



Log Cabin Republicans v. United States Ruling FAQ

Why did Federal District Court Judge Virginia Phillips find “Don’t Ask, Don’t Tell” unconstitutional?

After a careful examination of the extensive evidence presented by Log Cabin Republicans at trial, Judge Phillips found that “Don’t Ask, Don’t Tell” violates servicemembers First Amendment right to free speech and Fifth Amendment right to due process.

How does “Don’t Ask, Don’t Tell” violate a servicemember’s first amendment freedoms?

While the military does have wide latitude to restrict servicemember speech in order to further its national defense mission, servicemembers remain American citizens protected by the Constitution. At trial, Log Cabin Republicans argued that the speech restrictions imposed by “Don’t Ask, Don’t Tell” are overbroad and unconstitutionally restrict speech based on its content. The court agreed.

Unlike time/place/manner restrictions on speech – i.e. restricting the use of loudspeakers in residential areas late at night – restrictions based on content typically face exacting constitutional scrutiny in order to prevent the government improperly driving certain ideas or viewpoints out of the marketplace. “Don’t Ask, Don’t Tell” restricts speech based on content because it bars a servicemember from saying the words “I am gay” while permitting heterosexual servicemembers to freely speak about being straight, having an opposite-sex spouse or significant other, etc. It is not a bar on discussing sexuality generally, but gay and lesbian orientation in particular.

However, in the context of the military, courts give great deference to restrictions on speech. As cited by Judge Phillips, “the military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.” Therefore regulations on speech in a military context will survive judicial scrutiny if they “restrict speech no more than is reasonably necessary to protect the substantial government interest.” In *Log Cabin Republicans v. United States*, the government’s interest in protecting military readiness and unit cohesion was accepted as a substantial government interest. At issue was the degree to which speech was restricted, and whether it actually furthered the government’s interest. The court found that too much speech was restricted, and that the state did not show that the interests of unit cohesion and military readiness were furthered at all – indeed, they were undermined by the policy.

The court found that “Don’t Ask, Don’t Tell” failed this minimal standard because the sweeping reach of the statute’s restrictions on speech is far broader than is reasonably necessary to protect the interest at stake. Various witnesses testified that, by preventing them from discussing their personal lives or comfortably socializing off duty with their colleagues, the speech restrictions imposed actually undermined unit cohesion by creating a certain “distance.” When a servicemember earns the nickname “Vapor” for how he seems to disappear when not on duty – a precaution taken in order to comply with “Don’t Ask, Don’t Tell” - it undermines the trust that is critical to America’s military strength. When a servicemember cannot even write to his or her same-sex partner in in a foreign language in a personal letter (the discovery of which resulted in a

trial witness facing discharge) it shows that the restrictions on speech imposed are vastly overbroad and do not accomplish the objective of supporting military readiness and unit cohesion, and therefore unconstitutional.

In addition to restricting speech, the court found that “Don’t Ask, Don’t Tell” infringes on the First Amendment rights of freedom of association and the right to petition the government for redress of grievances, as shown by the fact that Lt. Col. John Doe could neither openly become a member of Log Cabin Republicans under his own name, nor appear to testify at trial for fear of discharge.

How does “Don’t Ask, Don’t Tell” violate a servicemember’s right to due process?

The Fifth Amendment states that no person shall be deprived of life, liberty or property without due process of law. In the 2003 ruling *Lawrence v. Texas*, the United States Supreme Court held that among the liberty interests protected by the Constitution is the “autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct.” This ruling overturned state anti-sodomy laws, and established a right to private, adult consensual same-sex sexual activity.

“Don’t Ask, Don’t Tell” burdens this right by discharging servicemembers who engage in such conduct or who indicate a propensity to do so (by disclosing their orientation or by marrying a same-sex partner). Because this right is at stake, the government bears the burden of proof in challenges to “Don’t Ask, Don’t Tell.” In *Witt v. Dep’t of the Air Force*, the 9th Circuit Court of Appeals established the standard that the government must meet in order to enforce the policy. According to Witt, “when the government attempts to intrude upon the personal and private lives of homosexuals...the government must advance an important government interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest.”

As noted above, there is no disagreement that military readiness and unit cohesion are important government interests. However, the court found, based on ample testimony and documentary evidence presented by Log Cabin Republicans at trial, that rather than advancing that interest, the enforcement of “Don’t Ask, Don’t Tell” actually undermines military readiness and unit cohesions. Among the evidence presented by Log Cabin Republicans were several admissions by the defense, including statements by President Barack Obama, Secretary of Defense Robert Gates and Admiral Mike Mullen, chairman of the Joint Chiefs of Staff, against “Don’t Ask, Don’t Tell.” The judge found that:

- by impeding the efforts to recruit and retain an all-volunteer military force, the Act contributes to critical troop shortages and thus harms rather than furthers the Government's interest in military readiness;
- by causing the discharge of otherwise qualified servicemembers with critical skills such as Arabic, Chinese, Farsi, and Korean language fluency; military intelligence; counterterrorism; weapons development; and medical training, the Act harms rather than furthers the Government's interest in military readiness;
- by contributing to the necessity for the Armed Forces to permit enlistment through increased use of the "moral waiver" policy and lower educational and physical fitness standards, the Act harms rather than furthers the Government's interest in military readiness;
- Defendants' actions in delaying investigations regarding and enforcement of the Act until after a servicemember returns from combat deployment show that the Policy is not necessary to further the Government's interest in military readiness or unit cohesion;

- by causing the discharge of well-trained and competent servicemembers who are well-respected by their superiors and subordinates, the Act has harmed rather than furthered unit cohesion and morale;
- the Act is not necessary to protect the privacy of servicemembers because military housing quarters already provide sufficient protection for this interest.

Because the government failed to show that “Don’t Ask, Don’t Tell” significantly furthers the state’s interests, let alone is necessary to do so, the policy is therefore unconstitutional.

What about the judiciary branch’s traditional deference to the military? Don’t servicemembers sacrifice certain rights and privileges by being part of the military?

It is true that the military is a special circumstance deserving of significant judicial deference. However, this deference is expressed by holding the government to a lower burden of proof and by giving the state every opportunity to prove that a policy which infringes upon servicemembers’ rights is justified by military necessity. Over the last six years, the government was given every opportunity to show that “Don’t Ask, Don’t Tell” significantly furthered military readiness and unit cohesion; it failed to do so, indeed failed to present a single witness at trial or any evidence other than the seventeen year old legislative history. As Judge Phillips noted, judicial deference is at its highest in cases involving the military, however, “deference does not mean abdication.”

Now that the ruling is in, what next? What is the timeline for *Log Cabin Republicans v. United States*?

On September 16, 2010, Log Cabin Republicans filed for an injunction to suspend all discharges under “Don’t Ask, Don’t Tell.” The Department of Justice has until September 23, 2010 to respond.