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11 *of America and Secretary of Defense*

12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
EASTERN DIVISION

14 LOG CABIN REPUBLICANS,
15 Plaintiff,
16 v.

17 UNITED STATES OF AMERICA AND
18 ROBERT M. GATES, Secretary of
Defense,
19 Defendants.

No. CV04-8425 VAP (Ex)

APPENDIX IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

DATE: April 26, 2010

TIME: 2:00 p.m.

BEFORE: Judge Phillips

EXHIBIT 1

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IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS,)
Plaintiff,)
v.)
UNITED STATES OF AMERICA AND)
ROBERT GATES, Secretary of)
Defense,)
Defendants.)

No. CV-04-8425 (VAP) (Ex)

Deposition of TERRY HAMILTON, taken in the
above-entitled matter before Lindsay Pinkham, Certified
Shorthand Reporter No. 3716, Certified Realtime Reporter
within and for the State of California, taken at the
offices of WHITE & CASE, 633 West Fifth Street, Suite
1900, Los Angeles, California 90071, on Saturday, March
13, 2010, commencing at 10:00 A.M.

1 A Well, during --

2 MR. WOODS: I'm sorry. Before you answer
3 question, I'm going to object to it as being overly
4 broad and vague.

5 But go ahead and answer.

6 THE WITNESS: I was almost drafted during the
7 Vietnam War era and was ready to serve and was not
8 called.

9 Q BY MR. FREEBORNE: You say you were "almost
10 drafted." What do you mean?

11 A I had done my physical and all of the steps
12 necessary to induct me into the military.

13 Q And your number just didn't come up?

14 A The draft ended.

15 Q Okay. Thank you.

16 This morning we're going to talk about your
17 involvement in the Log Cabin Republicans. Starting with
18 the present, what is your current position with the Log
19 Cabin Republicans?

20 A I am the chairman of the national board of
21 directors of Log Cabin Republicans.

22 Q And what do you do in that position?

23 A I preside over an annual meeting for Log Cabin.
24 I preside over monthly meetings.

25 Q Anything else?

1 help my recollection.

2 Q How does one become a member of Log Cabin?

3 A There are several ways. According to our
4 bylaws, you may become a member directly, by paying
5 membership dues and stating that you are a member of the
6 Republican Party. You may also become a member by
7 joining a local chapter and following that same
8 procedure.

9 Q Just so I have it right, so you can pay dues to
10 the national office or you can join through a local
11 chapter?

12 A Yes.

13 Q Okay. But the process is the same. A, you
14 have to say that you're registered to vote as a
15 Republican, and anything else?

16 A Well, I'm not sure that each state has the same
17 requirements as far as registration. So being a
18 Republican in the various states may be a different -- I
19 think the bottom line is that you have to state that you
20 are a Republican and pay dues.

21 Q Again, bear with me. But if you're not
22 registered as a Republican, how can you say you're a
23 Republican?

24 A Well, that's all we require.

25 Q So the thought is that somebody votes

1 A I believe that he was involved in that. I
2 don't know that he was actively involved with Log Cabin
3 from the very beginning.

4 Q Okay. What attracted you to Pete Wilson as a
5 candidate?

6 A I think the main thing that attracted me to him
7 was that he came to a Log Cabin meeting and wanted our
8 support and wanted to listen to what our points of view
9 were. And at the time, that was fairly impressive, to
10 have either a candidate for governor or U.S. Senate, and
11 I don't recall which one it was at that particular time,
12 but to have someone of that stature come to a Log Cabin
13 meeting and say, "I want your input, I want your
14 support, I want your endorsement, I want to work with
15 you."

16 Q And when did Pete Wilson come to a meeting of
17 the Log Cabin Republicans?

18 A I don't remember exactly.

19 Q Are there criteria or requirements for active
20 membership in the Log Cabin Republicans?

21 A None beyond the membership that I've outlined
22 earlier.

23 Q In other words, if somebody falls delinquent in
24 their dues, are they no longer a member of the Log Cabin
25 Republicans?

1 A Ideally, yes.

2 Q You say, "ideally, yes." Does that mean there
3 are exceptions made?

4 A I wouldn't say there are exceptions made, but I
5 know that there are chapters that do a better job of
6 keeping up in the collection of dues than others.

7 Q Was that a requirement of the national office?

8 A Yes.

9 Q Is that set forth in the bylaws?

10 A Yes.

11 Q And are there separate bylaws at the state and
12 local level?

13 A Yes.

14 Q Is that a requirement of the bylaws at the
15 state and local level?

16 A Yes.

17 Q I'm going to move to another subject, but I
18 understand from counsel that you'll be providing
19 testimony at trial on one of two issues. The first is
20 Log Cabin as an organization and what it does.

21 Beyond the questions that I have posed to you
22 this morning, do you anticipate providing testimony on
23 any other subjects as it relates to Log Cabin as an
24 organization and what it does?

25 A No.

1 Q And that's different than your annual meeting?

2 A That's true.

3 Q And since it's an annual convention, you have
4 it once a year?

5 A Yes.

6 Q Any particular time?

7 A It has been in the springtime, but it's not
8 required that it be in the springtime.

9 Q And you said that you remember hearing
10 Mr. Nicholson speak at an annual convention. What
11 convention or what location do you remember him
12 speaking?

13 A Well, I know that he spoke at a national
14 convention in Washington. I know that he spoke at our
15 last national convention in Washington. I don't know
16 how I would exactly pin that down, actually.

17 Q Are you aware that Log Cabin has also
18 identified an anonymous member who has provided a
19 declaration a few years ago in which that member, John
20 Doe is his name, said that he was purportedly harmed by
21 the policy?

22 A I'm aware of that.

23 Q Without revealing his name, do you know who
24 John Doe is?

25 A I do not.

1 Q It's fair to say you can't vouch one way or
2 another for his --

3 A I can't --

4 Q Let me finish the question. You can't vouch
5 one way or another for his declaration?

6 A I cannot.

7 Q And so you don't know if he is even a current
8 member of Log Cabin; correct?

9 A I do not personally know.

10 Q Outside of Mr. Doe, does anyone else know that
11 within the organization that you're aware of?

12 A Yes.

13 Q Who would know that?

14 A One of my board members.

15 Q Who is that?

16 MR. WOODS: You can tell the board member's
17 name.

18 THE WITNESS: Okay. His name is Phillip
19 Bradley.

20 Q BY MR. FREEBORNE: And why do you believe
21 Mr. Bradley knows that?

22 A He told me that he knows that.

23 Q When did you have a conversation with
24 Mr. Bradley?

25 MR. WOODS: About this subject?

1 THE WITNESS: About this subject?

2 Q BY MR. FREEBORNE: Yes.

3 A I believe it was three months ago.

4 Q What did he say?

5 A He said he knows how to get in touch with the
6 John Doe, in case we need to.

7 Q Anything else?

8 A No.

9 Q So he did not tell you one way or the other
10 whether or not Mr. Doe was still a member of Log Cabin?

11 A Could you repeat the question, please?

12 Q Did Mr. Bradley tell you one way or the other
13 whether or not John Doe currently is a member of the Log
14 Cabin Republicans?

15 A No.

16 Q Did he tell you one way or the other whether or
17 not John Doe is a current member of the military?

18 A Yes.

19 Q What did he say?

20 A That he is.

21 Q What else did Mr. Bradley tell you about John
22 Doe?

23 A Nothing.

24 MR. FREEBORNE: Let me mark as Defendant's

25 Exhibit 36 a survey that Mr. Woods provided me prior to

EXHIBIT 2

1 UNITED STATES DISTRICT COURT
 2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 3 EASTERN DIVISION

4 - - - - - x

5 LOG CABIN REPUBLICANS, :

6 :

7 Plaintiff, :

8 :

9 v. : CA No. CV04-8425

10 : (VAP) (Ex)

11 UNITED STATES OF AMERICA AND :

12 ROBERT GATES, Secretary of :

13 Defense, :

14 :

15 Defendants. :

16 - - - - - x

17

18 Washington, D.C.

19 Monday, March 15, 2010

20

21

22

1 BY MR. SIMPSON:

2 Q Mr. Nicholson, are you currently taking
3 any medication or suffering from any medical
4 condition that could affect your ability to answer
5 my questions today?

6 A No.

7 Q And for the record, could you state your
8 full name?

9 A Sure. It's John Alexander Nicholson,
10 III.

11 Q And what's your address, please?

12 A 1804 North Quinn Street, Apartment 207,
13 in Arlington, Virginia 22209.

14 Q Are you a member of the Log Cabin
15 Republicans?

16 A Yes, I am.

17 Q When did you become a member?

18 A In April of 2006.

19 Q Have you been a member since then?

20 A Yes, I have.

21 Q How did you become a member in April
22 2006?

1 A It's my understanding that I became a
2 member when I signed up to be a part of their
3 database when I was entered into their database as
4 a member of the organization.

5 Q Did you have to make a monetary
6 contribution to become a member?

7 A No, I didn't.

8 Q What prompted you to become a member of
9 Log Cabin Republicans?

10 A I'd been involved with them in a couple
11 of ways for about maybe six months prior to that,
12 and they asked me to get more actively involved.
13 And so they asked me to become a formal member.
14 And so I accepted.

15 Q Do you pay annual dues?

16 A No, I don't.

17 Q Are you aware, Mr. Nicholson, that some
18 people become a member of Log Cabin Republicans by
19 making a contribution?

20 A I'm aware that that's one way in which
21 individuals can be considered members or become
22 members.

1 THE FOLLOWING SEGMENT OF THE TRANSCRIPT IS
2 SEALED UNDER PROTECTIVE ORDER

3
4 MR. SIMPSON: Okay. This part of the
5 deposition will have to be bound separately and
6 sealed. This is pursuant to a protective order,
7 stipulation and protective order.

8 And I should just put on the record the
9 report has signed the Privacy Act acknowledgment
10 that was submitted with the parties' stipulation
11 regarding Privacy Act confidentiality, which was
12 Docket Number 112.

13 If I could mark this, please.

14 (Deposition Exhibit No. 40
15 marked for identification.)

16 BY MR. SIMPSON:

17 Q Mr. Nicholson, the report has handed to
18 you what has been marked as Defendants' Exhibit 40
19 for this case.

20 Have you seen that document before?

21 A [Witness examined document]. Yes, I
22 have.

1 Q What is Defendants' Exhibit 40?

2 A This is the letter that I was advised to
3 give to my commander by the attorney who got
4 involved in my case at -- toward the end of it.

5 Q Did you sign that letter?

6 A Yes, I did.

7 Q Did you write it?

8 A No. I made edits to a letter that was
9 given to me by the attorney.

10 Q Do you know how the attorney drafted
11 that letter?

12 A It was my understanding that it was a
13 draft template that he used. But I don't know
14 exactly how he drafted the specific letter he gave
15 me.

16 Q By the way, was the attorney you worked
17 with Jeffrey Cleghorn?

18 A Correct.

19 Q C-L-E-G-H-O-R-N.

20 Did he talk to Mr. Cleghorn before he
21 sent you a draft of this letter?

22 MR. HUNNIUS: I'm going to caution you

1 Q And so in the last sentence of paragraph
2 two you say, I, therefore, chose to simply tell
3 the truth and come out, recognizing that the
4 Heterosexual Conduct Policy requires my
5 involuntary discharge.

6 And does that accurately reflect what
7 you were thinking at the time?

8 A By this point in the process, I would
9 say yes.

10 Q So what was the purpose of Exhibit 40?

11 A I think the purpose was to -- I think I
12 had two -- I think I had two purposes. I think --
13 I think one purpose was to -- how do I put it? --
14 to put the brakes on what appeared to be what I
15 would consider perhaps to be an abusive process
16 going forward with respect to how the command had
17 planned to handle the information that it had --
18 that it now had that I was gay.

19 And on a more literal level, it was
20 meant to -- well, I guess you could say -- yeah, I
21 guess you could wrap that into -- into one
22 statement. It was meant to formally disclose that

1 Q What they had planned to do?

2 A Yeah, in terms of the line of
3 questioning they intended to pursue in response to
4 finding out that information was out of the
5 ordinary and unnecessary.

6 Q How did you know what line of
7 questioning they planned to pursue?

8 A Because they told me that they planned
9 to question me about -- that the first sergeant
10 planned to question me about being gay, and a
11 number of things around that issue.

12 Q So that questioning never happened?

13 A Correct, because of the intervention
14 with the attorney.

15 Q And Exhibit 40?

16 A Correct.

17 Q Now, as far as you know, was Captain
18 Hamilton aware you were gay before he received
19 Exhibit 40?

20 A I don't know, but I don't believe so.

21 Q How did Captain Hamilton receive Exhibit
22 40, if you know?

1 A Huh.

2 Q Let me just ask, did you give it to him?

3 A I don't believe I did. I believe, if I
4 remember correctly, I believe I gave this to the
5 platoon sergeant to give to him. I believe all
6 the things that I passed on to the command was
7 done through the platoon sergeant.

8 Q The platoon sergeant's name was?

9 A Sergeant First Class Messenger, Keith
10 Messenger.

11 Q So you think you gave Exhibit 40 to him?

12 A Correct.

13 MR. SIMPSON: Okay. Let's mark another
14 exhibit. This is 41.

15 (Deposition Exhibit No. 41
16 marked for identification.)

17 BY MR. SIMPSON:

18 Q Mr. Nicholson, the reporter has handed
19 you what's been marked as Defendants' Exhibit 41.

20 Have you seen that document before?

21 A Yes, I have.

22 Q Can you just tell me briefly what it is?

1 A Sure. This is the letter that the
2 attorney I had at the time sent directly to the
3 company commander.

4 Q Did you know -- and I believe this comes
5 from an organization called Servicemembers Legal
6 Defense Network. I'm going to refer to that
7 occasionally as SLDN. Okay?

8 A Okay.

9 Q Did you know that SLDN was going to send
10 this letter on your behalf?

11 A I don't recall at the time if I knew
12 they were going to or not.

13 Q If I could just ask you, Mr. Nicholson,
14 if you could read Exhibit 41 silently. And just
15 let me know when you're done, please.

16 A Sure.

17 [Witness examined document]. Okay. I
18 read it.

19 Q Is there anything in Exhibit 41 that you
20 disagree with?

21 A Disagree with in terms of -- disagree
22 with whether or not it was -- it's accurate, or

1 A Okay.

2 Q Referring to the second paragraph now of
3 Exhibit 41, were you aware that your statement
4 regarding your sexual orientation created a
5 rebuttable presumption that you had the propensity
6 to engage in homosexual conduct?

7 A I think it would depend on how you
8 define "aware." I think I had seen the words
9 before. I don't remember exactly. But I would
10 imagine that at some point in this process -- and
11 I'm not sure if that point would be before or
12 after the point at which this letter was drafted
13 and sent -- I had seen those words or that
14 statement.

15 I'm not sure if you define "aware" in
16 terms of understanding what that meant. I'm not
17 sure I could say that I would be in aware in that
18 case. If that makes sense.

19 Q The next sentence says, Nicholson, with
20 my concurrence, elects not to rebut this
21 presumption.

22 That was your decision, correct?

1 A I believe that was the advise given by
2 the attorney. And I was inclined to go with
3 whatever his advice was.

4 Q Now, Mr. Nicholson, are you aware that
5 discharges under "Don't Ask, Don't Tell" are
6 categorized as being either prompted by a
7 statement or an act?

8 A Yes, I am.

9 Q Would it be fair to say that your
10 discharge was prompted by a statement?

11 A Yes, it would.

12 Q And just quickly, if you could turn to
13 the second page of Exhibit 41. It's the
14 authorization for SLDN assistance and privacy
15 waver.

16 Did you sign that?

17 A Yes, I did.

18 MR. SIMPSON: Okay. I'd like to mark
19 another exhibit. 42.

20 (Deposition Exhibit No. 42
21 marked for identification.)

22 BY MR. SIMPSON:

1 involuntary discharge?

2 A Which one are you reading from?

3 Q I'm sorry. Exhibit 40. I was reading
4 the end of the second paragraph.

5 A Okay.

6 Q Do you see any conflict between the
7 statements in Exhibits 40 and 41 and paragraphs
8 five and six of your declaration?

9 A I don't think they're inconsistent. I
10 think they're -- they have two different purposes.
11 I mean, like I said, paragraphs five and six of
12 Exhibit 42 are for the purpose of summarizing, I
13 guess you could say, a trigger event and -- and
14 the final result of the chain reaction set in
15 motion by that trigger, whereas Exhibit 40 and I
16 guess 41 is what was basically drafted by the
17 attorney representing me at the time to be I guess
18 direct and in line with the wording, legal and
19 regulatory, of the issue that he was dealing with,
20 or that we were dealing with.

21 Q I guess the bottom line question here is
22 would it -- and I think this is reflected already

1 in what you've said -- the immediate trigger for
2 your discharge was Exhibits 40 and 41, correct?

3 A If you insert "immediate" into there,
4 then yes.

5 MR. SIMPSON: That's the end of the
6 separately bound portion.

7 And why don't we take a break now.

8 (Recess)

9

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11 . END OF CONFIDENTIAL PORTION OF THE TRANSCRIPT

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EXHIBIT 3

1 UNITED STATES DISTRICT COURT
2 CENTRAL DISTRICT OF CALIFORNIA
3 EASTERN DIVISION

4 -----

5 LOG CABIN REPUBLICANS,
6 Plaintiff,

7 vs. No. CV04-8425

8 (VAP) (Ex)

9 UNITED STATES OF AMERICA
10 AND ROBERT GATES,
11 Secretary of Defense,
12 Defendants.

13 -----

14
15 February 26, 2010
16 10:02 a.m.

17 Deposition of Expert Witness

18 NATHANIEL FRANK, Ph.D., held at the
19 offices of White & Case, LLP, 1155 Avenue
20 of the Americas, New York, New York,
21 pursuant to Notice, before Theresa
22 Tramondo, a Notary Public of the State of
23 New York.

24
25
26
27 APPEARANCE OF COUNSEL:

1 Frank

2 A. The questions that I focus on,
3 because I think they're the most germane
4 question, in a discussion about whether
5 "Don't Ask, Don't Tell" is a militarily
6 necessary policy, focus on the relationship
7 between a so-called privacy interest and the
8 performance of military units. So the
9 question of whether there is a privacy
10 interest, I would consider to be a question
11 rooted in people's preferences, but the
12 question that I find germane to this policy
13 debate is whether that privacy interest first
14 of all is compromised by the presence of open
15 gays and secondly whether that -- the
16 presence of open gays compromises military
17 effectiveness.

18 Q. Do you believe that the privacy
19 interests that has been provided as a basis
20 for the "Don't Ask, Don't Tell" policy is
21 inherently based upon prejudice?

22 A. No.

23 Q. No?

24 A. No.

25 Q. What in your view is it based upon?

1 Frank

2 irrational in a legal sense, but go ahead
3 answer the question.

4 Q. Are you entering any legal opinions
5 in this case?

6 A. No.

7 When you say "in this case," do you
8 mean --

9 Q. As an expert in this case.

10 A. You mean LCRVUS or in this issue
11 we're discussing?

12 Q. I see them as co-extensive, but in
13 "this case" being Log Cabin versus United
14 States, as an expert, are you rendering any
15 legal opinions?

16 A. Well, I am not a lawyer, so I
17 have --

18 Q. I just note that because I am not
19 asking you for a legal conclusion.

20 A. Okay.

21 Q. When I use "irrational," I mean it
22 in a -- from the vantage point of expert
23 opinion as a factual matter.

24 A. Let me try to answer that question
25 this way: Some people in the military have a

1 Frank
2 desire not to serve with gay people because
3 they feel that it is an invasion of their
4 privacy. I'm not comfortable concluding that
5 some people's feelings and desires are
6 irrational, that those people's desires and
7 feelings are irrational.

8 Q. Do you have anything else to add on
9 that? I don't want to cut you off?

10 A. No.

11 Q. Have you ever been involved either
12 as an expert or a nontestifying expert in any
13 other challenge to the "Don't Ask, Don't
14 Tell" policy?

15 A. Legal challenge?

16 Q. Legal challenge?

17 A. I was involved as an expert witness
18 in a case -- a military criminal case of
19 nonconsensual sex. My understanding is that
20 was not a challenge to "Don't Ask, Don't
21 Tell."

22 Q. Is that United States V Sergeant
23 Dale Boldware?

24 A. That's right.

25 Q. What did you do in that case?

1 Frank

2 testified, I believe, that we must make
3 special accommodation for men and women based
4 upon a cultural expectation?

5 A. And the relative -- and the
6 relatively low costs of honoring those
7 expectations when it comes to men and women.

8 Q. When you say "costs," are you
9 talking about costs in a financial sense?

10 A. I mean costs broadly, but including
11 a financial sense. For instance, the cost of
12 building a separate room and bathroom
13 facility for every gay person would be
14 prohibitive and I think harmful to cohesion.
15 So to the extent that some people are made
16 uncomfortable by undressing in front of known
17 gay people, that concern has to be weighed
18 against the costs of creating separate
19 accommodations for tens of thousands of
20 individuals. Where in the case of men and
21 women, you're talking about two sexes. And
22 so while there are costs to separating males
23 and females, those costs are much less than
24 they would be to separate straight males from
25 every individual gay male because obviously

1 Frank

2 according to this concern if it were to be
3 fully honored, you couldn't put individual
4 gay males together either because then they
5 could be uncomfortable undressing in front of
6 one another.

7 Q. Beyond the financial cost, what
8 other costs are you referring to?

9 A. Costs to cohesion; for instance,
10 General Carl Mundy, who is former opponent of
11 allowing open gay service has said
12 nevertheless that if open gay service is to
13 be the new policy there should not be
14 separate facilities, a finding that echoed in
15 the RAND study, because that breeds
16 resentment and undercuts the cohesiveness of
17 the force by separating people out that need
18 to be training and living together.

19 Q. Part three of your report you
20 attribute certain statements to Senator Nunn.
21 If you could return back to your expert
22 report and look at part three, I ask you
23 where I could find the statements that you
24 attribute to Senator Nunn? I am sorry. On
25 page 5.

1 Frank

2 service members?

3 A. Yes.

4 Q. Do those notes identify the service
5 members by name?

6 A. At least by first name. There were
7 some who didn't give me their last names
8 because they were serving anonymously. Most
9 of them I do have their names, but was not
10 authorized -- am not authorized to say their
11 full names, but I kept the notes in a marking
12 system to ensure I was taking notes on the
13 right person.

14 Q. When you were writing the study
15 that I we see in Exhibit 15, did you ensure
16 yourself or assure yourself that what you had
17 memorialized in the report corresponded with
18 the notes that you had taken of the
19 conversations?

20 A. In other words, am I confident that
21 I transcribed my notes accurately?

22 Q. Yes.

23 A. To the best of my ability.

24 Q. I would like you to turn to page 22
25 and refer you to the section on "Privacy"

1 Frank

2 which is section 3.

3 Do you see that?

4 A. Yes.

5 Q. And I ask you to turn to page 24
6 and direct your attention to the conversation
7 that you had with E4 Army National
8 Guardsman." Do you see that?

9 A. Yes.

10 Q. And direct your attention to the
11 second sentence where he says, "I would like
12 to sneak a peek, but I respect other people
13 and their spaces"?

14 A. Yes.

15 Q. Are you confident that that's an
16 accurate quote?

17 A. Yes.

18 Q. I would ask you to turn over to
19 page 25 and the second full paragraph which
20 is an interview you had with another soldier
21 who served in Iraq. I would like to direct
22 your attention to the last sentence in which
23 this soldier told you "Not everyone in the
24 military is a head-turner he said, but 'when
25 there is someone worth looking at, the last

1 Frank
2 thing I want to do is look and then have
3 nature take its course down south.'" "

4 Do you see that?

5 A. Yes.

6 Q. What was your understanding what he
7 was referring to when he said "and then have
8 nature take its course down south"?

9 A. That he would try not to look at
10 someone who might arouse him because he
11 didn't want his arousal to be visible.

12 Q. I would ask you to turn to page 26
13 and the last paragraph which is an interview
14 you had with a sergeant first class in the
15 army.

16 Do you see that?

17 A. Yes.

18 Q. And you quote I believe -- it's not
19 really relevant. I believe it's a woman.
20 She's quoted as saying, "Any gay stuff I had,
21 I certainly had it, but not in the shower.
22 There was nothing you could do about it
23 there." I am sorry, he said, that people in
24 his units shared the same showerhead.

25 Do you see that?

EXHIBIT 4

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS,)
)
Plaintiff,)

) Case No.
vs.)
) CV04-8425

UNITED STATES OF AMERICA AND ROBERT) (VAP) (Ex)
GATES, Secretary of Defense,)
)
Defendants.)

DEPOSITION OF AARON BELKIN, Ph.D.
March 5, 2010
San Francisco, California

Reported by:
EMI ALBRIGHT
RPR, CSR No. 13042
Job No. 19676

1 say those kinds of things. And that's why.

2 Q Now, you also mention that they
3 perceive that the disclosure of their sexual
4 orientation would give rise to discomfort among
5 heterosexual service members. Is that a correct
6 characterization of your testimony?

7 A Say that again. I am sorry.

8 Q I believe you also testified that gay
9 and lesbian service members perceive that the
10 disclosure of their sexual orientation in a
11 postrepeal environment would give rise to
12 discomfort on the part of heterosexual service
13 members?

14 A No, what I said was that in some cases
15 prerepeal or postrepeal if they sense that there
16 are intolerant or homophobic people in their unit,
17 then if they acknowledge that they are gay, those
18 homophobic, or whatever you want to call, those
19 service members would be uncomfortable.

20 Q You are imposing a label of homophobe.
21 Do you believe that if heterosexual service
22 members had discomfort being naked in front of an
23 openly gay or lesbian service member, that that is
24 necessarily based upon a moral animus towards gay
25 and lesbian service members?

1 A I think that to have discomfort when
2 someone says the words, I am gay, is almost
3 always, if not always, a function of what I would
4 characterize as homophobia. To be uncomfortable
5 in the nude around another human being, whether
6 gay or straight, I do not say is homophobia, no.

7 Q But introducing homosexuality into that
8 atmosphere, that atmosphere of being naked in
9 front of someone else, you do not believe
10 introduces any additional element beyond just
11 simply being naked in front of another human
12 being?

13 A Are you talking about in general or are
14 you talking about prerepeal or postrepeal?

15 Q Let's talk about postrepeal.

16 A I think that postrepeal, yes,
17 service -- straight service members could be
18 uncomfortable in the nude around gays and
19 lesbians.

20 Q Why?

21 A A range of reasons. Sometimes shyness,
22 sometimes homophobia, sometimes just lack of
23 knowledge about who a gay person is, sometimes
24 religious reasons.

25 Q And do you necessarily equate the

1 religious reasons with moral animus?

2 A I think in practice they are often
3 empirically very closely related. I think in
4 theory you could have a religious objection that
5 was not ground in moral animus.

6 Q What would be an example of that?

7 A I don't know.

8 Q Let's go to the second part of your
9 analysis, the privacy rationale. And I believe
10 you said that you could marshal evidence of the
11 different accommodations by way of showers and
12 barracks?

13 A Uh-huh.

14 Q Is that fair?

15 A I am not quite sure what you mean by
16 marshal evidence.

17 Q That was your phrase. I believe you
18 said that you could marshal evidence and look at
19 the legitimacy of the privacy rationale by looking
20 at accommodations such as showers, barracks, and
21 other types of living conditions?

22 A I don't remember what context I made
23 the statement in.

24 Q This was in the context of I had asked
25 you a question -- we could have it read back if

1 you feel more comfortable. But how would you go
2 about evaluating the privacy rationale from an
3 empirical or research perspective. And you had
4 listed five factors. And we had just gone through
5 one, they are already serving --

6 A Yes.

7 Q -- and looked at that issue.

8 Now, the second issue was marshal
9 evidence. And I believe you testified that you
10 could look at the accommodations that are provided
11 that could address the privacy rationale?

12 A Sorry. My point was you could look at
13 whether service members have access for the most
14 part to group showers or whether they have single
15 stall arrangements and also whether they are in
16 group living arrangements or individual living
17 arrangements; that was correct.

18 Q Why would you look at that?

19 A Because if it is true that for the most
20 part they are not sharing intimate spaces, then
21 again by definition the privacy rationale could
22 not be valid. So sorry. Go ahead. That's it.

23 Q Well, do you dispute that in combat,
24 example, separate showers are just not practically
25 possible, at least under certain conditions?

1 A Under certain conditions?

2 Q Yes?

3 A Absolutely, under certain conditions
4 private showers are not possible.

5 Q Do you believe that would be important
6 to take into consideration in evaluating the
7 privacy rationale?

8 A I would say that if that were true --
9 and I have just acknowledged it is -- then the
10 privacy rationale could be valid in those
11 circumstances.

12 Q Well, is it your opinion that a Don't
13 Ask, Don't Tell policy would be appropriate in,
14 say, combat conditions but not in noncombat
15 conditions where accommodations permit individual
16 showers or more private accommodations?

17 A The research shows that, no, a Don't
18 Ask, Don't Tell situation would not further
19 heterosexual privacy in combat situations where
20 individual accommodations are not possible.

21 Q What is that research that you are
22 referring to?

23 A Well, my research, for one thing.

24 Q What research?

25 A The point -- well, it is many points.

1 and the percent of gay men in the military is just
2 about the same, very close to each other.

3 However, if you look at statistical evidence about
4 the frequency of male/male sex among veterans, it
5 is much higher than in the general population.

6 And what that -- it does not prove that
7 the veterans are having the -- the straight
8 veterans are having gay sex in the military
9 because it is possible that veterans have more gay
10 sex than civilians because they have their gay sex
11 after their military service; that is absolutely
12 possible. But I would say at the very least it is
13 not inconsistent with the notion supported by
14 ethnographic and legal evidence that straight
15 people are having gay sex in the military. And
16 even if you could get rid of all gays, they would
17 just keep right on having that sex. It is kind of
18 like a fraternity ritual, I mean, some of the
19 hazing rituals you hear about.

20 So I actually make this argument at
21 military academies when I go speak there. And you
22 get a perplexed look from some people, but a lot
23 of people kind of nod and smirk and they know what
24 is going on.

25 Q The fourth factor or fourth layer of

1 Q All right. And what specific questions
2 did she say to anticipate in that regard?

3 A I don't think she specified anything,
4 but she said that that was -- my memory is
5 correct, she said that was an area where your
6 side, the Government seems intent on trying to
7 make a point.

8 Q Okay. With respect to we talked
9 earlier about the privacy rationale, did the
10 Israeli defense forces make any special
11 accommodation for gays and lesbians or
12 heterosexuals postrepeal?

13 A Are you talking about special
14 accommodations in terms of systematic policy law
15 or regulation or are you talking about special
16 accommodations in terms of micro-practices,
17 discretionary practices on the ground?

18 Q Let's start with the latter. What I am
19 thinking of is either in terms of facilities or
20 allowing heterosexuals, for example, to serve, to
21 live at home if they had a particular privacy
22 interest that they felt was being infringed upon
23 by allowing gays and lesbians to openly serve.

24 A I believe we found one case where a
25 commander had allowed a straight service member to

1 shower at different times. So I believe it was he
2 would not have to be in the shower with other
3 people. And I believe we found one case where
4 someone was allowed to live off base. And I am
5 sorry I don't remember if that was the same person
6 or not.

7 Q So that was a heterosexual service
8 member?

9 A If my memory is correct.

10 Q And the special accommodation that was
11 provided for that heterosexual member or members
12 was based upon a privacy concern expressed by the
13 heterosexual member?

14 A I don't know the details but my strong
15 suspicion would be yes.

16 Q What is that suspicion based upon?

17 A That they wouldn't have done the --
18 they wouldn't have made the accommodation if there
19 wasn't a concern.

20 Q Did you find any other -- well, step
21 back.

22 You have looked at the Canadian,
23 Australian, Israeli, and Great Britain examples;
24 right?

25 A Me personally or the center?

1 unit cohesion?

2 A I believe that, yes, I believe much of
3 that report spoke to the issue of unit cohesion.

4 Q Do you know if the privacy rationale
5 that we have been discussing here today was
6 studied by the RAND group?

7 A Yeah, there was -- I believe there is a
8 scholar named Lois Shawver. And if I am not
9 mistaken, there was some work on privacy in RAND
10 that talked about a discretion of etiquette and
11 whether that discretion would characterize a
12 postrepeal environment.

13 Q What were the findings?

14 A I believe it was that, yes, there is a
15 discretion of etiquette in the military, and it
16 would be like a doctor's office, which I actually
17 don't believe is correct.

18 Q Why is that?

19 A Because as I said before, people in the
20 military have sex with each other. And so it is
21 absolutely a partial truth that there is a
22 discretion of etiquette, but it is also true that
23 both straight and gay people have sex with each
24 other in the military. So I guess I would
25 recharacterize what I said. It is a partial truth

1 that there is a discretion of etiquette.

2 Q There is also a school of thought that
3 homosexuals would not become aroused, for example,
4 in a shower setting by looking at a heterosexual;
5 correct?

6 A There is a school of thought to that
7 effect.

8 Q And you disagree with that school of
9 thought?

10 A I would say it is a partial truth.

11 Q How is it a partial truth?

12 A Because some straight people get
13 aroused in the context of other nude people of the
14 same sex and some gay people get aroused. So
15 anecdotally I have never heard of a gay person
16 getting aroused in the shower in the way that you
17 are talking about. The narratives that I have
18 seen have been like, oh, my God, I am so careful
19 about controlling myself, et cetera, et cetera.
20 But in theory anyone can get aroused by anyone.

21 Q In the circumstances that you read, did
22 you read that in Nathaniel Frank's book?

23 A I don't remember it in Nathaniel's book
24 but I remember it a lot in Randy Shilts' work.
25 And I would have to go back and see where else.

1 studies that have addressed this concern, and one
2 is by Lois Shawver?

3 A That's the one I was referencing
4 before.

5 Q And basically her thesis was same sex
6 nudity in this context would not give rise to
7 arousal and, therefore, the privacy concern falls
8 flat?

9 A It is the etiquette of disregard
10 thesis.

11 Q You disregard with that thesis?

12 A Again I find it to be a partial truth.

13 Q Remind me why it is a partial truth.

14 A Because it is true that there can be an
15 etiquette of disregard, and it is true that gay
16 and lesbian service members are careful about
17 that. But it is also true that heterosexual
18 members of the military have sex with other
19 members of the same sex.

20 Q Has there been a study of that or is
21 that just based upon anecdotal information that
22 you have?

23 A It is a false dichotomy. As I
24 mentioned before, there is statistical evidence
25 about that, qualitative or ethnographic evidence

1 and the legal, what I would call legal evidence,
2 which is the history of the queen for a day
3 exception which suggests that the military knows
4 about this.

5 Q How does one determine this question
6 statistically, though?

7 A I think we did discuss this. The
8 proportion of veterans, the percent of veterans
9 who acknowledge -- male veterans who acknowledge
10 having had sex with other men is higher than the
11 percent of civilians who acknowledge having had
12 sex with other men. Sorry. It is higher than the
13 percent of gay people in the civilian population.
14 And yet the percent of men in the military who are
15 gay is actually just roughly the same but just a
16 little bit lower than the percent of gay men in
17 the population. So that does not prove that
18 straights are having gay sex in the military, but
19 because again the veterans could have had gay sex
20 after their military service, but it is I would
21 say suggestive evidence in combination with the
22 other evidence.

23 Q We did talk about that. I am sorry.

24 A That's okay.

25 Q Just again to walk our way through this

1 Q I am not trying to. I am just trying
2 to posit a different thought process.

3 A Now, do you believe that the privacy
4 concern could be accommodated, for example, by
5 having separate barracks for heterosexuals and
6 homosexuals?

7 A The costs -- no, I don't believe it
8 could be done. No, I don't believe it could be
9 done. And even if it could be done, the costs
10 would outweigh the benefits.

11 Q Are we talking about financial costs or
12 are we talking about other types of costs?

13 A Financial and other types of costs.

14 Q Let's take it in pieces. What would be
15 the financial cost?

16 A You would have to pay for separate
17 facilities.

18 Q And then what would be the other types
19 of costs?

20 A Well, you would be re-instantiating
21 another discriminatory system which would send the
22 signal that gay people are second class citizens.
23 And that signal in and of itself is detrimental to
24 unit cohesion and military effectiveness.

25 Q But we do that for men and women;

EXHIBIT 5

Freeborne, Paul (CIV)

From: Hunnius, Patrick [phunnius@la.whitecase.com]
Sent: Thursday, March 25, 2010 12:00 AM
To: Freeborne, Paul (CIV); Woods, Dan
Cc: Parker, Ryan (CIV); Simpson, Scott (CIV); Gardner, Joshua E (CIV)
Subject: RE: Log Cabin Republicans v. United States (C.D. Cal.)

Paul,

We understand from the meet and confer regarding the government's motion for summary judgment that the government contends Log Cabin Republicans ("Log Cabin") lacks standing based on a theory that Mr. Nicholson is not currently a member of Log Cabin.

As you know, Mr. Nicholson testified in 2006 (through a declaration) and again this month (at deposition) that he is and was a member of Log Cabin. In addition, please be advised that Mr. Nicholson has been an honorary member of the Georgia chapter of Log Cabin since 2006. He is presently a dues-paying member, and his annual dues are paid in full.

Regards,

Patrick O. Hunnius
Telephone: + 213-620-7714
Mobile: + 818-205-4976

From: Freeborne, Paul (CIV) [mailto:Paul.Freeborne@usdoj.gov]
Sent: Thursday, March 18, 2010 6:52 AM
To: Woods, Dan; Hunnius, Patrick
Cc: Parker, Ryan (CIV); Simpson, Scott (CIV); Gardner, Joshua E (CIV)
Subject: Log Cabin Republicans v. United States (C.D. Cal.)

Dan & Patrick,

Please call me today. In addition to the arguments we discussed in our conference call yesterday, we will argue in our summary judgment motion that plaintiff lacks standing to sue and failed to identify a current member in accordance with the Court's 2006 order. Please call to meet and confer on this issue. In addition, I have not received plaintiff's response to our affirmative discovery.

Paul G. Freeborne
Trial Attorney
United States Department of Justice, Civil Division
Federal Programs Branch
20 Massachusetts Avenue, N.W.
Room 6108
Washington, D.C. 20001
Tel. (202) 353-0543
Fax. (202) 616-8460

EXHIBIT 6

10 February 2002

CPT Hamilton
Company Commander
E, 309 MI Bn.
Ft. Huachuca, AZ

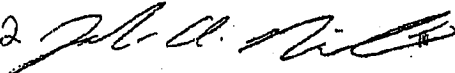
Sir:

After considerable thought, I have come to the decision to make the very difficult disclosure that I am gay.

Since enlisting in the Army in June 2001, I have heard constant anti-gay comments come from both my peers as well as NCOs. Without provocation, several soldiers have asked me whether I am gay, several others have questioned friends of mine about my sexuality, and yet others have told me that they already knew I was gay. The Army's anti-gay policy creates an unbearable dilemma for me and, I believe, places me and other gay soldiers in harm's way by improperly labeling us as undesirables. I, therefore, chose to simply tell the truth and come out, recognizing that the Homosexual Conduct Policy requires my involuntary discharge.

I have requested the assistance of the Servicemembers Legal Defense Network (SLDN) in Washington, D.C., and am represented by Mr. Jeff Cleghorn, an SLDN staff attorney. Please direct all questions pertaining to the content of this letter, as well as to my sexual orientation, directly to Mr. Cleghorn. He may be reached [REDACTED] via email at jmcleghorn@sldn.org.

Very Respectfully,

PV2 

PV2 John A. Nicholson III
United States Army

LCR000033

EXHIBIT 7

Servicemembers Legal Defense Network

* * * * *

February 8, 2002

CPT Neil Hamilton
Company Commander
E Company, 309 MI Bn.
Fort Huachuca, AZ

Re: PV2 John A. Nicholson, SSN: _____, Statement of Sexual Orientation

Dear CPT Hamilton:

I write on behalf of PV2 John A. Nicholson (encl. 1). PV2 Nicholson has asked the Servicemembers Legal Defense Network (SLDN)¹ to assist him in disclosing his sexual orientation to the Army and in all subsequent legal/personnel actions stemming from this disclosure. As the attached letter from PV2 Nicholson to you states, Nicholson is gay (encl. 2).

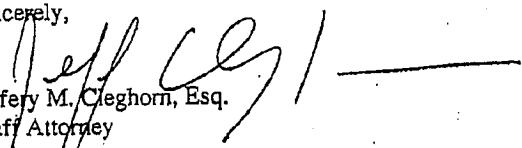
In accordance with AR 600-20 and AR 635-200, Nicholson's statement creates the rebuttable presumption that he has the propensity to engage in "homosexual conduct." Nicholson, with my concurrence, elects not to rebut this presumption.

The first step you should take upon receipt of this letter is to consult with a senior Judge Advocate General legal advisor. I remind you that the following military rules apply in gay discharge situations:

1. In "coming out" cases, such as this, Army policy states "in most cases of homosexual admission, no investigation is required." See HQ, DA Message, "Homosexual Conduct Policy," (HCP) ALARACT, 101700Z JAN 00. On my advice, this is the only statement that Nicholson will provide, at this time.
2. If you wish to conduct any type of inquiry into this statement, please note that you are prohibited by Army Policy (HCP Message 101700Z JAN 00) and DoDD 1332.14, Enclosure 4 from questioning anyone other than Nicholson and Nicholson's direct chain of command. You may exceed this investigative limitation only if you first obtain Secretary of the Army level approval. In my capacity as Nicholson's legal counsel, I ask that you speak with me before questioning Nicholson about this statement.
3. A soldier may not be harassed or otherwise retaliated against for being gay or lesbian. The Army Secretary and Chief of Staff has ordered that all soldiers, including those who are gay, lesbian or bisexual, be treated with dignity and respect. See HQ, DA Message, "Dignity and Respect for All," ALARACT 008/00, 101800Z JAN 00. I ask that you ensure all reasonable measures are taken to protect Nicholson from harm and to ensure the confidentiality of this disclosure.
4. AR 600-20 and AR 635-200 state that soldiers discharged for "homosexual conduct" should receive a discharge characterization based on the quality of their service. Nicholson is a good Soldier who should receive an Honorable discharge.

I welcome the opportunity to further discuss this matter with you. If you or your command legal advisor have any questions, please do not hesitate to contact me. I can be reached _____ via email at jmcleghorn@sldn.org.

Sincerely,


Jeffery M. Cleghorn, Esq.
Staff Attorney

Encl. (2)

¹ SLDN is a national legal aid and watchdog organization assisting men and women harmed by "Don't Ask, Don't Tell, Don't Pursue, Don't Harass." Since 1994, SLDN has assisted over 3,300 military personnel.

**AUTHORIZATION FOR SLDN ASSISTANCE AND
PRIVACY WAIVER**

I, John A. Nicholson III : , E2, United States Army, hereby authorize the Servicemembers Legal Defense Network (SLDN) to communicate with the United States Army, the Department of Defense, members of the United States Congress, and other government officials on all matters pertaining to my military service and on all ongoing legal matters pertaining to my service.

I further authorize the United States Army through its employees and personnel, to release information contained in its records relating to my military service and service-related legal matters to representatives of the Servicemembers Legal Defense Network (SLDN) and to communicate with SLDN on all such matters.

This authorization waives protections afforded me by the Privacy Act of 1974, 5 U.S.C. § 552a, as amended.

Pvt 

[Signature] PV2 JOHN A NICHOLSON III

13 Feb 02

[Date]

1 Dated: March 29, 2010

Respectfully submitted,

2 TONY WEST
Assistant Attorney General

3 ANDRÉ BIROTTE, JR.
4 United States Attorney

5 JOSEPH H. HUNT
Director

6 VINCENT M. GARVEY
7 Deputy Branch Director

8 */s/ Paul G. Freeborne*
9 PAUL G. FREEBORNE
10 W. SCOTT SIMPSON
11 JOSHUA E. GARDNER
12 RYAN B. PARKER
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23 *Attorneys for Defendants United*
24 *States of America and Secretary of*
25 *Defense*