February 2nd and said he had talked to the military
13 leaders of some of these other countries.

14 **THE COURT:** Well I understand and hear your using the
15 words not of President Obama but another government individual.

16 **MR. WOODS:** Well actually we're not. These were sent
17 out before the statements by Admiral Mullen.

18 **THE COURT:** Oh, you're not? I'm sorry, I
19 misunderstood.

20 **MR. WOODS:** Yeah.

21 **THE COURT:** So documented adverse impact are your
22 words?

23 **MR. WOODS:** Yes.

24 **THE COURT:** All right.

25 **MR. WOODS:** But the -- what I was try --

1 **THE COURT:** But what do they mean?

2 **MR. WOODS:** I mean documented in a report or a study.

3 **THE COURT:** Not in a complaint communication?

4 **MR. WOODS:** Right.

5 **THE COURT:** Report or study by whom? An official
6 report or study commissioned --

7 **MR. WOODS:** By --

8 **THE COURT:** -- by the government of that particular
9 country?

10 **MR. WOODS:** Yes.

11 **THE COURT:** All right. Anything further?

12 **MR. WOODS:** No, your Honor. Thank you.

13 **THE COURT:** Thank you. Mr. Freeborne.

14 Let me begin by asking you about the opposition that
15 you have to much of the discovery. Of course Judge Phillips
16 ruled, on July 24 that Plaintiff is entitled to conduct
17 discovery in this case to develop the basis for its facial
18 challenge. But in opposing these motions or this motion and
19 these applications you appear, sometimes, to be arguing or to
20 come close to arguing to me that which you argued
21 unsuccessfully to Judge Phillips, namely that because this is a
22 facial challenge discovery is not appropriate, that no
23 discovery is relevant.

24 Am I exaggerating the argument that you're making?

25 **MR. FREEBORNE:** No, your Honor. And we acknowledge

1 your -- we acknowledge that Judge Phillips has ruled that
2 discovery is appropriate. At the last Status Conference though
3 she was very clear that she has not made any ruling as to the
4 appropriate scope of discovery.

5 **THE COURT:** Okay, so what subjects do you believe,
6 under Judge Phillips' order permitting discovery, would be
7 proper subjects for examination by a Request for Admission of
8 documents or depositions? And let me give you some
9 possibilities. Are they entitled to have discovery concerning
10 the truth or pretextual nature of the stated basis for the
11 policy? Are they entitled to have discovery into the
12 experience that the U.S. military has had since the policy has
13 been implemented? To what are they entitled?

14 **MR. FREEBORNE:** Well, your Honor, as a threshold
15 matter we don't believe that they're entitled to any discovery.
16 But again, we acknowledge --

17 **THE COURT:** Right. My question was under Judge
18 Phillips' order --

19 **MR. FREEBORNE:** Well, it's difficult to say. I mean
20 we're -- you know, again we -- this is a facial challenge
21 governed by rational basis. All of the case law tells us in
22 both of those contexts that Courts are not to second guess the
23 judgment of the military and the political branches. And so --
24 but we -- again, we acknowledge -- we don't believe any
25 discovery into the motivations of Congress in 1993 or the

1 Executive in implementing or promulgating implementing
2 regulations is appropriate for all of the reasons that we set
3 forth in our brief and all the Supreme Court and Ninth Circuit
4 authority acknowledges.

5 With respect to the experience of foreign militaries
6 which I believe your Honor just referred to, that may be
7 appropriate in an as applied challenge, but Log Cabin has made
8 a litigation decision --

9 **THE COURT:** My question is under the order of Judge
10 Phillips and certainly I can't reach a contrary conclusion to
11 the conclusion that she reached in July, at least I can't do it
12 properly, so under that ruling the Plaintiff is entitled to
13 take discovery to develop the basis for its facial challenge.
14 Discovery of what subjects are appropriate? And I suggested a
15 couple general subjects. I understand your threshold position
16 is Judge Phillips was wrong, no discovery should have been
17 permitted but we are where we are. My question is what
18 discovery is appropriate under the order?

19 **MR. FREEBORNE:** Well your Honor, perhaps it's best
20 addressed in this -- we have produced documents. We've worked
21 with Plaintiff to initially produce studies and statistical
22 information after our November Meet-and-Confer. We produced a
23 privilege log and response to that. We've also been working
24 with Plaintiff, recognizing that much of the material that
25 they've requested has interspersed within it a Privacy Act

1 protected information, we've worked with --

2 **THE COURT:** Okay, I'm interested in knowing where you
3 drew the lines in making --

4 **MR. FREEBORNE:** Where we drew the line --

5 **THE COURT:** -- your decisions with regard to
6 discovery. Studies and statistical information concerning
7 what? Concerning the experience in the military post-1993?
8 Concerning statistics and studies before 1993? Concerning the
9 lead up to the policy?

10 **MR. FREEBORNE:** Your Honor --

11 **THE COURT:** What did you do?

12 **MR. FREEBORNE:** Well, what we did was, again to be
13 reasonable, we don't agree that any of this discovery is
14 appropriate but acknowledging Judge Phillips' order, we have
15 specifically carved out frankly all of the areas that are now
16 before the Court, either the Motion to Compel or in the two ex
17 parte applications. We have, we don't believe, any discovery
18 into the motivations of Congress or --

19 **THE COURT:** Now I know what you haven't given them.

20 **MR. FREEBORNE:** Well --

21 **THE COURT:** What you haven't given them is
22 represented in the motion and the applications before me.
23 Right now I'm interested in what you did give them, what you
24 did deem to be at least, if not relevant under your threshold
25 position, relevant enough under Judge Phillips' order, that you

1 weren't going to fight about it.

2 **MR. FREEBORNE:** Well in terms of documents, your
3 Honor, again all of the statistical information we provided
4 that they had asked for. The application of the policy both
5 generally and as it relates to various circumstances. We
6 provided --

7 **THE COURT:** Statistical information concerning what?
8 How many --

9 **MR. FREEBORNE:** How many discharges.

10 **THE COURT:** -- people were discharged and so forth?

11 **MR. FREEBORNE:** During what timeframe. We did
12 provide information on the so-called enlistment waivers. We
13 have, to the best of our ability --

14 **THE COURT:** That's the felon issue?

15 **MR. FREEBORNE:** Well they say it's -- the technical
16 term is enlistment waiver. Yes, that's the felon issue. Your
17 Honor again, I want to be clear, we don't acknowledge that any
18 of this discovery is appropriate but we also don't want --

19 **THE COURT:** All I'm doing is asking for the facts.
20 You need not repeat your threshold position to preserve the
21 objection. I understand that you object on that basis. But I
22 don't think you can ask me properly to reach the conclusion
23 that yes, you're right in that threshold argument and Judge
24 Phillips was wrong and therefore I'm denying both of these
25 applications and this motion. I don't think I'm at liberty to

1 do that.

2 **MR. FREEBORNE:** Well, your Honor on that score though
3 the fact that we have provided documents that relate to many of
4 the issues that Plaintiff seeks to inquire into in the 30(b)6
5 deposition does establish our point that alternative means were
6 not only available but had been taken advantage of by Plaintiff
7 and we have responded to those which would negate any need for
8 a 30(b)6 deposition.

9 **THE COURT:** So you gave them discovery concerning
10 discharge experience and enlistment waivers, to some extent?
11 What other discovery have you given them?

12 **MR. FREEBORNE:** They had asked for information about
13 service members who had successfully rebutted the presumption.
14 The statutory presumption, your Honor, is that one who makes a
15 statement that he or she is homosexual, that gives rise to a
16 presumption that they will engage in homosexual acts. They had
17 asked that we produce information about service members who
18 have successfully rebutted that presumption, which of course
19 necessitated the Privacy Act Protective Waiver but we have
20 provided that.

21 **THE COURT:** All right. Anything else that comes to
22 mind?

23 **MR. FREEBORNE:** Your Honor, we've provided all the
24 studies, which I believe that there were -- don't hold me to
25 this, I believe there were, well hundreds of studies that we

1 had provided pursuant to their request that we initially
2 provide studies and statistical information. And --

3 **THE COURT:** Studies?

4 **MR. FREEBORNE:** Studies most of which were conducted
5 by third parties, Rand, for example.

6 **THE COURT:** And they were studies of what? The
7 propriety of Don't Ask, Don't Tell?

8 **MR. FREEBORNE:** Well there have been studies of
9 homosexuality, both generally and in the context of the
10 military since the '50s. The Crittenden Report was a study
11 that was conducted in the '50s. We have produced all of the
12 studies within the custody and control of the Department of
13 Defense.

14 **THE COURT:** Regardless of when they happened, whether
15 it was 1950's or the 2000's?

16 **MR. FREEBORNE:** Yes. That's all that comes to mind,
17 your Honor. I mean we've produced, now that the Privacy Act
18 Protective Order has been put in place, somewhere in the
19 neighborhood of 50,000 pages of documents. And we've provided
20 -- we supplied a privileged log, we've provided again in terms
21 of the privilege, we've now supported the deliberative process
22 privileged through the declaration of Mr. Carr. That's why I
23 think, if I may, I think it is helpful to look at the areas
24 that are now in dispute because we believe that all of the
25 areas of dispute are either facially improper in the document

1 requests and very narrow.

2 Your Honor will note that in the deliberative process
3 assertion we've focused on -- we've only asserted privilege
4 over PERSREC Reports. And with respect to the so-called
5 Category One documents we've only withheld draft regulations on
6 the grounds that the only reason they want those is because
7 they want to probe the motivations of the Executive in
8 promulgating regulations, which is per se improper. We --

9 **THE COURT:** Well in -- they're entitled to probe, are
10 they not, the factual context of the relation between the
11 policy and the purposes the policy supposedly serves, that's
12 what the U.S. Supreme Court said in Romer versus Evans. So
13 they're entitled to do that.

14 **MR. FREEBORNE:** Your Honor, if I --

15 **THE COURT:** What does that mean? What's the factual
16 context?

17 **MR. FREEBORNE:** Well your Honor, in Romer what the --
18 what was examined was the face of the statute. The face of the
19 statute --

20 **THE COURT:** Oh, I understand that but the Court said
21 that the law must be grounded in a sufficient factual context
22 for the Court to ascertain some relation between the
23 classification and the purpose it served.

24 **MR. FREEBORNE:** And your Honor, the Phillips Court
25 has specifically recognized that there are two -- at least two

1 conceivable constitutional applications in the privacy context
2 as well as in the reduction of sexual tension. We've pointed
3 to those. They must negate those two basis that have now been
4 found by the Ninth Circuit to not be grounded in animus. And
5 frankly, none of their discovery goes to that. And the expert
6 discovery that we've conducted thus far tells us that their
7 experts have steered away from that issue.

8 **THE COURT:** Well, I understand the argument. You're
9 trying their import the Phillips' rational -- I'm sorry, equal
10 protection conclusions on to the substantive due process claim
11 that the Plaintiff makes and Judge Phillips said that Phillips
12 wasn't decisive because you can't do that, but again I'm not
13 sure that needs to be the focus of this discussion.

14 Phillips also says -- I'm sorry the case Phillips,
15 not the Judge Phillips, that -- and you argue this point in
16 your papers, that just because there's an imperfect fit between
17 the policy and the purposes that it maybe was designed to serve
18 that that doesn't mean that there's a lack of rational basis
19 just because there's an imperfect fit.

20 **MR. FREEBORNE:** That's correct, your Honor.

21 **THE COURT:** As I understand it, the Plaintiff is
22 attempting to demonstrate, factually, that there's no fit, not
23 just an imperfect fit, that there's no fit between the policy
24 and the purposes it -- the stated purposes anyway it was
25 supposed to serve. If they prove that factually then they win,

1 don't they?

2 **MR. FREEBORNE:** No, your Honor, for the reasons Judge
3 Noonan -- this is a judgment, this is really not susceptible to
4 empirical --

5 **THE COURT:** Well Judge Noonan's concurrence you
6 interpret as saying you defer always and everywhere to whatever
7 the military says is a stated purpose?

8 **MR. FREEBORNE:** No, what Judge Noonan said is that
9 this is not -- privacy and the need to reduce sexual tension,
10 those types of considerations are not susceptible to empirical
11 study, factual study. Those are judgment calls that frankly
12 were made here by Colin Powell --

13 **THE COURT:** Would you -- I'm sorry, would you repeat
14 that, my mind wandered for a second.

15 **MR. FREEBORNE:** Well the point that Judge Noonan
16 makes in his concurrence is that when you have considerations
17 such as the need to address heterosexual privacy and the need
18 to address sexual tension within the unit, those types of
19 considerations do not lend themselves to empirical or factual
20 analysis and therefore the discovery that they seek, both in
21 terms of documents as well as testimony --

22 **THE COURT:** Well --

23 **MR. FREEBORNE:** -- it just doesn't fit.

24 **THE COURT:** -- well what if they're talking about
25 getting discovery about public opinion? I'm sure they wouldn't

1 be able to establish this, but hypothetically, what if they
2 could establish that there is no American citizen or resident
3 inside or outside the military that has any objection
4 whatsoever to homosexuals serving openly in the military, why
5 wouldn't that be something? Why wouldn't that show that sexual
6 tension is capable of being proven or refuted?

7 **MR. FREEBORNE:** Well a.) they already have those
8 polls, b.) I think your Honor is right that they would not be
9 able to prove that, according -- even according to their own
10 experts, c.) To our knowledge the -- I think Admiral Mullen
11 made it clear at the February 2nd hearing, the Government
12 hasn't undertaken any poll, it's just too difficult an area to
13 poll in by the Government.

14 **THE COURT:** Well the --

15 **MR. FREEBORNE:** So for all those reasons their
16 discovery, at least in that area is inappropriate.

17 **THE COURT:** Is it sexual tension or is promoting
18 morals, good order, discipline and unit cohesion that is the --
19 that the offered rational basis for the policy now?

20 **MR. FREEBORNE:** Well your Honor, I think the Phillips
21 Court framed it nicely in that it's unit cohesion. Two of the
22 considerations that again they focused on were privacy and the
23 reduction of sexual tension which are part of unit cohesion.

24 **THE COURT:** Well, I guess that part of the problem is
25 if a policy, a military policy is stated in terms of -- in such

1 general terms, such vague terms as unit cohesion, maybe the
2 terms are not susceptible to factual refutation because they're
3 so vague. But does that mean that every vaguely stated
4 military policy is something to which the Courts ought to defer
5 in a rational basis analysis?

6 **MR. FREEBORNE:** Your Honor again, the focus of -- if
7 you -- the Senate Armed Services Committee report is on the
8 privacy and sexual tension and everybody understood what Colin
9 Powell was talking about there, but as Judge Noonan recognized
10 in his concurrence, appropriately so, any inquiry or attempt to
11 rebut what Colin Powell said during his testimony is not
12 susceptible to factual rebuttal. It is judgment, nothing more
13 than that. So it does not come down to the vagueness.

14 **THE COURT:** You're not arguing, I suppose, that
15 there's no stated military purpose that a Court couldn't say
16 that's lacking in a rational basis. I used a double negative,
17 but you understand what I'm asking? Could there be -- let me
18 phrase it better, could there be some stated purpose, purpose
19 stated by the military to be served by some discriminatory
20 policy where the Court would say no, even though the military
21 claims that this policy would serve that purpose it seems so
22 nonsensical to us or nonsensical in relation to experience,
23 that we're going to decide there's no rational basis there?

24 **MR. FREEBORNE:** Your Honor, it's hard to conceive of
25 one. I thought your Honor was going to ask --

1 **THE COURT:** Could you conceive of one?

2 **MR. FREEBORNE:** I can't conceive of one. I --
3 perhaps I'm too grounded in this case and this policy, but --

4 **THE COURT:** Well let's take it way out of this case.
5 What if -- because -- well --

6 **MR. WOODS:** I can conceive of one.

7 **THE COURT:** Please. What if the military decided
8 that for the sake of order and discipline, unit cohesion and
9 uniformity or whatever that we need in the military, that we
10 can't have people in the military who have naturally blonde
11 hair, we'll let them in only if they conceal the fact that
12 they're natural blondes and dye their hair black or brown --
13 did I say, yeah black or brown. And we need that for the sake
14 of cohesion. Or what if the military said, for whatever reason
15 unit cohesion, discipline, general -- generality, generality
16 we're not going to let in anybody in the military who's exactly
17 five feet nine inches tall. We'll let in people that are 5'10"
18 but not 5'8" -- or 5'8" but not 5'9".

19 You and I looking at that would say probably both of
20 those policies, that's ridiculous. What the military is
21 saying, and my hypothetical I understand has no basis in fact,
22 the military is saying we need that for uniformity. We're the
23 experts, this is important stuff, the Courts ought not to be
24 second guessing us. Wouldn't those be examples of situations
25 where stated policy serving stated purposes but the Courts

1 would say no rational basis?

2 **MR. FREEBORNE:** Perhaps, your Honor. Although the
3 two examples you give I mean I'd have to know more facts,
4 frankly. But perhaps those are areas, but here again the Ninth
5 Circuit has spoken to the privacy and sexual tension
6 rationales.

7 Now we agree, Judge Phillips has not dismissed this
8 case based upon what she sees in Phillips, she has deferred it
9 to Summary Judgment. That doesn't -- I don't believe she's
10 ever ruled or suggested that the Ninth Circuit's recognition
11 there that the privacy and sexual tension rationale's rebut any
12 claim of animus. So again, we don't have the blonde hair --

13 **THE COURT:** Does -- does animus matter?

14 **MR. FREEBORNE:** Well it perhaps could matter in a
15 context like Romer where the only rationale was based upon what
16 the Court found to be animus. But here again, the Ninth
17 Circuit has found, with respect to this policy, just the
18 opposite.

19 **THE COURT:** So in my hypothetical an animus against
20 blonde haired people by the majority of Americans who are black
21 or brown hair, that wouldn't matter, even if a significant
22 minority of the soldiers wouldn't want to be around somebody
23 with blonde -- naturally blonde hair? That wouldn't matter or
24 would it?

25 **MR. FREEBORNE:** Well animus of a statute or a policy

1 that is grounded in nothing but animus would run afoul of
2 Clayburn and Romer.

3 **THE COURT:** Uh-huh.

4 **MR. FREEBORNE:** But what I'm saying and the Ninth
5 Circuit has said is that the Ninth Circuit has looked at this
6 precise issue and determined query, does the statute have any
7 grounding outside of animus and they specifically found that
8 the privacy and sexual tensions rationales are not grounded in
9 any animus.

10 **THE COURT:** So you're saying if Phillips hadn't been
11 -- isn't -- if Phillips were not on the books it would be open
12 to Plaintiff to discover facts concerning animus, facts
13 concerning whether the stated policy is real or fictitious.
14 But Phillips is on the books and establishes that as to this
15 policy those two reasons off of unit cohesion are applicable at
16 least in the sense that the Courts can't second guess it?

17 **MR. FREEBORNE:** No. What I'm saying is that the
18 analysis would be as it was in Romer. One would look at the
19 face of the statute and find that that could only be grounded
20 in animus and in a concern that would run afoul of Clayburn but
21 that it would not necessarily lead to discovery of that issue.
22 You would look at the face of the statute, which again in this
23 case is that's perfectly appropriate because they had made a
24 decision to pursue nothing but a facial challenge.

25 **THE COURT:** But you say though that they have to do

1 more than look at the face of the statute, they have to
2 negative any even hypothetical speculative basis that might be
3 served -- purpose that might be served by the policy.

4 **MR. FREEBORNE:** Well that is the analysis. But
5 again, we're focusing on privacy and sexual tension and their
6 discovery doesn't go to that.

7 **THE COURT:** Some of it does.

8 **MR. FREEBORNE:** I -- you know, their experts have
9 steered away from this issue and so we don't read their
10 discovery as even relating to that.

11 **THE COURT:** You have reports from their experts?

12 **MR. FREEBORNE:** We had deposed of their experts, your
13 Honor.

14 **THE COURT:** Is there a couple --

15 **MR. FREEBORNE:** There's one --

16 **THE COURT:** -- who are going to be deposed later in
17 the month?

18 **MR. FREEBORNE:** Well Mr. Corve (phonetic) is
19 undergoing cancer treatment, the other two were to be deposed
20 in Canada and we have to go through the Canadian Embassy to
21 swear a witness which has created some logistical difficulties
22 and so we've filed a stipulation with the Court.

23 **THE COURT:** Let me ask you about some procedural
24 aspects of these disputes. You argue that you didn't waive
25 your objections to the document requests by not serving timely

1 a formal Rule 34 response. Judge Phillips seemed to indicate
2 that you had waived your potential objections. Why shouldn't I
3 apply the Richmark case and reach the same conclusion that she
4 maybe stated tentatively?

5 **MR. FREEBORNE:** Well your Honor, we set forth, as
6 your Honor noted in the 1292(b) motion as well as in the July
7 6th argument, our objection to the discovery that we now have
8 before the Court. We specifically noted the case law regarding
9 any attempt to probe the motivations of Congress, seeking to
10 inquire into drafts and making it clear that that would be
11 subject to deliberative process. We also noted that the
12 attorney --

13 **THE COURT:** With regard to deliberative -- you did
14 use the words deliberative process in your October, 2009
15 motion. But you didn't give any item by item response and you
16 didn't then or even now apparently submit a privilege log
17 identifying those documents withheld under claim of
18 deliberative process privilege. Regardless of what the Court
19 does with respect to the other Rule 24 request, why shouldn't
20 the Court discern, even under Burlington a waiver as to
21 deliberative process privilege?

22 **MR. FREEBORNE:** Well your Honor, we've supported the
23 privilege through Mr. Carr's declaration.

24 **THE COURT:** Filed in your supplemental memorandum in
25 opposition to the documents motion, about as late a filing as

1 it could possibly be.

2 **MR. FREEBORNE:** Well your Honor but even if the Court
3 were to ignore that, under Ramirez the cases that are cited in
4 Ramirez recognize that the Court has the authority to void an
5 improper request. And really all the discovery disputes that
6 we're now down to, drafts are per se deliberative, seeking on
7 their face to inquire into attorney/client documents, things
8 that talk about Lawrence for example --

9 **THE COURT:** I'm quite concerned with their
10 attorney/client document requests, regardless of whether you
11 submitted a proper Rule 34 response. But you said Ramirez, you
12 wanted to call the Court's attention again to that case.

13 **MR. FREEBORNE:** Well, your Honor, the cases that are
14 cited under the waiver analysis there. For example, the *Cruzan*
15 (phonetic) case, the District of Massachusetts case, I mean
16 that case makes clear that the Court has the authority to void
17 a facially improper request; requests that ask for drafts are
18 deliberative. And also here, where we have requests for draft
19 regulations, are improper both because they're deliberative;
20 also because they are -- plaintiff is seeking to inquire into
21 the motivations of the executive in promulgating regulations,
22 so on that ground it --

23 **THE COURT:** I'm not at all sure that a request
24 seeking documents that may be covered by a qualified privilege
25 like the deliberative process privilege is the same thing as

1 asking for documents that are covered by an absolute privilege
2 like the attorney-client privilege.

3 **MR. FREEBORNE:** Well, your Honor, to be clear, what
4 we have asserted deliberative process over is the PERSREC
5 report (phonetic), which frankly didn't even address the unit
6 cohesion argument, and counsel knows this from our discovery.
7 It focused on the interrelationship between homosexuality and
8 security clearances, which don't play any role in this policy.
9 So to the extent there's any balancing analysis, the balance
10 would be in favor of the privilege we would respectfully
11 submit.

12 **THE COURT:** What's the approximate volume of the
13 documents you're withholding under the claim of deliberative
14 process privilege?

15 **MR. FREEBORNE:** Well, your Honor, they're set forth
16 in the Carr declaration.

17 **THE COURT:** I've read the Carr declaration but what's
18 the approximate volume?

19 **MR. FREEBORNE:** It's about a binder -- I don't know
20 the exact page number, your Honor; I apologize.

21 **THE COURT:** That's all right; it gives me some idea.

22 **MR. FREEBORNE:** And your Honor, we are willing to
23 make the documents available for *in camera* review in response
24 to Mr. Woods' suggestion, if the Court would like to undertake
25 that inquiry.

1 **THE COURT:** My tentative view is that if I decide
2 that you haven't waived as to deliberative process privilege, I
3 probably will require an *in camera* review.

4 You make some arguments procedurally -- Well, let me
5 back up. As to the 30(b)(6) deposition, ordinarily a party is
6 required to show up at a properly noticed Rule 30(b)(6)
7 deposition, and that objections served later are improper and
8 ineffective to redeem that failure to appear.

9 I guess you argue here that circumstances are
10 different than the norm because you didn't get a copy of the
11 notice timely?

12 **MR. FREEBORNE:** Yes, your Honor. And it's unclear to
13 me why they mailed the notice. They were mailing things to me
14 early in the case. I hope it wasn't gamesmanship but that was
15 my take. And they were e-mailing things and mailing other
16 things I never received, and to this day, I've never received
17 an actual copy through the mail of the notice of deposition.

18 So when I received e-mail notification from
19 Mr. Huneas (phonetic), Mr. Woods' partner, that they had served
20 such a notice, I obviously was taken by surprise. I
21 immediately informed Mr. Huneas that we would not be producing
22 a witness and we needed additional time to consider appropriate
23 objections to the notice. We did that. We went a letter on
24 January 29th. Mr. Huneas and I had a very professional meet-
25 and-confer on February 9th in which we agreed to exchange --

1 that motions practice would be by way of cross-motion. We
2 would move for a protective order; they would move to compel.
3 We essentially agreed to disagree on the issues.

4 And, in fact, they served us, your Honor, which is
5 somewhat lost in the papers, with a stipulation on May 3rd on
6 the 30(b)(6).

7 **THE COURT:** I'm sorry; you said May 3rd?

8 **MR. FREEBORNE:** I'm sorry, March 3rd. Excuse me,
9 your Honor. On March 3rd they actually served us with a
10 stipulation pursuant to our agreement to proceed by way of
11 cross-motion. But as Mr. Woods pointed out, on March 4th Judge
12 Phillips ruled that she would not extend the discovery period.
13 They realized that they were out of time, that they couldn't
14 properly notice a motion within the discovery period, and so
15 they proceeded by way of ex parte application. Now, I
16 appreciate your Honor doesn't want to get into the 'he said she
17 said', but that's the factual background.

18 With respect to the RFAs, I contacted counsel,
19 frankly three times. I talked to Melanie Scott, Mr. Huneas
20 individually and then Mr. Woods and Mr. Huneas following the
21 status conference to work out a manageable briefing schedule on
22 all of the discovery motions, the documents, the 30(b)(6) and
23 the RFAs. I said 'Let's just brief these together; it's more
24 convenient for the Court, it's frankly more convenient for the
25 parties.'

1 **THE COURT:** This is you talking or communicating
2 when, February 18th?

3 **MR. FREEBORNE:** After the status conference, your
4 Honor. And they said 'No, we want to press ahead.'

5 **THE COURT:** Which was when, I'm sorry?

6 **MR. FREEBORNE:** It was February 18th, your Honor.

7 **THE COURT:** All right.

8 **MR. FREEBORNE:** I communicated that --

9 **THE COURT:** By then it was too late to proceed by
10 notice motion and have the motion heard before the discovery
11 cutoff, wasn't it?

12 **MR. FREEBORNE:** As I read the rules, it's twenty-one
13 days, your Honor. We could have, if we had filed --

14 **THE COURT:** No, you're leaving out the seven days
15 that you get once you get their portion of the joint
16 stipulation to give them your portion of the joint stipulation.

17 **MR. FREEBORNE:** Well, your Honor, I think again, we
18 perhaps both assumed that the Court would be extending the
19 discovery period.

20 **THE COURT:** Right; but for an extension of the
21 discovery cutoff which didn't happen, these disputes would have
22 to be heard on short notice or by *ex parte* application.

23 **MR. FREEBORNE:** Correct, your Honor. And that's why
24 we were trying to work cooperatively with the other side. They
25 said no, so they wanted to proceed. Then they realized that we

1 were out of time and they moved by way of *ex parte* application,
2 which, you know, is not the appropriate mechanism to proceed.

3 **THE COURT:** It was the only one that was available
4 under the circumstances at that point, wasn't it?

5 **MR. FREEBORNE:** Well perhaps, your Honor. But again,
6 I had said 'Let's move jointly for an extension of the
7 discovery period.'

8 So, your Honor, again, that's all I have on the
9 merits of the respective motions. If your Honor wants to
10 discuss the 30(b)(6), I know we've discussed the documents --

11 **THE COURT:** I have a few additional questions on
12 specific requests.

13 The request number thirty-eight asks for the
14 defensibility -- I'm sorry, document request thirty-eight.
15 It's page thirty of the joint stipulation. It asks for the
16 defensibility memorandum and all drafts or prior versions of
17 that memorandum. Is the government's response accurately
18 reprinted at pages thirty and thirty-one of the joint
19 stipulation?

20 **MR. FREEBORNE:** I believe so, your Honor. We have
21 produced a copy of the defensibility memorandum.

22 **THE COURT:** But that's on a website.

23 **MR. FREEBORNE:** But they have it. I mean this is
24 something that's publicly available.

25 **THE COURT:** Right. So you're not, or you didn't,

1 object to request thirty-eight on grounds of attorney-client or
2 work product privilege --

3 **MR. FREEBORNE:** Well, this is --

4 **THE COURT:** -- correct?

5 **MR. FREEBORNE:** Well, your Honor, this is within --
6 we have not searched outside of DOD for these documents.
7 That's why this is category three. We believe that the only
8 appropriate search area is within DOD for all the reasons that
9 we set forth. I mean this is a fundamentally --

10 **THE COURT:** My question is: Just did you interpose an
11 objection on grounds of attorney-client or work product
12 privilege when you served your response to request thirty-
13 eight? And I think the answer is 'no' if this response is
14 reprinted accurately in the joint stipulation.

15 **MR. FREEBORNE:** Your Honor, our general objections --
16 I'm sorry, I misunderstood your Honor's question. Our general
17 objections interposed all of the requisite privileges.

18 **THE COURT:** I wondered about that. So you had
19 general objections to the document requests on grounds of
20 attorney-client privilege?

21 **MR. FREEBORNE:** Yes, among other things, Privacy Act,
22 et cetera.

23 **THE COURT:** Yeah. And your response is nowhere in
24 the moving papers, your general objections.

25 **MR. FREEBORNE:** Upon reflection, your Honor, we

1 should have put that in there. I apologize for not putting in
2 the general objections. All of the issues though that are now
3 in dispute are either in our general objections or in the
4 specific objections.

5 **THE COURT:** Okay. So with respect to thirty-eight,
6 the defensibility memorandum is essentially a memorandum signed
7 by Janet Reno, then attorney general, saying this 'don't ask-
8 don't tell' policy is going to be more constitutionally
9 defensible, we feel, than the existing policy. I know there's
10 a lot more to it than that, but that's the gist of what the
11 memorandum says?

12 **MR. FREEBORNE:** I believe so, your Honor, yes.

13 **THE COURT:** And that's been exposed to public
14 consumption?

15 **MR. FREEBORNE:** It is publicly available, your Honor.

16 **THE COURT:** Right. So to the extent that was an
17 attorney-client privilege communication, the privilege has been
18 waived by the disclosure of the memorandum?

19 **MR. FREEBORNE:** No, your Honor. I mean in terms of
20 drafts or things of that nature, or the deliberations that went
21 into that memorandum, those have not been waived.

22 **THE COURT:** Well, separate out the deliberative
23 process privilege from the attorney-client privilege. Don't
24 you ordinarily waive the attorney-client privilege by producing
25 the attorney-client communication? And isn't the waiver not

1 necessarily strictly limited to the communication itself?

2 **MR. FREEBORNE:** Your Honor, this defensibility
3 memorandum is publicly available. With respect to any
4 attorney-client communications that preceded that memorandum --

5 **THE COURT:** Which drafts are prior versions.

6 **MR. FREEBORNE:** Right. Those would be; those
7 communications would be subject to the privilege. And also the
8 deliberative process privilege and, to the extent any case was
9 discussed, potentially work product.

10 **THE COURT:** And are you -- I guess you're not
11 withholding specific documents in response to request thirty-
12 eight because you say you don't have the drafts or prior
13 versions?

14 **MR. FREEBORNE:** Your Honor, we have not searched
15 outside of DOD. Our position is that the only appropriate
16 search here is within DOD.

17 **THE COURT:** So DOD does not have possession, custody
18 or control of any drafts or prior versions of the defensibility
19 memorandum?

20 **MR. FREEBORNE:** I don't believe so, your Honor. I'll
21 have to check on that, your Honor; I don't know that off the
22 top of my head. But I don't believe any of those documents
23 have been logged --

24 **THE COURT:** Is the answer 'you don't know' or is the
25 answer that 'DOD does not have any such'?

1 **MR. FREEBORNE:** The truthful answer is I don't know,
2 your Honor, and I don't have the privilege log in front of me.

3 **THE COURT:** Would the privilege log cover this?

4 **MR. FREEBORNE:** Well, if DOD had --

5 **THE COURT:** Would the privilege log that you've
6 served cover this document?

7 **MR. FREEBORNE:** If the documents were within the
8 custody and control of the Department of Defense, the privilege
9 log would cover it, your Honor.

10 **THE COURT:** I thought the privilege log was limited
11 to documents withheld -- No, strike that.

12 All right.

13 **MR. FREEBORNE:** Your Honor, I can conceive of a
14 search situation in which these documents made their way over
15 to DOD, that relate to this defensibility memorandum. If those
16 documents were within DOD, then those would have been captured
17 as part of our search and properly logged. I'm making the
18 distinction between DOD and DOJ and other governmental entities
19 or, as your Honor noted, Congress, et cetera.

20 **THE COURT:** Have you served a log that includes
21 documents withheld under claim of attorney-client or work
22 product privilege?

23 **MR. FREEBORNE:** We have, your Honor.

24 **THE COURT:** But you don't happen to know whether the
25 log includes documents responsive to request thirty-eight?

1 **MR. FREEBORNE:** I don't, your Honor.

2 **THE COURT:** The Personnel Security Research and
3 Education Center reports, those were from the late 1980s?

4 **MR. FREEBORNE:** They were, your Honor, and that's why
5 I noted those reports don't opine on the unit cohesion
6 rationale, if you will. The report specifically said that that
7 is an issue for study for another day. So in other words, they
8 don't have any connection to the issues in this case.

9 **THE COURT:** What do they concern?

10 **MR. FREEBORNE:** The security clearance. Under the
11 previous policy, so-called Carter policy, and predecessor
12 policies, a security clearance, gay and lesbian service members
13 were deemed to be a security risk, and so that study was
14 examined in the context of the PERSREC report. Unit cohesion
15 was not.

16 **THE COURT:** The idea of the deliberative process
17 privilege is that if some protection isn't accorded to decision
18 makers in their considerations and deliberations, then the
19 decision makers might not have a full and candid exchange and
20 communication of their thought processes in leading up to
21 making a decision. Doesn't that policy somewhat become less
22 compelling when so much time has passed since the
23 deliberations? In other words, is it realistic or is it just
24 now illegal fiction to suggest that the people who were
25 involved with the reports in the 1980s, had they known that

1 twenty years or more later what they committed to paper
2 concerning their deliberations might see the light of day in
3 civil lawsuits, is it realistic to suggest that they would have
4 behaved materially differently in their deliberations had they
5 had that knowledge?

6 **MR. FREEBORNE:** Yes. I mean that is, as your Honor
7 explained, that is the purpose of the deliberative process
8 privilege. We don't want to freeze frank discussions among
9 policy members. And that concern has particular application
10 now in which, as both parties have informed the Court, the
11 policy is undergoing review. These same types -- or
12 deliberations -- are ongoing right now. And Judge Phillips, at
13 the last status conference, noted that and recognized that that
14 may present somewhat of a political question in how we should
15 proceed through discovery. So it's not an issue that is
16 isolated to the eighties or the nineties; it's in fact a very
17 ripe issue.

18 **THE COURT:** Well, my question has to do with whether
19 the deliberative process privilege would have more force with
20 respect to deliberations that are going on currently than
21 deliberations that happened twenty years ago that maybe you're
22 saying 'No, you don't think that there's any difference to be
23 drawn'.

24 **MR. FREEBORNE:** I don't think there's any difference
25 to be drawn just because the same policy rationale applies

1 regardless of time; that people will not be as candid in their
2 exchange of ideas if they know that the underlying documents
3 are revealed in the context of civil litigation. That is why
4 the privilege exists.

5 As your Honor notes, it is a qualified privilege. It
6 can be balanced against the needs of the parties. We don't
7 believe that that balance strikes in favor of the -- or weighs
8 in favor of the plaintiff here, A, because we've properly
9 supported the privilege through an agency head declaration; and
10 B, these particular reports, the PERSREC reports, don't impact
11 or don't have any relationship to the underlying issues in this
12 case.

13 With respect to the regulations which, I just want to
14 be clear, we have also withheld those, those are sought because
15 the plaintiff wants to probe the motivations of the executive
16 in promulgating and implementing regulations. That's not even
17 a question of privilege; that's just improper under Ninth
18 Circuit and Supreme Court authority.

19 **THE COURT:** Contemporaneous statements made by the
20 decision makers can be relevant to the constitutional analysis,
21 can't it?

22 **MR. FREEBORNE:** Well, your Honor, in terms of
23 explaining the purposes of the statute, yes. And if you're
24 alluding to the Colin Powell statements, I think the Colin
25 Powell statements would fall within that category. There are

1 public statements before the Senate Armed Services Committee,
2 for example.

3 **THE COURT:** Just a moment, please.

4 **(Pause)**

5 **THE COURT:** I just found what I was referring to. I
6 was referring to *Village of Arlington Heights versus*
7 *Metropolitan Housing Development Corporation*, where the U.S.
8 Supreme Court said that contemporary statements by members of a
9 decision-making body, minutes of its meetings or reports may be
10 highly relevant.

11 **MR. FREEBORNE:** But footnote eighteen of that case,
12 your Honor, specifically recognizes that seeking to probe the
13 motivations of Congress or the executive is inappropriate.

14 **THE COURT:** Well, it says that putting a decision-
15 maker on the stand is usually to be avoided, but we're not
16 talking about that, we're talking about discovery.

17 **MR. FREEBORNE:** Well, in the context of a, for
18 example, a 30(b)(6), you run into that issue though. And with
19 respect to these documents, I think the proposition could be
20 stated more generally because all the cases that we cite
21 recognize that it's improper to seek to probe an elicited motive
22 by Congress or the executive.

23 And Mr. Woods made very clear what his purpose was at
24 the July 6th status conference, and it was to probe animus on
25 the part of the Congress and the executive. He stated to Judge

1 Phillips that he was going to come at discovery from both ends;
2 one was to probe animus through this type of discovery, and
3 then B, how, you know, the policy has been applied on a going
4 forward basis, which has formed the debate that we had at the
5 status conference.

6 **THE COURT:** Let me ask you about some of the requests
7 for admission. I'd like to ask you about request for admission
8 three. It says: 'Admit that DADT does not contribute to our
9 national security.' You object saying that the request does
10 not call for facts, the application of law to fact or an
11 opinion about facts or the application of law to facts.

12 **MR. FREEBORNE:** Correct, your Honor. What they're
13 seeking to do --

14 **THE COURT:** But it seems to the Court that it does.
15 Are you saying that this request calls for a pure legal
16 opinion?

17 **MR. FREEBORNE:** Well, it's not a question of fact. I
18 mean what they're seeking to do --

19 **THE COURT:** An application of law to fact?

20 **MR. FREEBORNE:** We don't believe it falls into any of
21 those categories.

22 **THE COURT:** An opinion about fact?

23 **MR. FREEBORNE:** It does not.

24 **THE COURT:** All right.

25 **MR. FREEBORNE:** It's --

1 **THE COURT:** Doesn't it ask for an opinion that, as a
2 matter of fact, the policy does not contribute to our national
3 security?

4 **MR. FREEBORNE:** Your Honor, what they seek to do is
5 juxtapose President Obama's statements on the one hand, which
6 we acknowledge, and use that to form the basis for an admission
7 that the policy somehow runs afoul -- or is either unlawful or
8 unconstitutional.

9 **THE COURT:** I understand that. But regardless of
10 whether these were President Obama's words or not, to the
11 extent the discovery is relevant, they're entitled to ask for
12 requests for admissions on the basis of it. And your objection
13 is that it's not a fact, it's not an opinion about a fact; it
14 appears to the Court that it is. That's why I'm asking.

15 You're not suggesting it's a legal conclusion?

16 **MR. FREEBORNE:** Well, what I'm suggesting is it's not
17 a fact. What they're seeking to do is use President Obama's
18 policy statement --

19 **THE COURT:** Regardless of their probing, their intent
20 to set up some juxtaposition, they may well have that intent.
21 And to the extent the only purpose served by these requests
22 would be to attempt to put the defense in an embarrassing
23 conflict of fact, that would not be a legitimate purpose of
24 discovery. But to the extent that these requests are material
25 to their claims, then it is not a proper objection to them to

1 say they may have some subjective motive that we don't like.

2 Let me go on with regard to the response because I
3 don't understand the last part of the response either, just
4 like I didn't understand the first part of the response. The
5 last part of this response is: To the extent a further response
6 is required, defendants note the responses to requests for
7 admission one and two, supra, but deny this request because it
8 was rationale for Congress to have concluded at the time the
9 statute was enacted in 1993 that DADT was necessary in the
10 unique circumstances of military service.

11 Beginning with the word 'because', that appears to
12 the Court to be a *non sequitur* in the context of this response.
13 The request is not asking about 1993 or a national basis; it's
14 asking whether the policy does or does not contribute to
15 national security.

16 **MR. FREEBORNE:** And we responded we believe it's
17 appropriate to respond based upon the considerations that were
18 before Congress in 1993 because --

19 **THE COURT:** Not at all.

20 **MR. FREEBORNE:** -- that's the statute that's on the
21 books.

22 **THE COURT:** Not at all. If the request is admit now,
23 you may not say we deny it because of something that happened
24 in 1993. You must give an unqualified admission or denial.

25 **MR. FREEBORNE:** And your Honor, but respect, the

1 statute is on the books. That 1993 determination remains on
2 the books, and so that's how we've responded.

3 **THE COURT:** Well, that just gets back to you want me
4 to rule some way in opposition to what Judge Phillips
5 concluded; they're just not entitled to any such discovery.
6 But let's move on because I think we've exhausted request
7 three.

8 Let me ask you about request eighty-one. That's the
9 one that begins this series of requests about the experience --
10 No, I'm sorry, the policy of other countries with regard to
11 permitting openly gay and lesbian service members to enlist and
12 serve in their armed forces. Put aside your objection to the
13 term 'openly gay and lesbian'. Doesn't the Department of
14 Defense have knowledge concerning whether other countries
15 permit openly gay and lesbian service members to enlist and
16 serve in their armed forces?

17 **MR. FREEBORNE:** Your Honor, there have been GAO
18 reports issued on this. But, as Mr. Woods pointed out, that
19 question is bound up on legal issues --

20 **THE COURT:** I'm sorry, what?

21 **MR. FREEBORNE:** Mr. Woods noted that that would be
22 susceptible to expert opinion as to what the laws of these
23 various countries are and what they allow. I also think it's
24 bound up in the objection because this whole term 'openly gay
25 and lesbian' has been a big --

1 **THE COURT:** I asked you to put that objection to the
2 side.

3 **MR. FREEBORNE:** But I think it's bound up in this
4 issue, that --

5 **THE COURT:** Well, maybe you can't put it to the side.
6 Do you have any objection other than that?

7 **MR. FREEBORNE:** Well, we have the objection, we --

8 **THE COURT:** Because the objection I read, 'that you
9 haven't conducted your own independent study' is again a *non*
10 *sequitur*. You don't have to have conducted your own
11 independent study to have some knowledge on the subject
12 sufficient to permit you to admit or deny.

13 **MR. FREEBORNE:** Well, and Admiral Mullen has said
14 that that is -- that type of review is what's ongoing now. As
15 of --

16 **THE COURT:** Again, it doesn't matter. Whether you've
17 decided to make a review such that you'll have better
18 information nine months from now, you still have to answer
19 discovery requests on a basis of existing information.

20 **MR. FREEBORNE:** But if --

21 **THE COURT:** Now it may be, contrary to what it seems
22 to me as a matter of, I'm not sure, common sense, it may be
23 that the entire Department of Defense has no knowledge
24 whatsoever concerning whether Australia permits openly gay and
25 lesbian service members to enlist and serve in its armed

1 forces. That would be very surprising to me but it may be the
2 truth. I don't know.

3 **MR. FREEBORNE:** Well, what I can say is that Admiral
4 Mullen said, and Secretary Gates said at the February 2nd
5 hearing that they are studying this issue. And so based upon
6 our current knowledge --

7 **THE COURT:** But they didn't say, however, they were
8 wholly ignorant of the issue.

9 **MR. FREEBORNE:** He said that it's worthy of formal
10 study, which they are undertaking.

11 **THE COURT:** Well, again, so that the point is clear
12 because you're likely to be ordered to admit or deny some of
13 these requests for admissions, you have to admit or deny based
14 upon the information that you have currently.

15 And let me now offer to you the same offer I made
16 earlier to Mr. Woods. I understand I'm intrusive of your
17 argument in my questioning if there is anything we haven't
18 covered that you would like to argue, please do so now.

19 **MR. FREEBORNE:** I have nothing, your Honor. Thank
20 you.

21 **THE COURT:** Thank you, sir.

22 Mr. Woods, do you have anything in rebuttal, just
23 briefly? If you do, please.

24 **MR. WOODS:** I just want to correct a couple of things
25 that counsel said, your Honor. I believe counsel said that the

1 government has produced fifty thousand pages of documents.
2 That is not correct. We have received approximately seven
3 thousand pages of documents.

4 Counsel is also incorrect to suggest that our expert
5 witnesses are not addressing Colin Powell's views about privacy
6 or the sexual tension issue, because they are.

7 **THE COURT:** Which experts? The ones who haven't been
8 deposited yet?

9 **MR. WOODS:** No, some of the ones who have been
10 deposited and some of those who haven't been deposited.

11 **THE COURT:** All right.

12 **MR. WOODS:** The *Ramirez* case that counsel mentioned
13 actually supports our position in this case about the waiver
14 issue. The Court correctly realized that there was no specific
15 attorney-client objection to request to produce number thirty-
16 eight and that the privilege as to that document that may once
17 upon a time ever existed has been waived.

18 And to the extent that the Department of Defense
19 hasn't searched for documents, it also must search for
20 documents within the possession, custody or control of its
21 agents or employees and people of that sort, so that can --

22 **THE COURT:** What do you mean by that distinction?

23 **MR. WOODS:** On that particular document, your Honor,
24 I believe that the Justice Department and the Attorney
25 General's office acting on behalf of the Department of Defense

1 are possibly in possession of relevant, responsive documents.

2 **THE COURT:** Oh, so you're saying that the Department
3 of Justice is acting as the agent of the Department of Defense?

4 **MR. WOODS:** Yes.

5 **THE COURT:** In connection with only, what, the
6 defensibility memorandum or something else?

7 **MR. WOODS:** I think that's what I would say, your
8 Honor, yes. I wouldn't say it applies to every request for
9 production necessarily, but that's one where it clearly would
10 apply.

11 And with respect to the distinction that you and
12 counsel were discussing between contemporaneous statements and
13 seeking to probe the motivation, your Honor, what we're trying
14 to get are the documents that may conceivably show what people
15 were saying at the time.

16 Now, these documents that we have not seen may show,
17 your Honor, that, in your example, the government did not want
18 any blond-haired -- naturally blond-haired -- people in the
19 military, or something equivalent in our context. Those are
20 the documents that the government seems to be withholding from
21 us by claiming that we are somehow trying to get at the
22 motivation of the people involved.

23 **THE COURT:** I think you're asking also for a
24 government witness to hold forth on these topics, so you are
25 asking to probe into the government decision makers' bases for

1 this policy.

2 **MR. WOODS:** Well, what we're trying to do in the
3 30(b)(6) is, also, your Honor, to get information about what
4 documents exist, don't exist, and what statements were or were
5 not made. So there we are.

6 But other than that, your Honor, I don't have
7 anything else to add to what we've already said. And we
8 appreciate the time and thorough consideration you've given to
9 these important issues.

10 **THE COURT:** All right, thank you. Thank you both. I
11 appreciate the arguments that you've made.

12 The matters are submitted. I understand there's a
13 need for expedition. I will rule as soon as I can, but I want
14 to reflect further on all of the issues in light of your
15 arguments. Thank you.

16 **(This proceeding was adjourned at 12:04 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

March 19, 2010

Signed

Dated

TONI HUDSON, TRANSCRIBER