

EXHIBIT 9

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

LOG CABIN REPUBLICANS, :
Plaintiff, :
v. : CA No. CV04-8425
:(VAP) (Ex)
UNITED STATES OF AMERICA AND :
ROBERT GATES, Secretary of :
Defense, :
Defendants. :

Washington, D.C.
Friday, April 9, 2010

Deposition of
LAWRENCE KORB, Ph.D., called for
examination by counsel for Defendants, pursuant to
notice, at the United States Department of Justice, 20
Massachusetts Avenue, Washington, D.C., commencing
at 9:03 a.m., before Barbara A. Huber, Notary
Public in and for the District of Columbia, when
were present on behalf of the respective parties:

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1 A Meaning about whether the laws are
 2 constitutional?
 3 Q All right. Dr. Korb, you understand
 4 that you will be presenting testimony at trial,
 5 correct?
 6 A That's correct.
 7 Q Okay. What are the opinions you intend
 8 to offer at trial?
 9 A The opinion -- it depends on the
 10 questions that I'm asked.
 11 Q Okay. So sitting here today, you can't
 12 tell me what opinions you're going to be offering
 13 at trial?
 14 A Opinions about what, the weather?
 15 Q How about germane to the Log Cabin
 16 Republican case?
 17 A I will -- if I'm asked whether I think
 18 that their case has merit, I will say it does have
 19 merit.
 20 Q And what does that mean, with merit?
 21 A It means I think that they're right.
 22 Q Why are they right?

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1 A Because all of the evidence supports
 2 what they are -- what they're saying.
 3 Q What are they saying?
 4 A Basically that -- my understanding, that
 5 the law is unconstitutional.
 6 Q Are you opining that the law is
 7 unconstitutional?
 8 A I am basically saying that, yes, it is.
 9 Q Huh. Are you a lawyer, Dr. Korb?
 10 A No. I'm not, but --
 11 Q So when you say the law's
 12 unconstitutional, why is the law unconstitutional,
 13 in your opinion?
 14 A Because you have to have a good reason
 15 for making a -- excluding people from serving
 16 their country.
 17 Q Uh-huh. And you're saying that the law
 18 is unconstitutional because there's not a good
 19 reason for excluding people?
 20 A That's correct.
 21 Q Okay. What methodology are you
 22 employing in this case to reach the conclusion

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1 that Don't Ask, Don't Tell is unconstitutional?
 2 A Well, for example, Admiral Mullin's
 3 statement.
 4 Q And you're saying that Admiral Mullin's
 5 statement is your methodology for concluding that
 6 Don't Ask, Don't Tell is unconstitutional?
 7 MR. HUNNIUS: He said, for example.
 8 Don't mischaracterize what he said.
 9 THE WITNESS: Pardon me?
 10 MR. GARDNER: And don't give speaking
 11 objections.
 12 BY MR. GARDNER:
 13 Q Dr. Korb, I want to understand. What is
 14 the methodology that you're employing to determine
 15 that Don't Ask, Don't Tell is unconstitutional?
 16 A The methodology that I'm employing
 17 basically says that if you want to exclude a
 18 person from serving their country, you have to
 19 have a reason that shows that exclusion is based
 20 on something that would harm military readiness or
 21 undermine unit cohesion.
 22 Q Uh-huh. Now, I understand that that is

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1 the basis for your opinion as to why Don't Ask,
 2 Don't Tell is, in your opinion, unconstitutional.
 3 What is the methodology you employed to
 4 reach that conclusion?
 5 A Basically, as I explained to you, you
 6 listen to the opinions of people like with Admiral
 7 Mullin, General Shalikashvili, my own experience
 8 as an assistant secretary of defense, my own
 9 experience in the military.
 10 Q Uh-huh. Now, what statement by --
 11 A And, for example, the latest article in
 12 the Washington Post by two lawyers who worked for
 13 President Bush and President Reagan, Rifkin and
 14 Casey, which I cite in my latest work. Which, if
 15 you were preparing for this, you would have looked
 16 up.
 17 Q Huh. Okay. And that Washington Post
 18 article you're referring to, is that within the
 19 information that you provided to the White & Case
 20 attorney?
 21 A In what?
 22 Q The Washington Post article that you

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1 And we're going to start with the very
 2 first one, which, by my account, is going to be
 3 Exhibit 57.
 4 Just so you understand, the local rules
 5 in California, as I understand them, require
 6 sequentially numbering exhibits. We've gone
 7 through 56 so far, just so that makes some sense
 8 to you.
 9 (Deposition Exhibit No. 57
 10 marked for identification.)
 11 BY MR. GARDNER:
 12 Q Dr. Korb, you've been handed what's been
 13 marked as Defendant's Exhibit 57 --
 14 A Uh-huh.
 15 Q -- to your deposition. This is --
 16 appears to be an e-mail with the header, Cheryl L.
 17 Ripley [phonetic] from a Patrick Hagan to Lawrence
 18 Korb.
 19 Do you see that?
 20 A I do.
 21 Q Did you receive this e-mail, sir?
 22 A As far as I can -- this is January 18th.

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1 To the best of my knowledge, I did.
 2 Q Okay. And if you look at the first
 3 sentence of this e-mail -- and the subject is
 4 expert report, by the way. And the Bates label is
 5 LCR 05771.
 6 The first line of this report -- or the
 7 first line of this e-mail says, Dr. Korb, your
 8 expert report is attached herein. If you could
 9 review the contents to confirm that the text was
 10 taken entirely and exclusively from your June 2009
 11 monograph and from your website at
 12 www.americanprogress.org, and then the last page,
 13 we'll be all set.
 14 Do you see that?
 15 A I do.
 16 Q Now, Dr. Korb, did you actually write
 17 your report in this case?
 18 A The June 2009? Yes.
 19 Q Not the June 2009, what you ultimately
 20 signed?
 21 A Yes, I read it.
 22 Q No. Did you write it?

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1 A They took it from this report, so I
 2 wrote the report.
 3 Q In other words, if I understand this
 4 correctly, you had a June 2009 report, correct?
 5 A That's correct.
 6 Q And you provided that report to the
 7 attorneys at White & Case?
 8 A That's correct.
 9 Q And the attorneys at White & Case took
 10 parts of that and turned it into a new document,
 11 correct?
 12 A That's -- that's correct.
 13 Q And you then signed that new document?
 14 A After reading it, yes.
 15 Q After reading it?
 16 You didn't add anything to that new
 17 document?
 18 A Not to the best of my knowledge.
 19 Q Okay. So, in other words, your
 20 report -- and you understand, now, your report is
 21 that -- that document you signed?
 22 A Uh-huh.

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1 Q You understand that?
 2 Okay. Your report is in essence a
 3 portion of your June 2009 previous report?
 4 A That's correct.
 5 Q Okay. Now, that June -- is it okay to
 6 call it a monograph?
 7 Is that what you would call it?
 8 A You can call it -- report is probably a
 9 better --
 10 Q We'll call it a report.
 11 That June 2009 report that you prepared,
 12 that was prepared by yourself and two other
 13 individuals, correct?
 14 A That's correct.
 15 Q Someone named Sean Duggan and Laura
 16 Conley?
 17 A That's correct.
 18 Q Which parts of the June 2009 report did
 19 Mr. Duggan prepare?
 20 A Let me explain something to you about
 21 the report, if I may.
 22 Q Please.

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1 Q Okay. You mentioned the notion of
 2 peer-review. Was this June 2009 report that's
 3 Exhibit 58 to your deposition peer-reviewed?
 4 A In terms of sending it to other
 5 scholars, no.
 6 Q Okay.
 7 A But when it came out, we had an open
 8 session and people came and critiqued it, asked
 9 questions about it.
 10 Q Why did you prepare the June 2009
 11 report?
 12 A Because that's my job.
 13 Q What does that mean, that's your job?
 14 A Well, what's your job?
 15 Why are you asking me questions?
 16 Q Because you're being deposed today, sir.
 17 A Well, my job is to write about major
 18 issues confronting the country.
 19 Q Okay. So, in other words, Dr. Korb, the
 20 answer is you prepared the June 2009 report
 21 because that is in connection with your work as a
 22 scholar?

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1 A That's correct.
 2 Q All right. And this report advocates
 3 for the repeal of Don't Ask, Don't Tell, correct?
 4 A That's correct.
 5 Q It's pretty fair to say you are a strong
 6 advocate for the repeal of Don't Ask, Don't Tell,
 7 correct?
 8 A That's correct.
 9 Q Okay. Who was the intended audience of
 10 this June 2009 report?
 11 A The intended audience of any reports
 12 that the center does are the media --
 13 Q Uh-huh.
 14 A -- members of the executive and
 15 legislative branches --
 16 Q Uh-huh.
 17 A -- scholars, students, the general
 18 public.
 19 Q So really just as broad a net as
 20 possible, right?
 21 A That's correct.
 22 Q Okay. We talked a little bit about the

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1 methodology used for your expert report. And we
 2 now understand the expert report is that document
 3 you signed.
 4 Can you walk me through the methodology
 5 that you employed for the June 2009 report that's
 6 Exhibit 58?
 7 A I'm not quite sure what you mean by the
 8 methodology.
 9 Q Okay. Well, let me try to clarify that.
 10 And, again, you're doing a great job by
 11 asking me to clarify, so I appreciate that.
 12 Do you understand that as someone who is
 13 offering an expert opinion in this case, that you
 14 need to employ a specialized method?
 15 A What I did in this report was to go back
 16 and take a look at how the military dealt with
 17 integrating African Americans, opening up
 18 opportunities for women --
 19 Q Uh-huh.
 20 A -- ending the draft, and said, what can
 21 we learn from that to deal with this situation.
 22 Q Uh-huh. So if I understand it, in terms

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1 of methodology what you did is you reviewed
 2 documents, correct?
 3 A Well, we reviewed documents, studies.
 4 Q Uh-huh. And then once you reviewed
 5 those documents and studies, you stated what those
 6 documents and studies say, correct?
 7 A To the best of my knowledge, that's
 8 correct.
 9 Q And then you memorialized those in the
 10 June 2009 report, correct?
 11 A I don't know what you mean by
 12 memorialized.
 13 Q You wrote down the conclusions of those
 14 studies -- previous studies in your June 2009
 15 report, correct?
 16 A Previous experiences that I -- we
 17 analyzed.
 18 Q Uh-huh. Other than reviewing and
 19 memorializing documents, can you tell me what
 20 other methods you did to prepare your June 2009
 21 report?
 22 A I'm not quite sure what you mean by

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1 based upon prejudice and fears that had no
 2 rational basis.
 3 Q And what's your basis for your opinion
 4 that Don't Ask, Don't Tell was based upon
 5 prejudice and fears that have no basis?
 6 A My own experience in the -- in the
 7 service.
 8 Q Uh-huh. Anything else, other than your
 9 experience in the service?
 10 A Based upon the experience of other
 11 militaries around the world.
 12 Q Anything else?
 13 A Talking to a lot of people who were
 14 still in the service.
 15 Q Anything else?
 16 A That's all that I can remember right
 17 now.
 18 Q How does talking to a lot of people in
 19 the service confirm in your mind that Don't Ask,
 20 Don't Tell was based upon prejudice and fear?
 21 A Because a lot of people that I spoke to
 22 basically said they knew there were openly gay

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1 people and it didn't bother them.
 2 Q And that, in your mind, suggested when
 3 Congress enacted Don't Ask, Don't Tell it did so
 4 based upon prejudice and fear?
 5 A Essentially, yes.
 6 Q How does the fact that there are people
 7 in the military who are aware that there are
 8 homosexuals in the military confirm, in your mind,
 9 that when Congress passed Don't Ask, Don't Tell it
 10 did so based upon prejudice and fear?
 11 A Basically because I could see no
 12 rational basis --
 13 Q I see.
 14 A -- for the decision that they made.
 15 Q I see. In other words, your conclusion
 16 is that because you do not see a rational basis
 17 for Don't Ask, Don't Tell, it must be the case
 18 when Congress enacted it, it did so based upon
 19 prejudice towards homosexuals?
 20 A And my basis goes all the way back to
 21 the 1957 Crittenden report that was prepared for
 22 the secretary of the -- of the Navy.

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1 Q I'm not sure I -- I got a "yes" or a
 2 "no" to that.
 3 It's your opinion that because you do
 4 not see a rational basis for Don't Ask, Don't
 5 Tell, Congress must have been acting with
 6 prejudice towards homosexuals in the enactment?
 7 A No. It's not just my opinion, it's the
 8 opinion of all of the studies that I've seen and
 9 the experiences of other militaries.
 10 Q No. I'm asking about your opinion,
 11 Dr. Korb.
 12 A My opinion is based, as I tried to tell
 13 you, not just on my own experience, but the
 14 studies of other countries and the studies done by
 15 the Department of Defense.
 16 Q And I think there is a disconnect.
 17 I'm asking you, when you say that it's
 18 your opinion that Don't Ask, Don't Tell -- or the
 19 enactment of Don't Ask, Don't Tell was based upon
 20 prejudice on homosexuals, are you basing that upon
 21 your belief that there is no rational basis for
 22 the enactment of Don't Ask, Don't Tell?

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1 A That's my belief --
 2 Q Okay.
 3 A -- which is informed by my experience
 4 and the studies that I've looked at.
 5 Q Got it.
 6 Now, do you know what the ultimate vote
 7 was for Don't Ask, Don't Tell in the Senate?
 8 A I don't recall.
 9 Q If I represented to you it was 77 in
 10 favor, 22 against, and one abstain, do you have
 11 any reason to disagree with that?
 12 A I do not.
 13 Q Is it your opinion that those 77
 14 senators who voted for Don't Ask, Don't Tell were
 15 motivated by prejudice?
 16 A I would say that they were. My opinion
 17 was that they were motivated by an overreaction to
 18 some testimony that they heard or some
 19 experiences. I also think there was an attempt to
 20 embarrass President Clinton at the time for
 21 political reasons.
 22 Q Now, what's the answer to my question?

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1 61 on a year by year basis, those numbers are all
 2 different compared to the figures on page 3 of
 3 your expert report, correct?
 4 A That there is a slight difference, yes.
 5 Q Okay. And sitting here today, you can't
 6 tell me which, either your expert report or the
 7 figures in Exhibit 61, are accurate?
 8 A I'd say they don't differ significantly.
 9 Q Didn't ask you that.
 10 Do you know which number is accurate?
 11 A I don't know.
 12 Q Okay. Now, if we go back to your report
 13 in this case, Exhibit 59 for those playing along
 14 at home --
 15 A Okay.
 16 Q -- the fourth bullet point states that
 17 this policy may have cost the U.S. Government up
 18 to 1.3 billion since 1980.
 19 Do you see that?
 20 A I do.
 21 Q Now, which policy are you talking about?
 22 Are you talking about Don't Ask, Don't

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1 Tell?
 2 A Yes.
 3 Q Well, how could Don't Ask, Don't Tell
 4 have cost the U.S. Government 1.3 billion since
 5 1980 if it was enacted in 1993?
 6 A No. I'm sorry. I said this policy
 7 because it refers to the discharge of gays since
 8 1980.
 9 Q Okay. Well, that was my question. So
 10 this policy is not Don't Ask, Don't Tell?
 11 A That's correct.
 12 Q All right.
 13 A That's correct.
 14 Q All right. All right. And you say that
 15 it may have.
 16 Why do you use the word "may" rather
 17 than "did"?
 18 A Because it's very difficult to put an
 19 exact number on it. That's why we use the term
 20 "may."
 21 Q Why is it difficult?
 22 A Again, how do you calculate how much it

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1 costs, for example, to train a pilot, how much
 2 does it cost to train an infantry person?
 3 We used to estimate when I was there
 4 that if you lose a person after 10 years of
 5 service, you have to bring in six people to get
 6 them up to that.
 7 Q I see. Now, Dr. Korb, do you have any
 8 training as an economist?
 9 A No. I've taken economics courses, but I
 10 would not say I'm an economist.
 11 Q Join the club. An economist by hobby, I
 12 think is what I am. Which is a sad, sad hobby.
 13 Dr. Korb, have you done any independent
 14 analysis to confirm how much Don't Ask, Don't Tell
 15 has cost the United States Government?
 16 A I have seen the two analyses. One, the
 17 GAO report. And then I've seen the one that was
 18 done by former Secretary of Defense Perry for the
 19 Palm Center.
 20 Q Yeah. And that's not my question.
 21 My question is have you conducted any
 22 independent --

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1 A No. I have not.
 2 Q Okay. And is it fair to say that the
 3 basis for your understanding of those costs
 4 associated with Don't Ask, Don't Tell come from
 5 the GAO report and Perry's report?
 6 A That's correct.
 7 Q Any others basis?
 8 A Not that I can recall right now.
 9 Q Okay. Now, you state in the next bullet
 10 point -- again on page 3 of your expert report,
 11 which is Exhibit 59 -- that, quote, no reputable
 12 or peer-reviewed study has ever shown that
 13 allowing service by openly gay personnel will
 14 compromise military effectiveness.
 15 Do you see that?
 16 A Which number is that?
 17 Q It is the second bullet point from the
 18 bottom.
 19 Oh, I think you're on the wrong page,
 20 sir. Page 3 of your report.
 21 A Page 3? Still on page 3? Okay.
 22 Q I'm not trying to reach over. If you

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1 could just --

2 A Okay.

3 Q Do you see where I'm referring to?

4 A That's correct.

5 Q And there's a footnote nine to an Aaron

6 Belkin and others.

7 Do you see that?

8 A I do.

9 Q Is Aaron Belkin's report the basis for

10 your statement that no reputable or peer-reviewed

11 study has ever shown that allowing service by

12 openly gay personnel will compromise military

13 effectiveness?

14 A His, as well as my own, experience.

15 Q Okay. And what in your experience are

16 you relying upon for that proposition?

17 A Looking at studies, for example, like

18 the Crittenden report, the PERSEREC report that

19 you referred to, the 1993 RAND report.

20 Q Now, so are you offering the independent

21 opinion that no reputable or peer-reviewed study

22 has ever shown that allowing service by openly gay

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1 personnel will compromise military effectiveness?

2 A I'm not quite sure what you mean by

3 independent.

4 Q In other words, are you simply relying

5 upon Dr. Belkin for that testimony, or are you

6 affirmatively offering the opinion?

7 A I'm relying on what he said in reading

8 his report.

9 Q Uh-huh. Anything else?

10 A As I said, my own experience.

11 Q Now, you say here that there is no

12 peer-reviewed study on this issue.

13 Are there any non-peer-reviewed studies

14 showing that allowing service by openly gay

15 personnel will compromise military effectiveness?

16 A Not that I know of.

17 Q Why then do you use the qualifier

18 peer-reviewed?

19 A What we're trying to say is that

20 peer-review is a higher level of -- higher level

21 of scholarly acceptance or scholarly insight.

22 Q Yeah. But wouldn't it be even stronger

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1 for your point to say that there's no studies at

2 all, peer-reviewed or otherwise?

3 A It would.

4 Q So why wouldn't you just say that?

5 A Because I'm trying to raise the bar here

6 in terms of what people might say.

7 Q Okay. And just to I'm clear, it's your

8 opinion that there are no studies at all,

9 peer-reviewed or otherwise, showing that allowing

10 service by openly gay personnel will compromise

11 military effectiveness?

12 A What I'm saying is no peer-reviewed

13 study.

14 Q No. I'm asking a different question

15 now.

16 I asked you if you were aware of any

17 studies at all, and you said you were not.

18 So my question to you is, is it your

19 opinion that there are no studies, peer-reviewed

20 or otherwise, showing that allowing service by

21 openly gay personnel will compromise military

22 effectiveness?

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1 A Not that I'm aware of.

2 Q Okay. And have you specifically looked

3 into that issue as to whether there would be such

4 studies out there?

5 A Basically I have looked at all of the

6 studies that have come to my attention.

7 Q And how do studies come to your

8 attention?

9 A You go online, look them up.

10 Q How do you know what to look for?

11 A Basically if you put in the correct

12 words. Plus, again, my own experience.

13 Q What correct words are you looking for?

14 A Basically the subject here.

15 Q What's the subject?

16 A Allowing openly gay people to -- to

17 serve.

18 Q And what resource do you use when you do

19 these searches?

20 Are you talking about Google?

21 A Google, that's correct.

22 Q Google is your primary source for

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1 research?
 2 A That's correct. Plus my own experience.
 3 Q And as a scholar, is Google a fairly
 4 well accepted tool for doing research?
 5 A It's not a -- it's an accepted tool to
 6 bring to your attention things that you may not be
 7 aware of.
 8 Q I see. I see. So you use Google as a
 9 research tool to try to find articles on the
 10 subject of homosexuals in the military?
 11 A Find articles that I may not be aware
 12 of, article studies, journal articles.
 13 Q Any other resources that you use, other
 14 than Google, to try to find studies on the subject
 15 of homosexuals in the military?
 16 A Well, basically I go to a lot of -- deal
 17 with a lot of people who are professionals in this
 18 area.
 19 Q Uh-huh. What do you mean you deal with?
 20 A Well, I go to -- you know, know them
 21 from having gone to conferences.
 22 Q And what's the import of that in terms

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1 of how you conduct your research on this issue,
 2 this issue being homosexuals in the military?
 3 A Well, basically just studies. Again,
 4 I -- when you say you're looking at the subject
 5 and you say, well, who are the experts on it; what
 6 have they said.
 7 Q I guess I don't understand.
 8 So are you telling me another source,
 9 other than Google, that you use is you would
 10 contact others in the field?
 11 A Well, contact them directly or
 12 indirectly.
 13 Q How do you indirectly contact someone?
 14 A Well, you just look on the website at
 15 the universities that they're on.
 16 Q I see. Through Google or some other
 17 Internet search --
 18 A Yes.
 19 Q I see. Any other method by which you,
 20 as a scholar, go about finding information, other
 21 than Google and contacting others in the field?
 22 A Well, when our studies come out, people

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1 sometimes call and bring things to your attention.
 2 Q Uh-huh. In other words, sometimes
 3 people will identify things for you?
 4 A People will help you, yes.
 5 Q Uh-huh. Anything else?
 6 A Not that I can recall.
 7 Q Uh-huh. Now, the other qualifier in
 8 this bullet point on page 3 of your expert report,
 9 which is Exhibit 59, is reputable.
 10 Is it your understanding that there are
 11 un reputable studies showing that service by openly
 12 gay personnel will compromise military
 13 effectiveness?
 14 A Not that I'm aware of.
 15 Q Why use the qualifier "reputable"?
 16 A Because trying to raise the bar.
 17 Q I see. Okay. Now, let's turn to the
 18 next page of your expert report. The first bullet
 19 point on page 4 of your expert report says,
 20 Researchers at the University of California Santa
 21 Barbara found that the GAO's methodology did not
 22 include several important factors, and that the

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1 actual number was closer to 37,000 per service
 2 member.
 3 Do you see that?
 4 A I do.
 5 Q And, again, you don't provide any
 6 citation or authority for this bullet point. What
 7 is your authority?
 8 A That's the study done by Secretary
 9 Perry.
 10 Q Okay. And when was that study
 11 conducted?
 12 A I don't know exactly. My guess would be
 13 2005, 2006, somewhere in there.
 14 Q You were involved in that study?
 15 A I did talk to some of the people in it,
 16 yes.
 17 Q And that was a horrible question on my
 18 part, so I'll self-correct.
 19 Were you on the panel that conducted
 20 that study?
 21 A I don't recall.
 22 Q Okay. You said that you talked to some

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1 A That's correct.
 2 Q Okay. Now, when you testified before
 3 the Senate committee in 1993 you stated that there
 4 was a probability that morale and unit cohesion
 5 may be undermined temporarily if the ban on
 6 homosexual service in the military was lifted,
 7 correct?
 8 A That's correct.
 9 Q Okay. And you stand by that testimony?
 10 A Because at the time you had the top
 11 leadership who was openly opposed to it --
 12 Q Uh-huh.
 13 A -- and in my view, doing what I would
 14 called legalized insubordination because they were
 15 not just testifying in Congress, they were out
 16 speaking against it in public.
 17 Q I don't understand what you mean.
 18 A Basically Colin Powell gave a speech at
 19 the Naval Academy during the interim between when
 20 President Clinton was elected and he took office
 21 basically talking about all the terrible things
 22 that would happen if you did it.

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1 Q Okay. Now, you also testified before
 2 the Senate Committee in 1993 that, All my research
 3 and experience on this issue tells me that the
 4 question of whether the presence of openly gay men
 5 and women in the armed services would undermine
 6 fighting effectiveness cannot be answered
 7 definitively until the policy is actually changed.
 8 Do you recall that?
 9 A Yes, I do.
 10 Q Do you stand by that statement?
 11 A I do.
 12 Q Okay. Describe for me, if you can, the
 13 methodology that you employed to conclude that the
 14 damage to unit cohesion argument in defense of
 15 Don't Ask, Don't Tell does not make sense.
 16 A Well, again, I think it's -- it's right
 17 here. We looked at the -- talking about Bob
 18 MacCoun's review and looking at Nathaniel Frank's
 19 book.
 20 Q Uh-huh.
 21 A And then, of course, the articles that I
 22 reference here by Judith Stiehm and Brian Mullen

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1 and Carolyn Copper.
 2 Q So you're relying upon four other
 3 people's reports to conclude that the unit
 4 cohesion argument does not make sense?
 5 A I'm saying that they support my
 6 position, that's correct.
 7 Q Okay. Now, you say here that the
 8 problem with this argument, according to Nathaniel
 9 Frank, is that there is not good evidence to
 10 support this claim and considerable evidence
 11 against it.
 12 Do you see that?
 13 A I see it.
 14 Q In fact, in this entire section, the
 15 only source that you cite to is Frank in
 16 Unfriendly Fire, right, if you look at the
 17 footnotes?
 18 A That's correct.
 19 Q Okay. And I just want to make sure.
 20 Other than Dr. Frank's book, you're relying upon
 21 Bob MacCoun?
 22 A Uh-huh.

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1 Q Correct. And you're relying upon a
 2 Judith Stiehm article, correct?
 3 A Yes.
 4 Q And then you're relying upon an article
 5 by Brian Mullen and Carolyn Copper, correct?
 6 A That's correct.
 7 Q But the only actual citation you have is
 8 to Nathaniel Frank's book Unfriendly Fire?
 9 A That's correct.
 10 Q And is that because in Unfriendly Fire
 11 he talks about each of these sources?
 12 A That's correct.
 13 Q Okay. So it's fair to say that you're
 14 not adding anything that Nathaniel Frank doesn't
 15 say in his book?
 16 A That's correct.
 17 Q Okay. Your opinion is fairly cumulative
 18 of Nathaniel Frank's on the point of unit
 19 cohesion?
 20 A That's correct.
 21 Q Okay. Have you independently studied
 22 the issue of unit cohesion as it would apply to

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1 1980 through the present?
 2 A That's correct.
 3 Q Okay. But Don't Ask, Don't Tell, again,
 4 was only promulgated in 1993, correct?
 5 A That's correct.
 6 Q So the 1.3 billion figure does not
 7 reflect the total cost of Don't Ask, Don't Tell?
 8 A That's correct.
 9 Q Okay. Now, let's go back. Let's go to
 10 page 5 of your report. We're going to go
 11 backwards.
 12 A Page 5 of --
 13 Q Okay. Your expert report.
 14 A Page 5, so we're going back?
 15 Q We're going backwards. We're
 16 regressing, not progressing.
 17 You state on page 5 of your report,
 18 Don't Ask, Don't Tell is irrational.
 19 Do you see that?
 20 At the very top of page 5 of your
 21 report, do you see it says, Don't Ask, Don't Tell
 22 is irrational?

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1 The heading?
 2 A Oh, yeah. Okay.
 3 Q Is it your opinion in this case that
 4 Don't Ask, Don't Tell is irrational?
 5 A That's correct. That there's no
 6 rational basis for it.
 7 Q Okay. I think you just answered my
 8 question, but I'll ask it just to be sure.
 9 What do you mean by irrational?
 10 A That there's no rational basis.
 11 Q Thank you.
 12 Now, are you offering the opinion that
 13 Don't Ask, Don't Tell was irrational when it was
 14 enacted in 1993?
 15 A Yes.
 16 Q And what's your basis for that?
 17 A Because there was no rational basis for
 18 it.
 19 Q Uh-huh. And so your opinion is there's
 20 no rational basis when Don't Ask, Don't Tell was
 21 enacted in 1993 because there was no rational
 22 basis?

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1 A That's correct.
 2 Q Why was there no rational basis?
 3 A Because there was never any data that
 4 showed allowing people to serve who were openly
 5 gay was going to cause problems in unit cohesion
 6 or for military readiness.
 7 Q Why does the absence of data on those
 8 two points, in your mind, show that Don't Ask,
 9 Don't Tell, when enacted in 1993, was irrational?
 10 A Well, without data, I don't see how you
 11 can have a rational policy.
 12 Q By data, are you also lumping in there
 13 the views of those in the military?
 14 A People in the military?
 15 Q Uh-huh.
 16 A I'm looking at the studies that were
 17 done.
 18 Q Okay. Let me ask a better question.
 19 When you're talking about the data, are you
 20 referring to, say, Colin Powell's testimony --
 21 A No.
 22 Q -- before the Senate subcommittee?

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1 Okay. Are you referring Norman
 2 Schwarzkopf's testimony in 1993?
 3 A No. I'm not.
 4 Q Okay. In other words, you're talking
 5 really about empirical data?
 6 A That's correct.
 7 Q Okay. You are not, when you are
 8 offering the opinion that in 1993 Don't Ask, Don't
 9 Tell was irrational, considering the statements of
 10 Colin Powell and Norman Schwarzkopf?
 11 A I'm basically saying that's their
 12 opinion. Just like General Bradley said, if you
 13 integrate the Army, in 1948 he told President
 14 Truman, it would destroy the Army.
 15 Q Of course, you testified before Congress
 16 that it is inappropriate to equate racial
 17 integration in the military with that of
 18 homosexuals, correct?
 19 A I said they're not an exact thing. But
 20 I do think there are things we can learn from how
 21 military people responded to that social change,
 22 yes.

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1 African Americans into the military, that will
 2 destroy the Army. Or the commandant of the Marine
 3 Corps said that if you allow women to serve
 4 openly, that would do something no enemy has done:
 5 Destroy the Marine Corps. And I could go on and
 6 on.
 7 General -- the Air Force chief of staff
 8 basically said he'd have an unqualified man as a
 9 pilot than a qualified woman, yes.
 10 Q So really, at the end of the day,
 11 Dr. Korb, you really disagree with the wisdom of
 12 Congress relying upon the testimony of Colin
 13 Powell and Norman Schwarzkopf, correct?
 14 A I basically think that they did that
 15 because they had already made their mind up ahead
 16 of time.
 17 Q And, again, that would be just a
 18 disagreement with the wisdom of what Congress
 19 decided, correct?
 20 A That's correct.
 21 Q Perfect.
 22 MR. GARDNER: Let's take a break.

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1 (Recess)
 2 BY MR. GARDNER:
 3 Q Dr. Korb, we're back from a break.
 4 Did you speak to counsel during the
 5 break?
 6 A Yeah. I asked him why what we said, we
 7 couldn't keep private. And he said because he's
 8 not my attorney.
 9 Q Oh, okay. What else did you say?
 10 A I think we tried -- I said is there a
 11 restroom near here.
 12 Q I'm sorry. Off the record.
 13 (Discussion off the record)
 14 BY MR. GARDNER:
 15 Q Anything else?
 16 A Yeah. We talked about the weather, and
 17 my getting over here, their walking over, how long
 18 would it take me.
 19 Q Did you talk about anything regarding
 20 the substance of your testimony?
 21 A No.
 22 Q Okay. I think you've explained to me

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1 the basis for your opinion that Don't Ask, Don't
 2 Tell was irrational when enacted in 1993.
 3 Are you also offering the opinion that
 4 Don't Ask, Don't Tell is irrational today?
 5 A It's even less rational.
 6 Q I see. Was it even less rational back
 7 in 1993?
 8 A I say it was irrational, but I wouldn't
 9 say -- somewhat more rational, but not, you know,
 10 more rational.
 11 Q I guess my question is: How do you get
 12 somewhat less rational than irrational?
 13 A Then I change my answer. It was
 14 irrational then. It's irrational now.
 15 Q Perfect.
 16 For the same reasons?
 17 A Same reasons.
 18 Q And by same reasons, your testimony --
 19 or your opinion is Don't Ask, Don't Tell is
 20 irrational today for the exact same reasons you
 21 believe it was irrational in 1993?
 22 A That's correct.

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1 Q And your ultimate conclusion in this
 2 case is that Don't Ask, Don't Tell was
 3 unconstitutional in 1993, correct?
 4 A That's correct.
 5 Q And it's also your opinion that Don't
 6 Ask, Don't Tell is unconstitutional today?
 7 A That's correct.
 8 Q Now, it is your opinion though,
 9 Dr. Korb, that things have changed dramatically
 10 since Don't Ask, Don't Tell was enacted in 1993,
 11 correct?
 12 A What things are you talking about?
 13 Q Well, for example, it's your
 14 understanding that the majority of civilians and
 15 those in the military are now comfortable with
 16 openly gay service members, correct?
 17 A That's correct.
 18 Q Okay. And back in 1993, the majority of
 19 civilians did not support open gays in the
 20 military, correct?
 21 A That's correct.
 22 Q Okay. And that's one example of, in

Page 230

1 A No.
 2 Q I see.
 3 A The submarines is --
 4 Q I see. I see what your point is then.
 5 Now, this Senate subcommittee report
 6 goes on to say, The committee concludes that while
 7 the foreign experience is worth monitoring, it
 8 does not provide a relevant basis for permitting
 9 gays and lesbians to serve openly in the armed
 10 forces of the United States.
 11 Do you see that?
 12 Do you see that, sir?
 13 A Sure.
 14 Q You disagree with that, right?
 15 A I do.
 16 Q You question the wisdom of Congress'
 17 judgment in that regard?
 18 A I do.
 19 MR. HUNNIUS: Congress or the committee?
 20 BY MR. GARDNER:
 21 Q The committee?
 22 A Yes.

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1 Q Perfect.
 2 Let's go back to your report.
 3 A Okay. And that's Exhibit 59?
 4 Q Yeah. That's the one you're going to
 5 want to keep out --
 6 A All right.
 7 Q -- for the better part of the day.
 8 And going back to the GAO report from
 9 1992, the one that you referred to, beginning on
 10 page 96, do you know whether the Department of
 11 Defense agreed with all the conclusions reached by
 12 the GAO in the --
 13 A I don't.
 14 Q In your view, is it significant whether
 15 or not the Department of Defense --
 16 A It's something to be considered.
 17 Q Okay. Did you consider that?
 18 A Yes.
 19 Q But I just thought you told me you
 20 didn't know whether DOD actually agreed or
 21 disagreed with the conclusions --
 22 A I did. But you asked me --

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1 Q I thought you told me you did not know
 2 whether or not the Department of Defense agreed or
 3 disagreed with the findings --
 4 A That's correct.
 5 Q -- in the GAO report?
 6 You've got to let me finish.
 7 A I don't remember.
 8 Q Okay. But you agree that whether or not
 9 the Department of Defense did or did not agree
 10 would be significant?
 11 A Obviously you'd have to take into
 12 account the reasons that they said they disagreed.
 13 Q Okay. And you didn't do that for
 14 purposes of your analysis?
 15 A I think when I did my first report on
 16 this, which was back in the mid-90s, I did, but I
 17 don't recall doing it specifically again this
 18 time.
 19 Q This time meaning for purposes of your
 20 expert report in this case?
 21 A That's correct.
 22 Q Okay.

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1 (Deposition Exhibit No. 6
 2 previously marked for
 3 identification.)
 4 BY MR. GARDNER:
 5 Q Dr. Korb, you've been handed what's been
 6 previously marked as Exhibit 6 to your deposition.
 7 A Yes.
 8 Q This is the GAO report that you referred
 9 to --
 10 A Uh-huh.
 11 Q -- on page 6 of your expert report,
 12 correct?
 13 A Uh-huh.
 14 Q Dr. Korb, I need a "yes" or "no."
 15 A Yes.
 16 Q That's all right. I know.
 17 And this is a document entitled GAO
 18 Defense Force Management, DOD's Policy on
 19 Homosexuality, dated June 1992, with a Bates label
 20 LCR GAO 00272.
 21 Now, can you turn to page 56 of this
 22 report, please? And if it's helpful for you, feel

1 CERTIFICATE OF DEPONENT
 2 I hereby certify that I have read and examined the
 3 foregoing transcript, and the same is a true and
 4 accurate record of the testimony given by me.
 5 Any additions or corrections that I feel are
 6 necessary, I will attach on a separate sheet of
 7 paper to the original transcript.

8
 9 _____
 10 Signature of Deponent
 11 I hereby certify that the individual representing
 12 himself/herself to be the above-named individual,
 13 appeared before me this _____ day of _____,
 14 2010, and executed the above certificate in my
 15 presence.

16
 17 _____
 18 NOTARY PUBLIC IN AND FOR
 19
 20 _____
 21 County Name
 22 MY COMMISSION EXPIRES:

1 CERTIFICATE OF NOTARY PUBLIC
 2 I, BARBARA A. HUBER, CSR, the officer
 3 before whom the foregoing deposition was taken, do
 4 hereby certify that the witness whose testimony
 5 appears in the foregoing deposition was duly sworn
 6 by me; that the testimony of said witness was
 7 taken by me in stenotypy and thereafter reduced to
 8 print under my direction; that said deposition is
 9 a true record of the testimony given by said
 10 witness; that I am neither counsel for, related
 11 to, nor employed by any of the parties to the
 12 action in which this deposition was taken; and,
 13 furthermore, that I am not a relative or employee
 14 of any attorney or counsel employed by the parties
 15 hereto, nor financially or otherwise interested in
 16 the outcome of this action.

17 _____
 18 BARBARA A. HUBER, CSR
 19 Notary Public, in and for the
 20 District of Columbia
 21 My Commission Expires: March 14, 2012
 22

EXHIBIT 10

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

LOG CABIN REPUBLICANS,
Plaintiff,

vs. No. CV04-8425

(VAP) (Ex)

UNITED STATES OF AMERICA
AND ROBERT GATES,
Secretary of Defense,
Defendants.

February 26, 2010

10:02 a.m.

Deposition of Expert Witness

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

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1 Frank
 2 honor certain standards for interpretation
 3 and findings use adequate deductive
 4 reasoning, and that's what I've tried to do
 5 here. As I've said, the specific
 6 subdisciplines in terms of political science
 7 as with -- you know, as a specialty that
 8 allows people to formulate polling is not
 9 something that I have training in. So I read
 10 the polls the way he or you might read the
 11 polls, but my specialty is to be a social
 12 scientist with that broad training with a
 13 focus on the historical evolution of the
 14 policy.
 15 Q. How about the RAND study, the
 16 subdisciplines we see reflected in the RAND
 17 study, do you believe you have specialized
 18 knowledge that could contribute to the
 19 findings that we see in the RAND study?
 20 A. "That could contribute to the
 21 findings," what do you mean by that?
 22 Q. Do you have any specialized
 23 knowledge that would assist the trier of fact
 24 in understanding the findings of the RAND
 25 study.

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1 Frank
 2 MR. WOODS: Objection. It calls
 3 for a conclusion.
 4 You may answer.
 5 A. Well, sure, the historians are
 6 among those that contribute to the RAND study
 7 and the question of cultural history and
 8 cultural expectations you were asking me
 9 about previously has a bearing on whether
 10 this policy is necessary, rational, helpful
 11 to the military, appropriate, culturally, and
 12 my training in social science and my
 13 understanding of cultural history helps me to
 14 make sense of that and try to put it in
 15 context and apply additional deductive
 16 reasoning to help other people assess this
 17 honestly and wisely. A lot of what I do is
 18 to try to put appropriate information into
 19 context and allow people to determine whether
 20 they're persuaded by the conclusions.
 21 Q. I ask you to turn to part 7 of your
 22 report entitled "Costs of the Current
 23 Policy/Basis of Failure."
 24 Do you see that?
 25 A. Yes.

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1 Frank
 2 Q. Explain to me the methodology that
 3 you employed in this part of your report?
 4 A. The methodology here is relatively
 5 straightforward. There is a breakdown of
 6 impacts that the current policy has ranging
 7 from the financial costs to the loss of
 8 critical skills to the to sometimes
 9 compensatory actions that the military has to
 10 take in directions that its own research
 11 suggests are not optimal for cohesion and
 12 performance and put them together and again
 13 lay out the various costs in a way that
 14 allows people to assess the costs and
 15 benefits.
 16 Q. The first part of your analysis is
 17 financial cost, correct?
 18 A. Right.
 19 Q. Are you an economist?
 20 A. No.
 21 Q. What specialized knowledge do you
 22 think you bring to bear to your analysis of
 23 the financial cost of the policy?
 24 A. Well, I cowrote the report from the
 25 Blue Ribbon Commission, working closely with

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1 Frank
 2 the commissioners, who included a former
 3 defense secretary and working to assemble the
 4 material that they developed and gave me. I
 5 have a calculator.
 6 Q. Beyond having a calculator, do you
 7 have any specialized knowledge in the area of
 8 economics?
 9 A. No, but this report doesn't require
 10 even by its authors specialized knowledge in
 11 economics. It's a cost count.
 12 Q. Let's walk through that.
 13 The first report you rely upon is
 14 the GAO report issued in February of 2005,
 15 correct?
 16 A. Yes.
 17 Q. Let me show you that which has been
 18 previously marked as Exhibit 9.
 19 (Defendants' Exhibit 9, GAO report
 20 issued in February of 2005 entitled
 21 "Military Personnel, Financial Costs and
 22 Loss of Critical Skills Due to DOD's,
 23 Homosexual Conduct Policy Cannot Be
 24 Completely Estimated," marked for
 25 identification, as of this date.)

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1 Frank

2 Q. Do you have any reason to believe

3 that the people that you spoke to were

4 relying upon data other than the GAO report?

5 A. Well, I don't believe they were

6 relying on the GAO report because I was

7 asking them about information that went

8 beyond the report, which is what does it mean

9 to be studying a language at DLI, what does

10 the military expect, how proficient do people

11 have to be in order for the military to

12 consider them to be useful interpreters of

13 the language operationally.

14 Q. So the standard is useful

15 interpreters, not experts?

16 A. I probably used both terms when I

17 was discussing it with these people.

18 Q. I would like to return back to our

19 discussion earlier about the financial costs.

20 A. Okay.

21 Q. Are you aware of any polling data

22 or other information which suggests that if

23 the "Don't Ask, Don't Tell" statute is

24 repealed that service members would leave the

25 military, heterosexual service members would

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1 Frank

2 leave the military?

3 A. There is polling data in which

4 respondents say that they either would

5 consider leaving or would leave. To me that

6 doesn't suggest they would leave.

7 Q. Is that because polls are not

8 predictive of behavior?

9 A. That's right.

10 (Defendants' Exhibit 12, document

11 entitled "How to End 'Don't Ask, Don't

12 Tell,' A Roadmap of Political, Legal,

13 Regulatory and Organizational Steps to

14 Equal Treatment," dated May 2009, issued

15 by the Palm Center, marked for

16 identification, as of this date.)

17 Q. Let me show you what has been

18 previously marked as Defendants' Exhibit

19 Number 12.

20 I would like you to turn to --

21 first of all, for the record this is entitled

22 "How to End 'Don't Ask, Don't Tell,' A

23 Roadmap of Political, Legal, Regulatory and

24 Organizational Steps to Equal Treatment,"

25 dated May 2009 and it's issued by the Palm

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1 Frank

2 Center.

3 Do you recognize this document?

4 A. Yes.

5 Q. I note that you are one of the

6 contributors?

7 A. Right.

8 Q. What did you do to develop this

9 report?

10 A. I compiled information and helped

11 write and edit the report.

12 Q. Did you contribute any analysis

13 that we see in the report?

14 A. Well, in discussing this with my

15 coauthors and in writing the report, some

16 part of that writing would constitute

17 analysis.

18 Q. Let me ask you to turn to page 8

19 and specifically the last paragraph, third

20 sentence, which notes, "On one recent

21 nonrandomized survey between 10 and 24

22 percent of service members indicated that

23 they would leave or might leave the military

24 if gay men and lesbians were allowed to serve

25 openly. Social science research, however,

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1 Frank

2 shows that opinion polls do not predict the

3 troop's behavior in that there is a

4 significant gap between what is expressed in

5 military surveys and in the actual impact of

6 policy change on behavior. In both Canada

7 and Britain, two-thirds of male troops said

8 that they would not work with gay men if gay

9 bands were lifted in those countries. After

10 the lifting of the bands fewer than a half

11 dozen people resigned in each case."

12 Do you see that?

13 A. Yes.

14 Q. Do you share the view that is

15 expressed in the portion that I just read?

16 A. I do because the polling data is

17 only one variable that is necessary to look

18 at when you're trying to assess impact.

19 Q. What are the other variables?

20 A. Well, there is research on

21 institutional peer pressure for instance,

22 which helps bear out the conclusion that a

23 poll like this one may serve as an

24 opportunity to express institutional values

25 more so than it serves to predict behavior.

1 CERTIFICATE
2 STATE OF NEW YORK)
3 : ss.
4 COUNTY OF NEW YORK)
5

6 I, THERESA TRAMONDO, a Notary
7 Public within and for the State of New
8 York, do hereby certify:

9 That NATHANIEL FRANK, Ph.D., the
10 witness whose deposition is hereinbefore
11 set forth, was duly sworn by me and that
12 such deposition is a true record of the
13 testimony given by the witness.

14 I further certify that I am not
15 related to any of the parties to this
16 action by blood or marriage, and that I
17 am in no way interested in the outcome of
18 this matter.

19 IN WITNESS WHEREOF, I have hereunto
20 set my hand this 8th day of March, 2010.

21
22
23 _____
24 THERESA TRAMONDO
25

EXHIBIT 11

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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

Page 122

1 evidence that readiness would be comprised. Some
 2 people think that the statements by the generals,
 3 the thousand plus generals is evidence. So that's
 4 what I was gesturing at.
 5 Q On that last point you are making
 6 reference -- there are two. One is a petitioner
 7 right, that people who believe that Don't Ask,
 8 Don't Tell should remain the policy; correct? And
 9 then there is another report that was issued by
 10 other generals and flag officers who believe that
 11 the policy should be repealed; right?
 12 A Yes.
 13 Q And you are referring to --
 14 A The statement.
 15 Q -- the statement? Okay. So is your
 16 point there that arguments can be made on both
 17 sides of the issue or but that you believe that
 18 there is a preponderance of evidence that tilts in
 19 favor of a repeal of the statute?
 20 A I would say you can, obviously, make an
 21 argument about anything, but that the arguments
 22 which suggest that repeal would compromise
 23 readiness are not plausible.
 24 Q And when you say readiness, are you
 25 referring to the unit cohesion rationale as

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1 articulated by Professor MacCoun, for example?
 2 A Cohesion, retention, recruiting,
 3 morale.
 4 Q Where does privacy enter into that mix?
 5 A I am not talking about privacy in that
 6 sentence but I would say the same thing about
 7 privacy.
 8 Q Where do you address privacy in this
 9 report?
 10 A I don't know if I did.
 11 Q Are you rendering an expert opinion in
 12 this case on the privacy rationale?
 13 A I can if asked, yes.
 14 Q Have you been asked?
 15 A Last night, yes.
 16 Q You were asked last night?
 17 A Yes.
 18 Q So are you -- will you be offering up
 19 an amended expert report to provide the privacy
 20 expert opinion that you now intend to offer?
 21 A I have not been asked to do that but I
 22 am glad to do so.
 23 Q The next sentence reads -- first of
 24 all, in the first sentence you make reference to
 25 the term, openly?

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1 A Uh-huh.
 2 Q What did you intend to convey there?
 3 A That someone utters the words or
 4 like-minded words to the effect that I am gay and
 5 other people in the unit hear those words.
 6 Q Is an operational definition that you
 7 would use that an individual acknowledges his or
 8 her homosexual orientation to colleagues and
 9 supervisors? Is that the definition you are
 10 using?
 11 A I guess the way I would say it is that
 12 if someone acknowledged being gay to or lesbian to
 13 another person that, yes, that is to me an openly
 14 gay person at least in that context. There are --
 15 that is not the only way in which one could in my
 16 mind be an openly gay person.
 17 Q You mention that you have now been
 18 asked to opine on the privacy rationale. How, if
 19 any, would your expert report have to be revised
 20 to encompass that expert opinion?
 21 A Sorry. I wasn't asked to opine on it
 22 but I was asked what my research conclusions about
 23 it are.
 24 Q I see.
 25 A I would make the same points that I

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1 made when you asked me about privacy several hours
 2 ago. And I would say that according to the
 3 research, there is no evidence that the repeal of
 4 Don't Ask, Don't Tell would compromise
 5 heterosexual privacy in the military. And, in
 6 fact, something you did not, I believe, ask me
 7 about but which is also sustained by research is
 8 that heterosexual privacy would, in fact, be
 9 slightly improved by the repeal of Don't Ask,
 10 Don't Tell.
 11 Q How would that be?
 12 A Because the Don't Ask, Don't Tell
 13 policy is associated with some incursions into
 14 heterosexual privacy that would -- those privacy
 15 injuries would no longer obtain after repeal. For
 16 example, there is a case -- I am sorry I don't
 17 know the year of this case. But there was a case
 18 where -- I'm sorry. Let me step back.
 19 When the military is investigating the
 20 sexual orientation of a service member, they often
 21 interrogate people in the service member's orbit,
 22 lovers, partners, friends, parents, and so, many
 23 of whom are heterosexual, of course. And some of
 24 those interviews can involve privacy injuries.
 25 For example, there is I believe it was

1 article, you note that this concern for
 2 heterosexual privacy was widespread in 1993;
 3 right? You note that on page 182?
 4 A Yes. Well, yeah, I think I -- can I
 5 speculate for a moment? I would say for some it
 6 was probably disingenuous and for some it was not.
 7 Q Explain that. What do you mean?
 8 A Well, it is the same argument about
 9 cohesion, that what was really motivating a lot of
 10 people who were formulating this policy was moral
 11 animus. But they knew they could not get away
 12 with a moral animus argument in public so they
 13 needed other argumentation.
 14 Q Maybe I have asked this. And if I
 15 have, I apologize but I forget the answer.
 16 Do you believe that if a heterosexual
 17 would prefer not to shower with an openly gay man,
 18 do you believe that that is necessarily premised
 19 on moral prejudice?
 20 A I was not clear before and I apologize.
 21 I believe that being uncomfortable with the
 22 utterance of the words, I am gay, is almost always
 23 a function of moral prejudice but that not wanting
 24 to shower around a gay person or be seen by
 25 another person is not necessarily homophobia or

1 moral intolerance.
 2 Q Just to drill down on that point, what
 3 is do you see any difference between that
 4 circumstance and a male female example where a
 5 female would prefer not to be seen nude by a man?
 6 A Like is the psychology the same?
 7 Q Yeah, I guess start there.
 8 A I don't know. I am just trying to
 9 think. I have to wrap my mind around this. I
 10 don't know. I mean, I would think that -- a woman
 11 not wanting to be seen by a man or a man not
 12 wanting to be seen by a woman?
 13 Q Let's take it in pieces. Let's start
 14 first with the woman.
 15 A So you are asking for a kind of like
 16 big essentialist claims about everybody, and, you
 17 know, I can't characterize the psychology of every
 18 person in the world. But we have a norm in this
 19 country that separates the sexes. And so women
 20 are trained and men are trained not to use
 21 intimate facilities together. And so and that is
 22 not the case with people of the same sex.
 23 And so I would say that our psychology
 24 is conditioned in different contexts and,
 25 therefore, it is a little bit different.

1 Q So it is a question of cultural
 2 expectations?
 3 A I would say it could be a question of
 4 cultural expectations.
 5 Q Now, in this article you actually
 6 reference going to summer camp and showering with
 7 other men. Noting that, do you see a difference
 8 when you interject one's sexuality into a
 9 particular setting, in other words, when you
 10 thought Joe was straight, may not have a problem
 11 with it, but now that you know his sexual
 12 preference, does that introduce an additional
 13 element?
 14 A I believe that Melissa and I in this
 15 article acknowledged that there is some discomfort
 16 for some straights around some gays in some
 17 intimate settings. And I think I actually did
 18 just confirm that also, so, yes.
 19 Q And my next question, though, is having
 20 acknowledged that that element has now been
 21 introduced --
 22 A Yes.
 23 Q -- and perhaps an additional element of
 24 discomfort has resulted, do you believe that that
 25 discomfort is based upon moral prejudice?

1 A Not necessarily.
 2 Q Okay. Why the qualifier?
 3 A Because it may be.
 4 Q But it may not be?
 5 A Uh-huh.
 6 Q What are some examples of
 7 nonprejudicial motivations that you would find to
 8 be acceptable?
 9 A I am having trouble putting myself in
 10 the shoes of this hypothetical heterosexual person
 11 who is worried about the situation, so I am not
 12 quite sure.
 13 Q Do you see that situation, though, as
 14 reducing itself down to a concern about predatory
 15 behavior on the part of the gay service member?
 16 A Not necessarily.
 17 Q Why not?
 18 A Someone could just be uncomfortable.
 19 They could have shame. They could be embarrassed.
 20 Q Or just perhaps never -- they have
 21 never dealt with the situation before and any new
 22 situation could be a cause of discomfort?
 23 A I feel like you are putting words in my
 24 mouth just a little bit, so I would just leave it
 25 at what I said.

1 intolerance. I just found out that, in fact,
 2 General Conway of the Service Chief of the Marines
 3 is coordinating opposition to repeal efforts with
 4 Peter Pace. And Peter Pace is the former chairman
 5 of the Joint Chiefs of Staff who was honest enough
 6 to admit when asked by the Chicago Tribune
 7 editorial board why we have a Don't Ask, Don't
 8 Tell policy, he was honest enough to admit it is
 9 because homosexual conduct is immoral.

10 Now, he was rowdily criticized for that,
 11 but I was actually happy he said that because for
 12 the first time we had a military person being
 13 honest about the policy. So the fact that he is
 14 back in the quarterback seat tells me --
 15 reinforces my conviction that this policy is not
 16 and never has been about cohesion or privacy or
 17 any other rational military ends but it is about
 18 promoting the moral convictions of a particular
 19 group of individuals.

20 MS. FELDMAN: I have no other
 21 questions.

22 MR. FREEBORNE: Thank you, Doctor. No
 23 further questions.

24 (Deposition concluded at 2:53 p.m.)
 25

1 STATE OF CALIFORNIA)

2 : ss)

3 County of Alameda)

4 I, the undersigned, a Certified
 5 Shorthand Reporter of the State of California, do
 6 hereby certify: That the foregoing proceedings
 7 were taken before me at the time and place herein
 8 set forth; that any witnesses in the foregoing
 9 proceedings, prior to testifying, were placed
 10 under oath; that a verbatim record of the
 11 proceedings was made by me using machine shorthand
 12 which was thereafter transcribed under my
 13 direction; further, that the foregoing is an
 14 accurate transcription thereof. I further certify
 15 that I am not a relative, employee, attorney or
 16 counsel of any party to this action or relative or
 17 employee of any such attorney or counsel and that
 18 I am not financially interested in the said action
 19 or the outcome thereof;

20 IN WITNESS WHEREOF, I have this date
 21 subscribed my name.

22 Dated: _____

23
 24 EMI ALBRIGHT, CSR No. 13042
 25

1 CERTIFICATE OF DEPONENT

2
 3 I hereby certify that I have read and examined the
 4 foregoing transcript, and the same is a true and
 5 accurate record of the testimony given by me.
 6 Any additions or corrections that I feel are
 7 necessary, I will attach on a separate sheet of
 8 paper to the original transcript.
 9

10 _____
 11 Signature of Deponent

12
 13 I hereby certify that the individual representing
 14 himself/herself to be the above-named individual,
 15 appeared before me this _____ day of _____,
 16 2010, and executed the above certificate in my
 17 presence.
 18

19 _____
 20 NOTARY PUBLIC IN AND FOR

21 _____
 22 County Name

23
 24 MY COMMISSION EXPIRES:
 25

EXHIBIT 12

1 UNITED STATES DISTRICT COURT
 2 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 3 EASTERN DIVISION
 4

5 LOG CABIN REPUBLICANS,)
 6)
 7 Plaintiff,)
 8) Case No.
 9 vs.)
 10) CV04-8425
 11 UNITED STATES OF AMERICA AND ROBERT) (VAP) (Ex)
 12 GATES, Secretary of Defense,)
 13)
 14 Defendants.)
 15)

16
 17
 18 DEPOSITION OF ROBERT J. MACCOUN, Ph.D.
 19 March 2, 2010
 20 San Francisco, California

21
 22 Reported by:
 23 EMI ALBRIGHT
 24 RPR, CSR No. 13042
 25 Job No. 19672

Page 42

1 it was a publication issued by the National
 2 Defense Research Institute entitled, Sexual
 3 Orientation and U.S. Military Personnel Policy,
 4 Policy Options and Assessment.
 5 Do you see that?
 6 A That's correct.
 7 Q Is that the RAND study that we see in
 8 Exhibit 8?
 9 A That is Exhibit 8, yes.
 10 Q And the second publication which is
 11 entitled, What is Known About Unit Cohesion in
 12 Military Performance. Do you see that?
 13 A That's right.
 14 Q Is that Chapter 10 of the --
 15 A What is --
 16 Q Again let me finish the question and
 17 then you can answer. I know it is a natural
 18 tendency as you probably know better than I. But
 19 just for the benefit of the court reporter, that
 20 is Chapter 10 of the RAND study?
 21 A That's correct.
 22 Q Just so we are clear, in forming your
 23 expert opinion in this case, you rely upon the
 24 1993 RAND study, both generally as well as Chapter
 25 10?

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1 A That's right.
 2 Q Do you want to qualify that in any way?
 3 I think before you testified you had contributed
 4 to only certain parts of the RAND study that we
 5 see in Exhibit 8?
 6 A I make reference to the RAND report as
 7 a whole in my report. When I refer to the 1993
 8 RAND report, I believe I refer to the 1993 RAND
 9 report, I am referring to the entire document.
 10 Mostly in my report when I say MacCoun, 1993, I am
 11 referring to Chapter 10.
 12 (Exhibit No. 27 marked.)
 13 Q Let me show you what has been
 14 previously marked as Exhibit 27. Let me ask the
 15 court reporter to hand you Exhibit 27, which for
 16 the record is entitled, Sexual Orientation and
 17 Military Cohesion, a Critical Review of the
 18 Evidence.
 19 And is that the third publication that
 20 we see on page 2 of your expert report, which
 21 again has been marked as Exhibit 23?
 22 A That's correct.
 23 Q Is it fair to say you rely upon this
 24 1996 article in formulating your opinions in this
 25 case?

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1 A That's correct.
 2 Q Then you make reference to two
 3 additional publications, one that you co-authored
 4 with Dr. Belkin entitled, Does Social Cohesion
 5 Determine Motivation in Combat? Do you see that?
 6 A That's right.
 7 Q Was that article in response to an
 8 article that was written by Dr. Wong?
 9 A Leonard Wong.
 10 Q And you rely upon that article in
 11 formulating your opinions in this case, not the
 12 Wong study but the 2006 article that I just made
 13 reference to?
 14 A That's right.
 15 Q Then the final article was entitled,
 16 Biases in the Interpretation and Use of Research
 17 Results. Do you see that?
 18 A That's correct.
 19 Q Do you rely upon that article in
 20 formulating your opinions in this case?
 21 A Yes, I do.
 22 Q Okay. With respect to that last
 23 article how do you rely upon that article?
 24 A That article discusses standards for
 25 interpreting empirical evidence in highly

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1 contested issues and calls for the need for
 2 multiple sources of evidence using multiple
 3 methodologies and for social scientists and other
 4 people who use this evidence to take safeguards to
 5 try to minimize the role of their own personal
 6 biases.
 7 Q We are going to come back to the last
 8 two articles that I just mentioned. But first I
 9 want to start with the RAND study and walk through
 10 that.
 11 What were you -- when I say you, I mean
 12 you, Professor -- asked to do in the 1993 RAND
 13 study?
 14 A Well, the 1993 RAND study was a very
 15 large interdisciplinary effort. In the beginning
 16 of the project we worked as a group and did not
 17 have separate teams. And so I was involved in the
 18 planning of what the research activities would be.
 19 We then identified a variety of research tasks,
 20 for example, studying foreign military
 21 experiences, studying unit cohesion literature,
 22 studying police and fire departments, studying
 23 public health related issues, organizational
 24 issues. And we split into separate teams to do
 25 that work.

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1 possibility of violence, incidents of violence.
 2 Those are the things I remember him talking about.
 3 Q Are you aware that he referenced the
 4 privacy concern that we have been discussing?
 5 A I don't remember specifically the Armed
 6 Services hearings. He certainly has been very
 7 vocal about -- was very vocal. He passed away a
 8 few years ago. But especially in the past, in the
 9 last five years of his life he talked quite a bit
 10 about privacy in interviews.
 11 Q We have been discussing somewhat
 12 interchangeably your report that we see on
 13 Defendant's Exhibit 23 and the RAND study. In
 14 your expert report do you incorporate the privacy
 15 concern or any analysis about the privacy concern
 16 above and beyond what you did in the RAND study?
 17 A No, the privacy is really only -- my
 18 expert report refers really, Exhibit 23, addresses
 19 the question of the effect on cohesion and
 20 performance. To the extent that issues involving
 21 privacy would impair cohesion, then it is relevant
 22 to my chapter. But I did not -- there is no
 23 section of my Exhibit 23 that specifically takes
 24 up the question of privacy.
 25 Q Okay. Throughout Chapter 10 you talk

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1 about acknowledged homosexuality and open
 2 homosexuality. What is your or what was the
 3 operational definition that you used with respect
 4 to each of those terms? If they are the same --
 5 if they are different, let me know. I see them as
 6 being the same.
 7 A I think I probably use the words, open
 8 and acknowledged, in a very similar way. And in
 9 both cases I was trying to make a distinction
 10 between someone's personal beliefs about their
 11 sexual orientation and whether other people know
 12 about those personal beliefs.
 13 So, for example, if I were gay and I
 14 have never told anyone, then that would not be
 15 acknowledged or open. If I were gay and I told
 16 some people, that would be open or acknowledged.
 17 I make a -- the only subtle distinction between
 18 open and acknowledged is that open would include
 19 someone else outing you or revealing. If I reveal
 20 your sexual orientation but you have not said a
 21 word about it, that might be open but not
 22 acknowledged, but that is a subtle distinction.
 23 And somewhere in the chapter I say that
 24 actually coming out is not a dichotomous variable
 25 but so-called coming out of the closet is a matter

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1 of degree. So, for example, there are some people
 2 who have revealed their sexual orientation only to
 3 their very closest friends and then there are
 4 other people who openly pronounce it to anyone
 5 they know. And so it is a matter of degree.
 6 Q We have not talked about it much, but
 7 in Exhibit 27 the article entitled, Sexual
 8 Orientation and Military Cohesion, A Critical
 9 Review of the Evidence, you state in that article
 10 that an appropriate operational definition of
 11 openness for at least for purposes of unit
 12 cohesion is the extent to which one discloses his
 13 or her sexual orientation to colleagues and/or
 14 supervisors.
 15 Do you recall making that statement?
 16 A That's right, yeah.
 17 Q Is that the same operational definition
 18 that you used in the report or did that involve --
 19 A It was certainly my thinking when I
 20 wrote the report, but I was trying to clarify that
 21 the issue here is not whether people back home
 22 know your sexual orientation but the issue here is
 23 whether the people you work with know.
 24 If people back home know your sexual
 25 orientation, that should have no bearing on your

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1 unit's cohesion. The issue that is critical here
 2 is if your colleagues in your unit and your
 3 commanding officer, if they know your sexual
 4 orientation, that is really the question that I am
 5 addressing.
 6 Q Again we talked about this earlier.
 7 But in the foreign military experience and the
 8 paramilitary experience, at least as it existed
 9 back in 1993, the experience was that even though
 10 people could disclose their sexual orientation, as
 11 a practical matter very few revealed their sexual
 12 orientation to colleagues and supervisors; right?
 13 A That's right.
 14 Q Given that, did you consider that to be
 15 an open disclosure of sexual orientation within
 16 those two contexts?
 17 A Well, people, in those contexts people
 18 had the right to disclose if they chose to, or if
 19 someone disclosed it for them, there was no threat
 20 to their career. But what apparently was
 21 happening in those institutions at least in those
 22 years is that people were voluntarily concealing
 23 their sexual orientation, I would conjecture,
 24 because they want their careers to advance and
 25 they thought maybe the careers would advance more

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1 A Moskos made this observation that one
 2 of the things that happens during combat is people
 3 try to strengthen these statements of loyalty.
 4 His suggestion is that it is sort of a tacit
 5 agreement, I will protect you, you protect me.
 6 And then his assertion is that these bonds sort of
 7 evaporate after combat.
 8 Q My question to you is are you
 9 questioning, though, that those bonds, in fact,
 10 existed while they were in combat even though they
 11 may dissipate once a service member leaves the
 12 military?
 13 A No, my chapter does question whether
 14 those particular bonds are what is essential to
 15 military effectiveness. I think those bonds may
 16 exist but I don't think they are actually what
 17 determines effectiveness of the unit.
 18 Q Ask you to turn to page 309.
 19 A Okay.
 20 Q And again just to frame the discussion,
 21 here again you are referencing the experience of
 22 foreign militaries and paramilitary organizations
 23 such as police and fire departments and noting
 24 that the prevalence of acknowledged homosexuals is
 25 relatively low; correct?

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1 A In 1993, yeah.
 2 Q Right. And let's start first with
 3 1993. In 1993 you conclude the experiences of
 4 these institutions suggest that acknowledged
 5 homosexuals are likely to be quite rare in the
 6 military at least in the foreseeable future. Do
 7 you see that? To be clear, that is 1993.
 8 A Yes, yes.
 9 Q Do you stand by that statement that you
 10 made in 1993?
 11 A As a statement of 1993, yes.
 12 Q And has your thought on that evolved
 13 since 1993?
 14 A I actually don't have updated
 15 statistics on that, so I don't know what the
 16 current rate of open homosexuality would be in
 17 foreign militaries or police and fire departments.
 18 Q Are you aware that the Palm study
 19 recently issued a study last Tuesday on the
 20 question of foreign militaries?
 21 A Yes, I saw an announcement of the
 22 study. I have not read the study.
 23 Q You have not?
 24 A Well, I read an -- there was a one
 25 paragraph abstract of the study, so I am aware of

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1 the conclusion of the study. I have not read the
 2 study.
 3 Q Okay. Are you aware that that study
 4 concluded that as a practical matter, in the
 5 foreign militaries that were studied in which gays
 6 and lesbians can reveal their sexual orientation
 7 that today very few, in fact, do so?
 8 A I have seen studies subsequent to 1993
 9 that came out of the Palm Center -- or it used to
 10 have a different name before it was called the
 11 Palm Center. So they had one report I think on
 12 Canada, one on Israel, and one on Great Britain.
 13 And I remember at least one of those, maybe
 14 several of those mentioning that they also were
 15 finding very few people coming out.
 16 Q I believe the studies you are
 17 referencing were authored by Aaron Belkin?
 18 A Uh-huh, I think that's right.
 19 Q Let me direct your attention to
 20 page 311 and footnote 19. And footnote 19 reads
 21 as follows. One might argue that a homosexual
 22 individual is more likely to come out in an
 23 environment where there is already an open
 24 homosexual individual. However, this possibility
 25 is constrained by the facts that, one, the

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1 prevalence of homosexuals is already low, and,
 2 two, the high frequency of turnover and transfers
 3 mean that homosexuals cannot count on locally
 4 favorable conditions to last.
 5 Do you see that?
 6 A Yes, I do.
 7 Q And in 1993 did you believe that that
 8 statement was accurate?
 9 A Yes.
 10 Q Has your view of that changed today?
 11 A No. I mean, I should say this was my
 12 reasoning. I did not have evidence on this point.
 13 But I thought that there would be greater risk of
 14 coming out if you thought you might be reassigned
 15 to a different unit. You come out in a locally
 16 supportive environment, you are suddenly
 17 reassigned to a unit where people are very hostile
 18 but you already revealed your sexual orientation.
 19 So I thought that would be one reason why people
 20 would conceal their sexual orientation.
 21 Q Today we have been discussing the
 22 privacy concern. Do you think that is a trivial
 23 concern in any way?
 24 A No, I think it is a sincere concern,
 25 that people who raise it are being sincere.

1 to clarify.
 2 MR. FREEBORNE: We have no further
 3 questions. Thank you, Professor.
 4 THE WITNESS: Sure. Long day.
 5 (Deposition concluded at 2:49 p.m.)
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 25

1 STATE OF CALIFORNIA)
 2 : ss)
 3 County of Alameda)
 4 I, the undersigned, a Certified
 5 Shorthand Reporter of the State of California, do
 6 hereby certify: That the foregoing proceedings
 7 were taken before me at the time and place herein
 8 set forth; that any witnesses in the foregoing
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 10 under oath; that a verbatim record of the
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 12 which was thereafter transcribed under my
 13 direction; further, that the foregoing is an
 14 accurate transcription thereof. I further certify
 15 that I am not a relative, employee, attorney or
 16 counsel of any party to this action or relative or
 17 employee of any such attorney or counsel and that
 18 I am not financially interested in the said action
 19 or the outcome thereof;
 20 IN WITNESS WHEREOF, I have this date
 21 subscribed my name.
 22 Dated: _____
 23
 24 EMI ALBRIGHT, CSR No. 13042
 25

1 CERTIFICATE OF DEPONENT
 2
 3 I hereby certify that I have read and examined the
 4 foregoing transcript, and the same is a true and
 5 accurate record of the testimony given by me.
 6 Any additions or corrections that I feel are
 7 necessary, I will attach on a separate sheet of
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 9
 10 _____
 11 Signature of Deponent
 12
 13 I hereby certify that the individual representing
 14 himself/herself to be the above-named individual,
 15 appeared before me this ____ day of _____,
 16 2010, and executed the above certificate in my
 17 presence.
 18
 19 _____
 20 NOTARY PUBLIC IN AND FOR
 21
 22 _____
 23 County Name
 24
 25 MY COMMISSION EXPIRES: