

JUDGE PHILLIPS' DADT ORDER IS NOT THE VICTORY BEING CLAIMED

As David Dayen is reporting at FDL News, Judge Virginia Phillips of the Central District of California United States Federal Court has issued her injunctive order in the Log Cabin Republicans' (LCR) Don't Ask, Don't Tell (DADT) case, formally known as *Log Cabin Republicans v. United States of America and Robert M. Gates*:

(1) DECLARES that the act known as "Don't Ask, Don't Tell" infringes the fundamental rights of United States servicemembers and prospective servicemembers and violates (a) the substantive due process rights guaranteed under the Fifth Amendment to the United States Constitution, and (b) the rights to freedom of speech and to petition the Government for redress of grievances guaranteed by the First Amendment to the United States Constitution.

(2) PERMANENTLY ENJOINS Defendants United States of America and the Secretary of Defense, their agents, servants, officers, employees, and attorneys, and all persons acting in participation or concert with them or under their direction or command, from enforcing or applying the "Don't Ask, Don't Tell" Act and implementing regulations, against any person under their jurisdiction or command;

(3) ORDERS Defendants United States of America and the Secretary of Defense immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the "Don't Ask, Don't Tell" Act, or pursuant to 10

U.S.C. § 654 or its implementing regulations, on or prior to the date of this Judgment.

(4) GRANTS Plaintiff Log Cabin Republicans' request to apply for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

(5) GRANTS Plaintiff Log Cabin Republicans' request to file a motion for costs of suit, to the extent allowed by law.

Judge Phillips' order is being hailed far and wide as the greatest thing since sliced bread – at least on LGBT rights as they relate to DADT. I am quite decidedly not so sure about that.

I simply do not see how this judge, Virginia Phillips, has either the authority or jurisdiction to enter the sweeping injunctive mandates she has done in sections 2 and 3. The scope of those sections appear well beyond her actual authority and, quite frankly, have the patina of such an overreach that they *should* be appealed based upon protection of Executive Branch power and authority concerns. It is hard to see how the federal government in DC can allow a single remote District Court judge to have that type of reach over the conduct of the entire United States military across the globe.

There is little question but that the CACD had the jurisdiction to hear the case itself and to grant relief to the specific individuals within the established umbrella of the designated plaintiff "Log Cabin Republicans" within the territorial jurisdiction of the CACD. Further, there is no question Phillips has the authority to rule the DADT policy unconstitutional on a facial challenge to its constitutionality, which the government strongly argued this case was (they probably regret that now I suppose).

But the complaint in this case was brought as to a group – LCR – that claimed locus in, and harm

occurring within, the CACD. And, in fact, there was indeed much pretrial litigation of standing and scope and, before the case was allowed to proceed, the LCRs had to put up specific individuals claiming identifiable and quantifiable harm. Plaintiff LCRs eventually did that on the back of one originally identified and specified individual, to which a second specified and joined individual was later included for a grand total of two individuals the group "LCR" was allowed to proceed on as the nominal representative plaintiff.

There is, however, a distinction between having the authority to declare the DADT policy unconstitutional on its face, which Judge Phillips has done, and the further power to immediately force the entire US military worldwide to stop enforcing the policy, which Judge Phillips has now also done.

Having every district court judge in the country with that kind of injunctive authority over military function is likely unacceptable to any administration, and will be for the Obama Administration. It has only grown to this absurd point through the fantastical overreaching of the LCRs and, now, Judge Phillips. They have gone a bridge too far.

And that is the problem here, by wildly overreaching, Judge Phillips has given the White House/Executive Branch legitimate and compelling grounds to appeal that are separate from the critical merits issue of the constitutionality and propriety of DADT, which is a discriminatory and loathsome policy and should be terminated immediately.

In this regard, a grave disservice has been done by Phillips to the cause of elimination of DADT. I think the DOJ has to appeal and seek stay, and will unfortunately do just that. Phillips root determination of unconstitutionality combined with a compelling injunctive order limited to her jurisdiction would have been a very powerful stick in the eye of a recalcitrant White House and would have forced them to act, or not act,

on the merits and expose themselves as either true to their word on elimination of DADT or craven impostors. But now there are powerful side issues injected, and even I have issue with the posture the case is now in. And I am livid that it gives the duplicitous on DADT Obama White House something to hide behind when they deserve to be exposed.