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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION

- - -

HONORABLE VIRGINIA A. PHILLIPS, JUDGE PRESIDING

- - -

LOG CABIN REPUBLICANS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 04-8425-VAP (Ex)
	)	
UNITED STATES OF AMERICA, ET. AL.,	)	
	)	STATUS CONFERENCE
Defendants.	)	
	)	

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

Riverside, California

Thursday, February 18, 2010

9:07 A.M.

THERESA A. LANZA, RPR, CSR  
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APPEARANCES:

On behalf of Plaintiff:

WHITE & CASE  
BY: Dan Woods  
BY: Patrick Hagan  
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On behalf of Defendants:

UNITED STATES DEPARTMENT OF JUSTICE  
BY: Paul G. Freeborne  
20 Massachusetts Avenue, NW  
Room 6108  
Washington, DC 20001  
202-353-0543

I N D E X

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Status Conference..... 4

1 Riverside, California; Thursday, February 18, 2010; 9:07 A.M.

2 -oOo-

3 **THE CLERK:** Calling item one, case number CV  
4 04-8425-VAP, Log Cabin Republicans versus the United States of  
5 America, et. al. 09:06

6 May we have counsel please come forward and state  
7 your appearances for the record.

8 **MR. FREEBORNE:** Paul Freeborne on behalf of the  
9 United States and Secretary Gates.

10 **MR. WOODS:** Dan Woods and Patrick Hagan, White &  
11 Case, for plaintiff, Log Cabin Republicans. 09:07

12 **THE COURT:** Thank you. Good morning.

13 Counsel, I put this matter on the calendar for a  
14 status conference to talk primarily about the issue of the  
15 progress towards the trial date, which is June 14th, and also 09:07  
16 just to inform you about the status of the request made on  
17 behalf of the plaintiffs for participation in the Ninth  
18 Circuit's pilot project. I'll take up the latter issue first,  
19 because that will not require much time.

20 There was a letter request submitted by counsel on 09:07  
21 behalf of the plaintiffs which I think was directed, if I  
22 recall correctly, to Chief Judge Collins and I believe a copy  
23 to defense counsel.

24 You've received that?

25 **MR. FREEBORNE:** We have, Your Honor. 09:08

1           **THE COURT:** Also a copy to myself and to Chief  
2 Judge Kozinski.

3           For two reasons, at least, for two reasons, although  
4 I considered the request -- and if it had not been for the two  
5 reasons I'm about to get to, I would have, of course, sought a 09:08  
6 formal response from the defense -- I don't think this case  
7 is -- well, it's not that this case is or is not appropriate,  
8 but there are two impediments, as I see it, for any case to  
9 participate in the pilot project. The first is because of the  
10 decision by the United States Supreme Court affecting I guess 09:09  
11 you'd call it the mechanics of the pilot project as it stands  
12 now -- that is, putting a stay on the one case in the northern  
13 district of California which had been selected for  
14 participation in the pilot project -- it seems to me that until  
15 the issues identified by the Supreme Court are resolved by 09:09  
16 further order from the Ninth Circuit resolving some of the  
17 issues with respect to the changes in the local rules that were  
18 required in the northern district and would be required in the  
19 central district before any court could participate, because  
20 our local rules, like the northern district's local rules at 09:10  
21 the time, prohibiting any photographic or videotaping of  
22 proceedings would have to be changed.

23           There are various other -- mechanical is not quite  
24 the right word, but there are various other issues in the pilot  
25 project that came to light during the first trial that 09:10

1 participated in it. And until, as I understand it, the Ninth  
2 Circuit is trying to make some changes to resolve some of the  
3 issues that came to light during the attempts to film the  
4 Proposition 8 trial, and also, of course, the issues that  
5 caused the Supreme Court to issue a stay, such as whether it's 09:11  
6 the responsibility of the Court set up and be responsible for  
7 the equipment -- that is, all the equipment that would allow  
8 the taping to go forward -- or whether it's simply a matter of  
9 making the courtroom accessible to any news media that wanted  
10 to bring in their own equipment to unobtrusively film the 09:11  
11 proceedings -- until those issues are further resolved by the  
12 circuit, and then, until if and when our court changes its  
13 local rules, it's not appropriate or possible to proceed with  
14 the request; so that's the status of the request by the  
15 plaintiff. But it has been considered. 09:12

16 Now, the second and more pressing issue is the trial  
17 date.

18 I have checked the docket. Since the parties were  
19 last here, I have seen no activity on the docket before  
20 Judge Eick on discovery matters, so I assume that the discovery 09:12  
21 has proceeded forward with the parties, the discovery that was  
22 discussed at the last hearing, since I have not seen you going  
23 before Judge Eick.

24 Given the public announcements from the  
25 administration regarding the changes in the position about the 09:13

1 policy that's at issue in this case, I would ask the government  
2 to tell me what its position is with respect to the defense in  
3 this lawsuit and whether or not it has any different position  
4 with respect to the defense of the lawsuit.

5 **MR. FREEBORNE:** Starting with the defense, we 09:13  
6 continue to defend the statute. Obviously with the testimony,  
7 there are things to bring to the Court's attention.

8 First, as the Court noted, during the State of the  
9 Union address, the President committed to working with Congress  
10 to repeal the statute; and then on February 2nd, there was 09:14  
11 testimony heard from both Secretary Gates as well as  
12 Admiral Mullen on both interim measures that are being  
13 undertaken as well as long-term measures that are being  
14 undertaken. If I could start with the short-term measures.

15 It is anticipated within 45 days of the testimony 09:14  
16 that was provided on February 2nd that revised regulations will  
17 be promulgated by the Department of Defense.

18 **THE COURT:** That puts us at the middle of March.

19 **MR. FREEBORNE:** That's right.

20 **THE COURT:** Forty-five days would be March 17th. 09:14

21 **MR. FREEBORNE:** That's right, Your Honor.

22 I will cut to the chase. We believe that a stay of  
23 this case is appropriate to see what changes are effectuated  
24 through those regulations.

25 I would remind the Court that plaintiff's case is the 09:14

1 facial challenge, not only to the statute but to the underlying  
2 regulations. If those regulations are altered, it will  
3 fundamentally change the nature of this case.

4 To give you one concrete example, Mr. Nicholson,  
5 who's the one member that plaintiff has identified, he alleges 09:15  
6 in his declaration that he was outed by a third party. In the  
7 testimony heard on February 2nd, Secretary Gates noted that  
8 issue is being examined, among others, and the revised  
9 regulations; so if we have those regulations, it could alter  
10 both the standing and it could also alter whether or not even 09:15  
11 there's a viable case here; so it seems prudent at this  
12 juncture to stay the case to see what comes of the regulations  
13 in the review that's being undertaken by the Secretary.

14 In the long term, as both Admiral Mullen and  
15 Secretary Gates noted at the February 2nd hearing before the 09:16  
16 Senate Armed Services Committee, a working group has been  
17 instituted within the Department of Defense to look at issues  
18 that should be ironed out if a repeal is implemented by  
19 Congress, to look at those issues and attempt to effectuate a  
20 smooth transition. 09:16

21 But again, I want to highlight the regulations, that  
22 they -- that's within 45 days of the February 2nd hearing.

23 Your Honor, I would also note, just to speak to  
24 discovery, for example, on Friday we just received deposition  
25 notices for both Secretary Gates and Admiral Mullen. There 09:16



1 have been, now, discovery requests for documents that relate to  
2 the deliberative processes of the DOD as it relates to their  
3 attempts to repeal the statute; so there's now a bleeding in of  
4 this case into the political issues. And with all due respect,  
5 we would ask that the Court allow the political process to work  
6 its will here and not have this case interfere with that  
7 political process long-term.

8           Again, short-term, we think a 60-day stay is  
9 appropriate in light of the regulations which could  
10 fundamentally alter the nature of this facial challenge.

11           **THE COURT:** Are those the only two depositions that  
12 have been noticed?

13           **MR. FREEBORNE:** There are some 30(b)(6) notices that,  
14 again, as to their -- we have objected to the 30(b)(6) notices.  
15 We will have motions practice on that.

16           They ask, among other things -- well, a lot of the  
17 issues that are now being considered by this task force, for  
18 example, the experience of foreign nations that DOD to-date has  
19 not formally studied, that will be looked at by the task force  
20 to see what has been the experience of foreign nations in  
21 incorporating gay and lesbian service members into their armed  
22 services and allowing them to openly serve.

23           That's one of the issues that is, again, the subject  
24 of the 30(B)6 notice that we've objected to; that's now being  
25 considered by the task force that's been established by --

1           **THE COURT:** And it's a 30(b)(6) notice to the  
2 Department of Defense?

3           **MR. FREEBORNE:** It is.

4           It's to the United States, but DOD would be the  
5 responding agency. 09:18

6           So those are the things that we were glad to see that  
7 the Court called this status conference, particularly after the  
8 statements.

9           There has been a lot of movement, both in terms of  
10 the State of the Union remarks by the President, and, as I 09:18  
11 noted at the February 2nd hearing, that could fundamentally  
12 alter this case, if not moot it.

13           **THE COURT:** All right. Thank you.

14           Mr. Woods?

15           **MR. WOODS:** Thank you, your Honor. 09:19

16           Since we were here in November, we have been working  
17 very hard to comply with the Court's scheduling order and to  
18 get this case ready for trial in June; so, yes, we have served  
19 discovery on the defendants, as we would be expected to do, and  
20 we are in the middle of discovery disputes with the defense on 09:19  
21 some of these things.

22           We have also complied with the Court's order by  
23 designating expert witnesses.

24           **THE COURT:** And I noted that the parties submitted a  
25 stipulation to continue the deadline for that, which I 09:19

1 approved, back in January.

2 **MR. WOODS:** And we timely, after the brief extension,  
3 submitted expert materials to the government, and the  
4 government has scheduled the depositions of all of the experts  
5 that we designated. 09:19

6 **THE COURT:** And when are those depositions scheduled  
7 for?

8 **MR. WOODS:** The first one is next Friday in New York;  
9 they follow the week after that in the Bay Area, and the week  
10 after that in the District of Columbia. 09:20

11 **THE COURT:** And how many experts have you designated?

12 **MR. WOODS:** Seven.

13 **THE COURT:** How many has the government designated?

14 **MR. FREEBORNE:** As we indicated at, I believe, the  
15 July status conference, we intend to rely upon the statute and  
16 legislative history in response to the facial challenges. 09:20

17 **THE COURT:** So none.

18 **MR. FREEBORNE:** So none.

19 **MR. WOODS:** Let me also, your Honor, talk about our  
20 perspective on the recent State of the Union address and Senate  
21 hearing. 09:20

22 Despite what you read in the newspapers about those  
23 positions taken by the government, the government in our  
24 lawsuit continues to fight the lawsuit vigorously. For  
25 example, your Honor, the State of the Union address occurred on 09:20

1 January 27th. One day later, January 28th, we were served with  
2 objections to a set of requests for admissions that we had  
3 served on the government. One day after the State of the Union  
4 address, the government served us, plaintiff, Log Cabin  
5 Republicans, with a set of interrogatories, a set of document 09:21  
6 requests, and a set of requests for admissions. Two days after  
7 the State of the Union address, i.e. January 29th, the  
8 government served us with objections to the 30(b)(6) deposition  
9 notice we had served on the defendant. I note in that regard,  
10 Your Honor, that the defendant has refused to produce any 09:21  
11 witness in response a 30(b)(6) deposition notice on any subject  
12 listed in the notice, and we expect to have cross-motions about  
13 that to be filed soon.

14 You may recall when we were here in November, we also  
15 had discussions about our document requests to the government 09:21  
16 and the government's lack of a timely response to those  
17 document requests. Following the November hearing, we have met  
18 and conferred with the government about narrowing the requests;  
19 we have narrowed them to the extent we thought was appropriate.

20 Despite the government's untimely objections, the 09:22  
21 government has produced some documents, but the government  
22 continues to withhold responsive relevant documents; so we have  
23 anticipated a motion to compel further responses to the  
24 government about that.

25 Since the State of the Union address, the government 09:22

1 has noticed the depositions of our expert witnesses and has  
2 noticed the deposition of Mr. Nicholson as well.

3 So the government, Your Honor, despite the State of  
4 the Union address and whatever comments were made at the Senate  
5 hearing on February 2nd, is continuing to defend the lawsuit 09:22  
6 vigorously.

7 We also are well aware of what the Department of  
8 Defense and the Chairman of the Joint Chief of Staff said at  
9 the Senate hearing. And yes, counsel is right that there is an  
10 interim review being done and a longer-term review being done. 09:22  
11 Neither of these things should have any impact on our case,  
12 Your Honor.

13 The long-term analysis of this, your Honor, by our  
14 calculations, will take at least two years more, probably two  
15 and a half years more. Let me explain why I say that. At the 09:23  
16 February 2nd hearing, Secretary Defense Gates said that he  
17 wanted this study about "Don't Ask, Don't Tell" to be completed  
18 by the end of this calendar year; so by the end of 2010, the  
19 military working group will have produced a study.

20 Now, that's a study. 09:23

21 Congress has to decide whether to repeal the statute  
22 or not.

23 There's no doubt about that, because, again,  
24 Secretary Gates said to the Senate hearing that "the ultimate  
25 decision rests with you, the Congress." 09:23

1           So we don't know, of course, how long it would take  
2 the Senate to analyze whatever report is produced by the end of  
3 the calendar year 2010. But if we assume, for example, that it  
4 takes six months, that takes us to June 2011.

5           **THE COURT:** I'm sorry. 09:24

6           The study could be completed by December 2010, as a  
7 timeline.

8           **MR. WOODS:** Right.

9           **THE COURT:** And then it goes to Congress.

10          So what are you saying happens in the six months? 09:24

11          **MR. WOODS:** That maybe Congress will --

12          **THE COURT:** -- will act in six months.

13          **MR. WOODS:** Maybe. That's optimistic, I would say.

14          And then, according to Secretary Gates again, it  
15 would take at least a year to implement any change that 09:24  
16 Congress made.

17          So even if you assume that Congress can act in six  
18 months, we're not talking about any fundamental change until,  
19 at the earliest, the middle of 2012, more than two years from  
20 now. And that also assumes that Congress acts to repeal the 09:25  
21 statute, which, of course, is very iffy. As you may have read  
22 in the Senate hearing, there was opposition to the President's  
23 new position from various senators.

24          As you know, there's an election in November that  
25 could change, fundamentally, the composition of the Senate, and 09:25

1 that could change how Congress views any effort by the  
2 President to repeal the statute; so this is all very iffy in  
3 the long-term basis.

4 But even if there was any repeal to the statute, it  
5 was not going to take effect until, at the very earliest, more 09:25  
6 than two years from now, and more than two years after the  
7 trial. In the meantime, during that period, there is no  
8 moratorium on discharges of gays and lesbians serving. They  
9 will continue to be discharged. There is also no effort to do  
10 anything about that underway now. 09:25

11 When Counsel and I talked about possibly a stay of  
12 this case, I asked about a moratorium. That has been rejected.  
13 I asked about the possibility that during any stay period,  
14 there might be a slightly different standard applied. In other  
15 words, what I suggested to Counsel was the following: That 09:26  
16 before any gay or lesbian member of our armed forces be  
17 discharged during any stay period, the government be required  
18 to prove that that person's homosexuality had a negative impact  
19 on unit cohesion or troop morale. It would be similar to the  
20 standard adopted by the Ninth Circuit in the Witt case with 09:26  
21 which you are familiar; so that before anybody could be  
22 discharged, there actually had to be some showing of a negative  
23 impact on unit cohesion or troop morale in any stay period.  
24 The government is not agreeable to that either.

25 So in this period of time when the government is 09:27

1 thinking about changing the policy, your Honor, gay and lesbian  
2 soldiers, sailors and others will continue to be discharged and  
3 harmed by what we believe to be this unconstitutional policy.

4 Now, yes, there is some opportunity here for the case  
5 and politics to bleed together, and that is because, among 09:27  
6 other things, the Chairman of the Joint Chief of Staff said to  
7 the Senate on February 2nd that there was no evidence of which  
8 he is aware to support the proposition that the policy protects  
9 unit cohesion or troop morale, the stated purpose of the policy  
10 in the statute. The government's own leading enforcer of this 09:27  
11 policy admits that there is no evidence to support it, and we  
12 believe that is a damning admission to the government's  
13 position that we can use at the trial.

14 Now, we can't help that the politicians are involved  
15 in this at the same time that we're preparing a case for trial. 09:28  
16 We didn't do that, they did that; so that really should not  
17 matter.

18 With regard to this notion of a short-term stay of  
19 60 days, I'm opposed to that for all of the reasons that I just  
20 mentioned. There is no indication of what is going to change 09:28  
21 in these regulations. We don't know yet. The only thing that  
22 was discussed was that discharges would have to be approved by  
23 somebody at a higher level of authority, and investigations  
24 could be started only by somebody at a higher level of  
25 authority. That's the only change that is being discussed in 09:28



1 this 45-day period. It doesn't alter the fact that patriotic  
2 gay and lesbian members of our armed forces, who are fighting  
3 and dying in two wars today, will continue to be negatively  
4 impacted by this policy while the government continues to study  
5 it.

09:29

6 Your Honor, we had the same discussion back in  
7 November when the government was trying to stay the case then.  
8 Your order denying the stay at that time made perfect sense,  
9 and it continues to make perfect sense, even putting aside the  
10 fact that the government has not moved for a stay, which it  
11 really ought to do if it thinks a stay is appropriate. But  
12 back in November, you pointed out that the defendants, quote,  
13 "Cite no authority for the proposition that district courts  
14 should stay litigation concerning the constitutionality of  
15 federal laws for an indefinite period merely because  
16 legislative and executive branches have expressed doubts  
17 concerning the continued wisdom of the challenged laws.  
18 Indeed, such a rule would allow Congress effectively to  
19 insulate federal laws from constitutional challenge merely by  
20 continually holding hearings concerning those laws. This Court  
21 declines to adopt such a rule."

09:29

09:29

09:30

22 Your Honor, that's what you said in November. I  
23 think it's right. I think it still applies.

24 **THE COURT:** Well, first of all, I think there are two  
25 important things to discuss based on what you have both just

09:30

1 argued. And let's start with the -- of course it's a very  
2 effective technique -- and by 'technique,' I don't mean that --  
3 it's a very effective way to argue to quote back the judge's  
4 own words, because you put me in a position of having to, if  
5 I'm going to try to disagree with that, disagree with myself. 09:31  
6 But since the government has probably wisely asked for at this  
7 point a 60-day stay, which is different from an indefinite stay  
8 which is the language in the language that you just quoted, I  
9 think the first thing to consider is whether a stay of 60 days  
10 makes any sense. 09:31

11 So the first thing I'm wondering, as I listen to both  
12 of you, is whether anything -- I'm not inclined to issue an  
13 indefinite stay. If there is a stay, it should be for a  
14 definite term; and that's not to say that I have decided that  
15 there should be one. 09:32

16 In terms of thinking about whether a stay for a  
17 definite period of time would be appropriate or would make  
18 sense, looking back at the timeline that you just argued about  
19 how long it would take before a decision is made by Congress,  
20 the defense's argument is that in the long-term we're talking 09:32  
21 about at least two and a half years after our trial date. The  
22 problem I have with that amount with the timeline that you  
23 predict is this: I think it's a conservative timeline. That  
24 is, I think it's optimistic.

25 I agree with you that the study would be completed by 09:32

1 December of this year; a decision by Congress, say, in six  
2 months, which puts us at June 2011; and then a year to  
3 implement. It's that last year part that's...

4           If this case goes to trial in June -- and there's  
5 every reason to believe you'll start on the date that I have 09:33  
6 given you, or very shortly -- there's no reason to think you  
7 will not start on June 14th, because this is an old case and  
8 you should get priority on my calendar -- and then it will take  
9 me some time to do a decision after the trial -- but just  
10 assuming, for the purposes of argument alone, the decision is 09:33  
11 in the plaintiff's favor, it's still going to take time to  
12 implement.

13           Your assumption here is that the time to implement,  
14 if Congress changed the regulations and abolished the statute,  
15 is somehow longer than it would take if the Court's ruling had 09:34  
16 a similar effect, and I think that's a false proposition.

17           **MR. WOODS:** I don't agree with that, your Honor.

18           I think at the end of a court trial in this case, we  
19 will ask you to issue a permanent injunction; that's part of  
20 the remedy we'll ask you for. We will ask you to enjoin the 09:34  
21 government from enforcing its unconstitutional "Don't Ask,  
22 Don't Tell" policy immediately. That's what we're asking for.

23           **THE COURT:** I understand that.

24           I understand the relief you're seeking in this case,  
25 and I hesitate to draw this analogy, so I'm trying to think of 09:34

1 a different one, but whenever a policy of large proportion is  
2 changed, I think it's overly optimistic to think that one order  
3 issued from one court means that enforcement is unambiguous and  
4 occurs overnight.

5 Certainly, I have no idea yet even if, of course, the  
6 plaintiffs will prevail, but the words that come to mind are  
7 'all deliberate speed.' And I don't think that enforcement or  
8 nonenforcement of this policy would be as complex as what's  
9 faced other courts in other contexts.

10 But if you're predicting that it would take one year  
11 to implement a change if Congress repeals the regulations, then  
12 I don't see why it would be an overnight change if it's a court  
13 order.

14 **MR. WOODS:** Your Honor, with respect, I think you're  
15 underestimating your own powers. I mean, I do recall from  
16 personal experience as a law clerk to another federal judge  
17 some years ago, my first day on the job, the judge declared an  
18 act of Congress unconstitutional, and it stopped that very day.  
19 And there were appeals and such, but in the meantime, the  
20 judge's order became, in effect, the law of the land. And  
21 that's what we're asking this Court to do in a very different  
22 context.

23 I don't think that there is any possible way of  
24 resolving this without causing the continued harm to Americans  
25 in the position that we're representing.

1 I would have been accommodating to the government if  
2 the government had been willing to agree to stay discharges  
3 pending a stay period or even if they had adopted the Witt  
4 standard from the Ninth Circuit on a national basis. That  
5 would make sense, Your Honor, because in the meantime, people 09:37  
6 -- if the President is really interested in repealing the  
7 law -- would have the opportunity to study it, implement it;  
8 but in the meantime, no one would be harmed by the current law.  
9 So that, I thought, made sense. But the government is not  
10 interested. So in the meantime, people are harmed. 09:37

11 **THE COURT:** Which brings me to the next question  
12 which is that if there is a stay for a finite period of time,  
13 and the government's request is 60 days, if in that 60-day  
14 period, there is a change in the -- and I don't mean 'the  
15 government' meaning the defendant in this case or the defense 09:38  
16 in this case, but the government in the sense of the Department  
17 of Defense's implementation of the policy -- if there's a  
18 moratorium that is adopted, not as a part of this litigation,  
19 but then it seems to me that, to me, is the most compelling  
20 reason for a short stay over a finite period of, say, 30 to 09:38  
21 60 days to see if in that period the Department of Defense, in  
22 connection with the study that it's undertaking, enacts a  
23 moratorium.

24 **MR. WOODS:** I'm sorry, your Honor, but  
25 Secretary Gates at the very second hearing said that there 09:39

1 would be no moratorium. And I suggested this to Mr. Freeborne,  
2 who agreed that there would be no moratorium during this 45-day  
3 stay period and that that is not something the government is  
4 thinking about.

5 **THE COURT:** Well, that 45-day period, that's the 09:39  
6 45-day period that ends on March 17th.

7 **MR. WOODS:** Right. But they are not thinking about a  
8 moratorium in this 45-day period. The only thing, according to  
9 the testimony before the Senate, that is under consideration is  
10 elevating the level, the rank, if you will, of an officer who 09:39  
11 considers discharge proceedings and whether a higher level of  
12 officer or a higher-ranked person is required to initiate an  
13 investigation; so these are very, very minor changes that do  
14 not impact the status of the thousands of gay and lesbian  
15 members of our armed forces fighting for our country today. 09:40

16 **MR. FREEBORNE:** Your Honor, could I be heard on that  
17 issue, because I'd like to read in, actually, the testimony of  
18 Secretary Gates. This was in response to a question from  
19 Senator Levin, and he outlined what issues are being  
20 considered. And just so I'm clear, these issues are being 09:40  
21 considered, just so we're all on the same page about things  
22 that are being considered.

23 He was asked the question of what would be undertaken  
24 during this 45-day review period, and he said "We can raise the  
25 level of the officer who was authorized to initiate an 09:40

1 inquiry." That's what Mr. Woods just alluded to. "We can  
2 raise the level of the officer who conducts the inquiry; we can  
3 raise the bar of what constitutes credible information to  
4 initiate an inquiry; we can raise the bar on what constitutes a  
5 reliable person on whose words and inquiry can be initiated." 09:40

6 And it goes on: "Overall, we can reduce the instances in which  
7 a service member who is trying to serve the country honorably  
8 is outed by a third person with a motive to harm the  
9 serviceman." Then he goes on to talk about Witt, and states  
10 "We also have to devise new rules and procedures in light of 09:41  
11 the Appeals court decision in Witt versus the Department of Air  
12 Force for the areas of the country covered by the Appellate  
13 court."

14 That is what's being considered. Those are the  
15 issues that are being considered. Whether any of those will 09:41  
16 ultimately be implemented, we don't know. But that, just so  
17 we're all on the same page about the breadth of the issues, is  
18 not what Mr. Woods just stated; it's much broader.

19 Which, again, their challenge is a facial challenge  
20 to the statute and regulations. One needs only to look at the 09:41  
21 complaint. They draw, in large part, from the regulations. If  
22 those regulations change, I would argue they have to amend  
23 their complaint and file a new lawsuit.

24 **THE COURT:** The other issue that is of grave concern  
25 if we move towards a trial date in June is the extent to which 09:42

1 the discovery, not so much of the expert witnesses that the  
2 plaintiff has designated, but -- and let me just stop for a  
3 moment there and say, given that there is a discovery cutoff in  
4 this case, I cannot really fault the government for propounding  
5 discovery and continuing to defend the case vigorously, as the 09:42  
6 plaintiff has characterized it, at this point.

7 The real issue and the real concern is that the  
8 discovery that the plaintiff seeks to do, including the  
9 depositions of Secretary Gates and Admiral Mullen and so forth,  
10 to a certain extent, is going to call into question not just 09:43  
11 whether a protective order would issue to quash the deposition  
12 notices, but whether the jurisdiction of the Court over this  
13 case would be affected because of the constitutional limitation  
14 based on the political question.

15 And of course, that has not been briefed and that's 09:44  
16 almost a brand new issue in this case, given the most recent  
17 events, but it seems to me it's another reason why I might want  
18 to extend the trial date for a brief period of time. And I do  
19 mean brief, like 30 to 60 days, to allow the parties to brief  
20 that issue about any limitations on the Court's jurisdiction 09:44  
21 because of the impingement of a political question, and see if  
22 there's a way to fashion discovery so the plaintiff can take  
23 the discovery that it feels it's entitled to do of elected  
24 officials, especially if they have made a statement, but yet  
25 does preserve the deliberative process which also exists. 09:45



1 Because those are not issues that are going to be easily  
2 resolved in a 30-minute discovery motion hearing.

3 **MR. WOODS:** Your Honor, this is one of the reasons  
4 why I suggested it; that if there was going to be any request  
5 by the government for a stay, that it not come up verbally in 09:45  
6 the middle of a status conference but, instead, be made by a  
7 traditional, formal motion, which the government has not made.  
8 Because then we would be able to respond adequately to the  
9 points that may come up.

10 **THE COURT:** I'm going to give both sides -- if I'm 09:46  
11 inclined to do this, both sides will have a full opportunity,  
12 but the earliest that this question is addressed, the better,  
13 for both sides.

14 **MR. WOODS:** I agree.

15 And I would also suggest, Your Honor, that if there's 09:46  
16 any stay under consideration, that it only be a postponement of  
17 the trial date, not a stay of the entire case, so that we have  
18 time to finish all of the discovery. It needs to be done  
19 before we ever get to a trial.

20 **MR. FREEBORNE:** May I be heard on that issue? 09:46

21 **THE COURT:** Let him finish, and then I'll let you be  
22 heard.

23 **MR. WOODS:** And I would also suggest that if there's  
24 going to be any stay considered, that the Court condition any  
25 stay on preserving the position of people represented by our 09:46

1 client.

2 Now, he just read to you part of Secretary Gates'  
3 testimony in front of the Senate, but he missed or did not want  
4 to read another part of it, which was about moratoriums.

5 Senator Levin asked him whether he would support a moratorium  
6 pending this period on discharges, and Secretary Gates said "We  
7 will look at it, Mr. Chairman."

8 I will tell you that the advice I have been given is  
9 that the current law would not permit that; so they are not  
10 going to do a moratorium.

11 If you're going to stay anything in this case,  
12 Your Honor, we would ask you to stay it on the condition that  
13 either there be a moratorium on discharges or that the Witt  
14 standard be applied nationally so that no one could be  
15 discharged unless and until there was an actual showing that  
16 there was an impact negatively on unit cohesion or troop morale  
17 as a result of the service member's homosexuality. Otherwise,  
18 a stay in this case continues to damage the interests of those  
19 people fighting for our country today who have been delayed in  
20 this unfortunate case for so long already.

21 **THE COURT:** All right.

22 Mr. Freeborne?

23 **MR. FREEBORNE:** With regard to the last point, this  
24 Court's jurisdiction would only extend to this district. They  
25 are asking for nationwide relief, which this Court would not

1 even have the power to effectuate a nationwide injunction.  
2 This is not a class action; this is a case brought within this  
3 district.

4 **THE COURT:** But how in the world could -- if the  
5 plaintiffs succeed in this case on the relief that they are  
6 seeking, are you suggesting that an injunction would be only  
7 directed to service members serving within the Ninth Circuit?

09:48

8 **MR. FREEBORNE:** Your Honor, this Court does not have  
9 nationwide jurisdiction to issue an injunction.

10 **THE COURT:** Are you suggesting that, theoretically,  
11 if a district court orders that any regulation or federal law  
12 is unconstitutional, it only applies in the district where the  
13 Court sits?

09:49

14 **MR. FREEBORNE:** Well, Your Honor, we can put that  
15 issue aside. I just note that I think that --

09:49

16 **THE COURT:** That's because I think you are incorrect.

17 **MR. FREEBORNE:** Your Honor, with respect to the  
18 discovery, as the Court noted, that discovery runs headlong  
19 into the political question. They want to depose  
20 Secretary Gates and Admiral Mullen about their deliberative  
21 processes as it relates to their efforts to potentially repeal  
22 the statute, which, as the Court indicated, freezes any type of  
23 discussion. They want us to designate a 30(b)(6) witness to  
24 testify about matters that, again, are being considered by the  
25 task force.

09:49

09:50

1           Mr. Woods is correct, Secretary Gates said that DOD  
2 does not have the authority to effectuate a moratorium. But I  
3 noted the areas that are being examined in the regulatory  
4 review process that is being undertaken, and it is anticipated  
5 that within 45 days, or shortly thereafter, we will have new  
6 regs on the books that could fundamentally alter this case and,  
7 as I noted before, plaintiffs' standing to bring the case or  
8 whether or not the case is moot.

9           **THE COURT:** Well, maybe I misunderstood you when you  
10 earlier said that 45-day period, which ends roughly on  
11 March 17th -- are you predicting that there will be new  
12 regulations?

13           **MR. FREEBORNE:** Your Honor, that's the Secretary's  
14 testimony; that's what's anticipated to happen on that date.  
15 Which, as I note, it's reasonable to have a stay now so we can  
16 see what those regulations are and see how they affect this  
17 case, this very case that the Court has before it.

18           **THE COURT:** But this case and the complaint in this  
19 case does not challenge only the regulations.

20           **MR. FREEBORNE:** No. Without a doubt, it challenges  
21 both the statute and the regulations; and the regulations, if  
22 changes are implemented, will effectuate a change in how it's  
23 administered, which affects their --

24           **THE COURT:** It may, but it may not necessarily moot  
25 the case.

1           **MR. FREEBORNE:** It may not moot it, but it may  
2 actually moot some of the discovery issues that the Court would  
3 otherwise have to address.

4           And I also note the standing issue of Mr. Nicholson,  
5 which, again, I'm not here to commit to any regulatory changes  
6 but --

7           **THE COURT:** I understand that.

8           And we don't need to get into it, because it may or  
9 may not occur. I'm not sure I agree with you about how the  
10 changes in the regulations could moot the standing of  
11 Mr. Nicholson. But we don't need to argue that today.

12           **MR. FREEBORNE:** I should note, I think the political  
13 question or some type of a -- the Court deserves to know how it  
14 should be able to operate in this environment and also the  
15 overarching issues of how this case will ultimately be  
16 governed.

17           We had an argument back in July on whether or not we  
18 should be looking at continued rationality. Our view, as you  
19 know, is you look at the type of enactment and you look at the  
20 basis upon which Congress and the then-President looked to in  
21 enacting this statute, namely privacy and sexual tension. And  
22 perhaps in conjunction with that briefing, the parties would be  
23 aided by knowing exactly what the target is here.

24           We don't believe it's continued rationality, for the  
25 legal reasons we set forth in July, but also we run into the

1 difficulties that we have today, where now you have efforts  
2 afoot to potentially repeal a statute. This case has the  
3 potential of freezing those types of discussions through the  
4 discovery and, ultimately, perhaps thwarting the efforts that  
5 plaintiff actually wants to achieve here. That's the issue.

09:53

6 **THE COURT:** Well, I don't view the issue quite that  
7 broadly. I think there are issues that could come up in this  
8 case in the context of the discovery that the plaintiff wishes  
9 to take that may be subject to either the deliberative process  
10 privilege or the political question issue. But the more I hear  
11 from both sides -- and I appreciate what both of you have  
12 argued -- what I'm inclined to do -- and I'm going to take it  
13 under submission, and I may ask for briefing from both sides --  
14 what I'm inclined to do is probably to continue the trial date  
15 for a short period of time and continue the discovery cutoff  
16 date, because I foresee that what's probably really necessary  
17 here is more time to resolve the issues that I have identified  
18 about discovery, but not necessarily to issue a stay at this  
19 time.

09:54

09:54

20 So I will issue a written order.

09:54

21 And, as I said, if I'm inclined to order a stay  
22 rather than continuing the trial date, I'll ask for further  
23 briefing. Or I guess, alternatively, if you want to submit  
24 something in writing, both sides, I'll allow you to do that.  
25 I'll give both sides ten days in which to submit briefing on

09:55

1 those issues.

2 Is that preferable?

3 **MR. FREEBORNE:** So you're not inclined to issue a  
4 stay of the --

5 **THE COURT:** I'm not inclined to stay the case. I'm 09:55  
6 inclined to continue the trial date for a short period of time,  
7 because I think that what's going to happen is that in the  
8 course of preparing for trial, the issues that we've identified  
9 about the deliberative process privilege and the political  
10 question issues as it relates to the discovery that the 09:55  
11 plaintiff wants to propound, that's what's going to take up  
12 more time.

13 And in the course of that, and depending on what  
14 happens with the regulations, which may or may not issue by  
15 mid-March, if you feel that -- well, first of all, if the 09:56  
16 regulations do issue by then, then you can bring a motion if  
17 you think there's a real issue that certain parts of the  
18 complaint have been made moot. I think that's a more  
19 appropriate way to proceed. We don't know if any new  
20 regulations will issue; we don't know what they'll be; we don't 09:56  
21 know what the affect of them will be on the status of the case.

22 That's what I'm inclined to do at this point.

23 So if we're talking about a continuance of the trial  
24 date for 60 to 90 days, that means we're going to trial in July  
25 or August. 09:56

1 Does either side have any -- what do your trial  
2 calendars look like in July or August?

3 **MR. FREEBORNE:** August would be preferable, from the  
4 government's perspective, Your Honor.

5 **MR. WOODS:** We're happy to do it at the earliest  
6 possible date convenient to the Court. 09:57

7 **THE COURT:** All right.

8 Do the parties want to submit briefing on the issues  
9 before I take the matter under submission, or do you want to  
10 have it stand submitted based on your arguments today? 09:57

11 **MR. FREEBORNE:** If I could alert the Court, I'd like  
12 to consult with my supervisors back in Washington. I'll let  
13 the Court know what our preference is.

14 **THE COURT:** Mr. Wood?

15 **MR. WOODS:** That's fine, Your Honor. 09:57

16 I have no problem with a brief on the issue.

17 It may be that in light of this discussion, we might  
18 simply withdraw the notices of the depositions of  
19 Secretary Gates and Admiral Mullen.

20 **THE COURT:** And wait and see what happens with the  
21 issuance of new regulations? 09:58

22 **MR. WOODS:** Yes. I mean, it was never our intention  
23 to question them about what they are doing. The questions were  
24 about the evidence that exists today about the underpinnings of  
25 the statute. We're not trying to get into the politics of 09:58



1 this. The politics of this, of course, overtakes the case,  
2 because as it turns out, four years after we filed the lawsuit,  
3 the President of the United States, the Secretary of Defense  
4 and the Chairman of Joint Chiefs of Staff all today now seem to  
5 agree with our position, leaving the government defending the  
6 case in a rather awkward position.

09:58

7 But I'm happy to submit a brief in ten days to  
8 explain to the Court why no stay is necessary and how the  
9 discovery will proceed. By that time, we'll also probably have  
10 on file one or more discovery motions.

09:58

11 **THE COURT:** All right.

12 Well, I'm not sure I need further briefing at this  
13 point, because I think if any further briefing is necessary, it  
14 will come up in the context of discovery motions.

15 I'm still considering whether -- and I have the  
16 greatest confidence in Judge Eick, but I have a  
17 feeling whatever -- I'm still considering whether or not to  
18 vacate the discovery reference. I'll make a decision on that  
19 today; so you may be filing your motions directly here. But  
20 unless you hear otherwise, of course, discovery motions are  
21 heard before Judge Eick.

09:59

22 Thank you very much.

23 **MR. WOODS:** Thank you, your Honor.

24 **MR. FREEBORNE:** Thank you.

25 (Proceedings concluded.)

09:59

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CERTIFICATE

I hereby certify that pursuant to section 753, title 28, United States Code, the foregoing is a true and correct transcript of the stenographically recorded proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

\_\_\_\_\_  
THERESA A. LANZA, CSR, RPR  
Federal Official Court Reporter

\_\_\_\_\_  
Date