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7

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10  
11 LOG CABIN REPUBLICANS, a non-  
profit corporation,

12 Plaintiff,

13 v.

14 UNITED STATES OF AMERICA and  
15 ROBERT M. GATES, SECRETARY  
OF DEFENSE, in his official capacity,

16 Defendants.  
17  
18  
19  
20

Case No. CV 04-8425 VAP (Ex)

DECLARATION OF ELIZABETH  
HILLMAN IN SUPPORT OF LOG  
CABIN REPUBLICANS'  
OPPOSITION TO DEFENDANTS'  
MOTION FOR SUMMARY  
JUDGMENT

Date: April 26, 2010

Time: 2:00 p.m.

Courtroom: 2

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DECLARATION OF ELIZABETH HILLMAN

I, Elizabeth Hillman, declare that:

1. I am a former officer of the U.S. Air Force and current Professor of Law at the University of California Hastings College of the Law in San Francisco, California.

2. I have been retained by Plaintiff Log Cabin Republicans to testify as an expert witness in this case.

3. Attached as Exhibit A is a true and correct copy of the expert report that I prepared in this matter.

4. It is an accurate statement of my expert opinion in this matter and sets forth both my qualifications and the factual basis for my opinion.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed on April 2, 2010 in ~~San Francisco, California.~~

WASHINGTON, D.C.

  
Elizabeth Hillman

# Exhibit A

Report  
Prepared for White & Case, LLP  
Jan. 18, 2010

Elizabeth L. Hillman, J.D., Ph.D.  
Professor of Law, University of California Hastings College of the Law  
Former Captain, U.S. Air Force

1. The “don’t ask/ don’t tell” statute and implementing regulations were drafted and adopted because of hostility toward homosexuals and fear of homosexuality. The armed forces’ history of anti-gay practices and policies reflect not a reasoned response to a perceived threat, but an irrational attempt to punish lesbians and gay men. There is no rationale for the policy that is supported by empirical evidence, whether in official government and military studies<sup>1</sup> or external, scholarly assessments.<sup>2</sup>
2. “Don’t ask/ don’t tell” has been disproportionately used to limit and punish servicewomen as compared to servicemen. This is due to resentment over the increasingly important role of women in the armed forces and because women who chose to join a male-dominated profession, and to postpone or constrain family responsibilities in the ways that military service requires, are more vulnerable to allegations of homosexuality than men.<sup>3</sup> Men in the military are also more likely to be married (to women), and therefore are better protected from accusations that their sexual orientation violates the “ban” on homosexual servicemembers.<sup>4</sup>

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<sup>1</sup> *Report of the Board of Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directions Dealing with Homosexuality*, March 15, 1957 (Crittenden Report); General Accounting Office, *DoD's Policy on Homosexuality* (Washington, D.C.: General Accounting Office, June 12, 1992); General Accounting Office, *Homosexuals in the Military: Policies and Practices of Foreign Countries* (Washington, D.C.: General Accounting Office, 1993); RAND, *Sexual Orientation and Military Personnel Policy* (Washington, D.C., RAND, 1993).

<sup>2</sup> Frank, Nathaniel, *Unfriendly Fire: How the Gay Ban Undermines the Military and Weakens America*, (New York: St. Martin's Press, 2009); Belkin, Aaron, "Is the Gay Ban Based on Military Necessity?" *Parameters*, vol. 33, no. 2, Summer 2003, pp.108-119.

<sup>3</sup> Annual reports of the Servicemembers Legal Defense Network; Canaday, *The Straight State*; Hillman, *Defending America*; Leisa D. Meyer, *Creating G.I. Jane* (New York: Columbia University Press, 1996).

<sup>4</sup> Booth, Bradford, Mady Wechsler Segal, & D. Bruce Bell with James A. Martin, Morten G. Ender, David E. Rohall, & John Nelson, *What We Know About Army Families: 2007 Update* (Caliber, 2007) [online at <http://www.army.mil/fmwrcc/documents/research/whatweknow2007.pdf>] Segal, David R. & Mady Wechsler Segal, *America's Military Population* (Population Bulletin, 57:4, December 2004).

3. The “don’t ask/ don’t tell” policy preserves a false image of servicemembers as exclusively heterosexual, despite significant and extensive historical and contemporary evidence to the contrary.<sup>5</sup> In practice, military service is full of sexual opportunity because of the combination of travel and deployments far from home, the dominance of youth culture within the ranks, the intimate working conditions of military life, and the shared stress and vulnerability of those who commit to performing dangerous, arduous jobs.<sup>6</sup> To pretend that homosexuality does not already exist within the ranks is irrational, and to deny recognition and protection to open homosexuals is pernicious.
4. If the policy was irrational when drafted and adopted in 1992, to retain it in 2009 is detrimental to military efficiency. Commanding officers and judge advocates must administer the policy despite no evidence that open homosexuality corrupts the morale or effectiveness (the “unit cohesion”) of military units.<sup>7</sup> In fact, attitudes toward homosexuality have undergone a sea change since the policy was created.
5. In my personal experience (serving on active-duty during, before, and after the adoption of “don’t ask/ don’t tell”), the reactions of servicemembers to President Clinton’s proposal to open military service to lesbians and gay men were based on fear, hostility, and ignorance, not reason.
6. I am being compensated at a rate of \$375/hour for my work on this case. In the past four years, I have not testified in any other cases as an expert witness. A statement of my qualifications and a list of my publications can be found below.



Elizabeth L. Hillman

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<sup>5</sup> Canaday, Margot, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* (Princeton University Press, 2009); Hillman, *Defending America*; Shilts, Randy, *Conduct Unbecoming: Gays and Lesbians in the U.S. Military* (1993); Berube, Allan, *Coming Out Under Fire* (New York: Plume, 1990).

<sup>6</sup> Hillman, Elizabeth Lutes, *Defending America: Military Culture and the Cold War Court-Martial* (Princeton University Press, 2005).

<sup>7</sup> Moradi, Bonnie & Laura Miller, *Attitudes of Iraq and Afghanistan War Veterans toward Gay and Lesbian Service Members*, (Armed Forces & Society, October 29, 2009).

**ELIZABETH L. HILLMAN**

University of California Hastings College of the Law  
200 McAllister St  
San Francisco, CA 94102  
hillmane@uchastings.edu

***EDUCATION***

Yale University, Ph.D., History, 2001  
Yale Law School, J.D. 2000  
University of Pennsylvania, M.A., History, 1994  
Duke University, B.S.E.E. 1989

***TEACHING AND PROFESSIONAL EXPERIENCE***

University of California Hastings College of the Law  
Professor of Law, 2008-present  
Courses: Constitutional Law I & II, Military Law, Wills & Trusts, Law & Biography, California Legal History, Marshall-Brennan Constitutional Law Project  
Executive committee, 2008-2009  
Chair, Ad hoc Technology Committee, 2008-09  
Chair, Academic Dean Evaluation Committee, 2009  
Visiting Professor of Law, 2007-2008  
Rutgers University School of Law, Camden  
Professor of Law, 2006-2008  
Director of Faculty Development, 2006-2007  
Associate Professor of Law, 2004-06; Assistant Professor of Law, 2000-04  
Marshall-Brennan Fellowship Program, co-founder and co-director, 2002-2007  
University committee work: budget crisis (university & Camden campus), search for associate provost, equal opportunity policy committees  
Law school committee work: self-study for ABA accreditation; appointments, ethics (chair), speakers (chair), and pro bono committees  
Rutgers-Camden Women's Studies Program, advisor, 2001-2007  
Bar review lecturer, California Wills & Trusts, Kaplan/ PMBR, 2009-present  
Veterans Administration Grant on Military Sexual Trauma, Primary Mentor to Dr. William C. Holmes, University of Pennsylvania Medical School, 2004-07  
National Institute of Military Justice, board of directors, 2004-present  
Cox Commission II on military justice reform, reporter, 2009  
Awards committee, chair, 2006-present  
Education committee, chair, 2005-2008  
Search committee for executive director, chair, 2005

Cox Commission on the 50<sup>th</sup> anniversary of the UCMJ, reporter, 2001  
Board of advisors, 2000-2003

American Society for Law and History, Hurst Summer Institute Selection Committee,  
2007-2009

Referee for *Journal of the History of Sexuality*; *Journal of American History*; *Law and Society, Polity*, Duke University Press, *John Hopkins University Press*, *University of North Carolina Press*, *Frontiers: A Journal of Women's Studies*, *Journal of Women's History*, *Journal of Criminal Justice*, *University Press of Kansas*

American Civil Liberties Union of New Jersey, Board of Trustees, 2007

Task Force on Faculty & Curriculum, U.S. Public Service Academy, 2006-2008

Center for Lesbian and Gay Civil Rights, Phila., PA, board of directors, 2002-2006

Dignity Housing, board of directors, 2001-2005; chair, 2004; treasurer, 2002-2003

Yale College, Visiting Lecturer in History, Fall 1999

Yale Law School, Coker Teaching Fellow, 1998

U.S. Court of Appeals for the Armed Forces, the Honorable Andrew S. Effron, law clerk,  
Summer 1997

U.S. Air Force, officer, 1989-1996

U.S. Air Force Academy, Dept. of History, Colorado Springs, instructor, 1994-96  
Personnel and recruiting officer, 1995; taught American, military, world,  
and women's history

Cheyenne Mountain AFB, Colo. Springs, orbital & space control analyst, 1989-93  
Strategic Defense Initiative Organization, the Pentagon, strategic analyst, 1989

## **PUBLICATIONS**

### **Books**

*Fair Targets? American Bombing, World War II to the Present* (manuscript in progress)

*Military Justice Cases and Materials*, with Eugene R. Fidell and Dwight H. Sullivan  
(Lexis/Nexis, 2007)

*Military Justice Statutory Supplement and Teaching Manual*, with Eugene R. Fidell and  
Dwight H. Sullivan (Lexis/Nexis, 2007)

*Defending America: Military Culture and the Cold War Court-Martial* (Princeton  
University Press, 2005)

### **Chapters and articles**

"The Bomber Generals and the New Laws of War" (manuscript in progress)

"Covering the Costs of War: Veterans Benefits, Military Discharges, and the War in  
Iraq," with Melissa Epstein Mills (manuscript in progress)

"Heller, Citizenship, and the Right to Serve in the Military," *Hastings Law Journal*  
(forthcoming, 2009)

"Front and Center: Sexual Violence in U.S. Military Law," *Politics & Society* (2009)

- “Gentlemen Under Fire: The U.S. Military and ‘Conduct Unbecoming,’” 26 *Law & Inequality: A Journal of Theory and Practice* 1 (2008)
- “Franklin D. Roosevelt, Commander-in-Chief,” 29 *Cardozo Law Review* 1037 (2008)
- “Military Needs and Military Lawyers” and “Servicemembers’ Experiences,” 14 *Duke Journal of Gender, Law & Policy* 1147-54, 1266-68 (2007)
- “The Female Shape of the All-Volunteer Force” in *Iraq and the Lessons of Vietnam, Or, How Not to Learn from the Past* 150-61 (Marilyn B. Young and Lloyd C. Gardner, eds., The New Press, 2007); reprinted in *Women’s America: Refocusing the Past* (7<sup>th</sup> ed., Oxford University Press, 2009)
- “Guarding Women: Abu Ghraib and Military Sexual Culture” in *One of the Guys: Women as Aggressors and Torturers* 111-23 (Tara McKelvey, ed., Seal Press, 2007)
- “Disloyalty among ‘men in arms’: Korean War POW’s at Court-Martial,” 82 *North Carolina Law Review* 1629 (June 2004, pp. 1629-60)
- “The ‘Good Soldier Defense’: Rank and Character Evidence in Courts-Martial,” *Yale Law Journal* (Vol. 104, pp. 879-911, Jan. 1999); reprinted in *Evolving Military Justice: An Anthology* (Eugene R. Fidell & Dwight Sullivan, eds., Naval Institute Press, 2002, pp. 64-80)
- “Dressed to Kill? The Paradox of Women in Military Uniforms,” in *Beyond Zero Tolerance: Discrimination in Military Culture* (Judith Reppy & Mary Katzenstein, eds., Rowman, Littlefield, 1999, pp. 65-80)

### **Entries and reviews**

- Review of Marilyn Young and Yuki Tanaka, *Bombing Civilians*, for *Reviews in American History* (forthcoming 2009)
- “The Cold War” for *A Companion to Military History* (James C. Bradford, ed., Blackwell’s, 2008)
- “Ex parte Quirin,” “World War II and the President’s Power,” and “Gender and the Military” for *Encyclopedia of the Supreme Court of the United States* (David Tanenhaus, ed., Thomson Gale, 2008)
- “Military Tribunals,” *Encyclopedia of Legal History* (Stanley N. Katz, ed., Oxford University Press, 2008)
- Review of Laura Browder, *Her Best Shot: Women and Guns in America* (2006) for the *Journal of Interdisciplinary History* (2008)
- Review of Louis Fisher, *Nazi Saboteurs on Trial* (2005), Michael Dobbs, *Saboteurs* (2004), and Pierce O’Donnell, *In Time of War* (2005) for *Law and History* (Summer 2007)
- Review of Margaret A. Weitekamp, *Right Stuff, Wrong Sex: America’s First Women in Space Program* (2003) for *Journal of Military History* (July 2006)
- “Servicemembers’ Legal Defense Network” and “Government and Military Witchhunts,” *Encyclopedia of Lesbian, Gay, Bisexual, Transgender and Queer America Today* (John Hawley, ed., Greenwood Press, 2008)



- “Sexual Abuse and Harassment” and “The Court of Military Appeals,” *Encyclopedia of War and American Society* (Peter Karsten, ed., MTM Publishing, 2005)
- “Military Law and Policy,” *Encyclopedia of American Lesbian, Gay, Bisexual, and Transgender History and Culture* (Marc Stein, ed., Charles Scribner’s Sons, 2004, Vol. 2, pp. 262-65)
- “War,” *Encyclopedia of American Lesbian, Gay, Bisexual, and Transgender History and Culture* (Marc Stein, ed., Charles Scribner’s Sons, 2004, Vol. 3, pp. 255-59)
- “Charity Adams Earley,” “Oveta Culp Hobby,” and “Women’s Army Corps (WAC),” *Amazons to Fighter Pilots: A Biographical Dictionary of Military Women*, (Reina Pennington, ed., Greenwood Press, 2003, pp. 133-34; 201-02; 465-67)
- “Crimes by Lesbians and Gay Men,” *Readers Guide to Lesbian and Gay Studies* (Timothy F. Murphy, ed., Fitzroy Dearborn, 2002, pp. 166-67)
- “African-Americans and the War of 1812,” *War of 1812 Encyclopedia*, (Jeanne & David Heidler, eds., Garland Press, 1997, pp. 4-5)

### **SELECTED AWARDS, GRANTS, AND FELLOWSHIPS**

- Professor of the Year, Rutgers University School of Law, Camden, 2007
- American Law Institute, elected member, 2006
- Board of Trustees Fellowship for Scholarly Excellence, Rutgers University, 2006
- Human Dignity Award, Rutgers University, 2005
- LBJ Foundation, Moody Grant, 2002
- Dwight D. Eisenhower Foundation, Research Grant, 2002
- Gerald R. Ford Foundation, Research Grant, 2002
- Yale Prize Teaching Fellowship, 2000
- American Historical Association, Littleton-Griswold Grant in Legal History, 2000
- Olin Fellow, Center for Law, Economics, & Public Policy, Yale Law School, 1999
- Fund for Lesbian and Gay Studies, Yale University, Research Grant, 1999
- Sterling Prize and University Fellowship, Yale University, 1997-2000
- Smith-Richardson Fellowship, Yale International Security Studies, Summer 1997
- U.S. Air Force Academy, Colonel David Zook Award for the Outstanding World History Teacher, 1996
- U.S. Air Force Academy Commandant’s Research Award, Oral History Project, 1994-96
- National Endowment for Humanities Seminar, New York City, Summer 1995

### **SELECTED PRESENTATIONS AND CONFERENCES**

- “Human Rights and Military Justice from the Civil War to the ‘War on Terror,’” *Human Rights in the U.S.A.*, University of Connecticut, Storrs, October 2009 (upcoming).

- “Executive Authority Over Military Personnel Actions: The White House and ‘Don’t Ask/Don’t Tell,’” *A Conference on the History of American Rights*, San Francisco State University, September 2009 (upcoming).
- Issues in the Critical Study of Armed Forces and Militarization*, Watson Institute, Brown University, Providence, May 2009.
- “The Right to Military Service,” *Symposium on the Right to Bear Arms*, University of California Hastings College of the Law, San Francisco, February 2009.
- “Censoring Justice: Silence and Exposure in 20<sup>th</sup>-Century U.S. Military History,” *American Society for Legal History*, Ottawa, Canada, November 2008.
- Exploratory seminar, “Gender-based Violence and Intra-State Armed Conflict,” Radcliffe College, Harvard University, Cambridge, Mass., Sept. 19-20, 2008.
- “Bombs, Targets, and Presidents,” *Executive Authority in the 21<sup>st</sup> Century Symposium*, Center for Law and Government, Willamette University College of Law, Salem, OR, Sept. 12, 2008.
- Workshop, “Sexual Violence and Armed Conflict,” United Nations Office for the Coordination of Humanitarian Affairs, the United Nations, New York, NY, June 2008.
- “The Legacy of the Bomber Generals: Law, Politics, and Strategic Bombing,” *National Security Law: Junior Faculty Workshop*, Wake Forest University School of Law, Winston-Salem, NC, May 23, 2008.
- “Military Justice,” *Ninth Circuit Judicial Conference*, Federal Bar Association of Washington, Seattle, May 9, 2008.
- “The Bomber Generals and the New Laws of War,” *Distinguished Lecture, Institute for Global Security Law and Policy*, Case Western Reserve University School of Law, Cleveland, OH, Mar. 20, 2008.
- “Covering the Costs of War: Veterans Benefits, Military Discharges, and the War in Iraq,” Faculty workshop, Case Western Reserve University School of Law, Cleveland, OH, Mar. 20, 2008.
- “Inside the Ranks: Class and Gender in the U.S. Military,” *American Association of Law Schools Annual Meeting*, New York City, Jan 4, 2008.
- “Sexual Violence and U.S. Servicemembers: From Vietnam to Iraq,” *Sexual Violence during War workshop*, Yale University, New Haven, Conn., Nov. 2-4, 2007.
- “Front and Center: Sexual Violence in U.S. Military Law,” *Gender, War, and Militarism conference*, University of Pennsylvania, Philadelphia, Penn., Oct. 25-26, 2007.
- “Franklin D. Roosevelt, Commander in Chief,” *The Domestic Commander-in-Chief Conference*, Cardozo Law School, New York, N.Y., Apr. 16, 2007.
- “Don’t ask/don’t tell” Conference, sponsored by Harvard Law School Lambda-GALLA, Cambridge, Mass., Mar. 2-3, 2007.
- Militarization Roundtable, Open Society Institute, New York, Feb. 28, 2007.
- Wingspread Conference for the U.S. Public Service Academy, *the Johnson Foundation*, Racine, Wisc., Feb. 23-25, 2007.

- Militarization Working Group, *Watson Institute for International Studies, Brown University*, Dec. 3, 2006, Providence, R.I.
- “Defending America,” *Penn Legal History Forum*, University of Pennsylvania, Nov. 13, 2006, Philadelphia, Penn.
- Panel on “don’t ask/don’t tell” policy of U.S. military*, Yale Law School, Oct. 5-6, 2006, New Haven, Conn.
- “Law Schools and the Military’s Anti-Gay Policy,” *Lavender Law Conference*, September 2006, Washington D.C.
- “U.S. War Crimes,” *WHYY’s Radio Times with Marty Moss-Coane*, June 2006, [www.whyy.org/91FM/radiotimes.html](http://www.whyy.org/91FM/radiotimes.html)
- “Interrogation in the Korean War: The U.S. Response,” *Conference on Jurisprudence and the War on Terror*, Columbia Law School, April 2006, New York.
- “The Solomon Amendment: History and Implications,” *Pace Law School Legal Education Series*, February 2006, White Plains, NY.
- “Gays in the Military Revisited,” Princeton University, *LGBT Lecture Series*, November 2005, Princeton, NJ.
- “Military Socialization: Why Soldiers Fight,” chair, *In the War Zone: How Does Gender Matter?*, Radcliffe Institute, Harvard University, Nov. 2005, Cambridge, Mass.
- “The Other G-Men: Gentlemen, Officers and ‘Conduct Unbecoming’ in the U.S. Military” *Rutgers-Camden History Seminar*, October 2005, Camden, NJ.
- “Abu Ghraib and Military Sexual Culture,” *Conference on Military Culture and Gender*, September 2005, Baldy Center at the State Univ. of New York-Buffalo Law School.
- “Prisoners of War and Culture: Soldiers, Detainees, and Military Operations,” *Didactic Seminar, Law and Society Association’s Annual Meeting*, June 2005, Las Vegas, Nev.
- “Abu Ghraib and Military Sexual Culture,” Keynote Address at Elizabeth Cady Stanton research conference, Villanova University, March 2005, Philadelphia, Penn.
- “Why They Did It: Abu Ghraib and Military Sexual Culture,” *Women/War/Work: American Women and the U.S. Military in the 20th Century Conference*, Massachusetts Historical Society, August 2004, Boston, Mass.
- “‘The very survival of this nation’: Criminalizing Sexual and Political Dissent,” *Sexual Worlds, Political Cultures, conference sponsored by the Social Science Research Council*, October 2003, Washington, D.C.

### **PROFESSIONAL AFFILIATIONS**

American Historical Association; American Society for Law and History; Organization of American Historians; American Bar Association; Ass’n of American Law Schools; American Law Institute.