OBAMA DOJ MOVES 9TH CIRCUIT TO STAY DADT BAN

Last night (Tuesday October 19), Central District of California Judge Virginia Phillips entered her order denying the Obama DOJ motion for stay of her surprisingly broad worldwide injunction against enforcement by US Military of the DADT policy. Here is a report from Josh Gerstein at Politico on Phillips' decision.

As expected, the DOJ has appealed Phillips' denial of stay to the 9th Circuit, and did so already this morning. Here is the full main brief submitted in support of the motion for stay.

Having read the brief, I will say that it is much better constructed than previous filings by the DOJ regarding the injunction, maybe they are starting to take the matter seriously. By the same token, it is also striking that the filing is much more forceful in its assertion that the policy of President Obama and his Administration is for elimination and repeal of DADT. That message is conveyed by language such as this from footnote one in the brief:

> The Administration does not support § 654 as a matter of policy and strongly believes that Congress should repeal it. The Department of Justice in this case has followed its longstanding practice of defending the constitutionality of federal statutes as long as reasonable arguments can be made in support of their constitutionality.

That is positive. What is very troubling, however, is that the Administration, by and through the DOJ never – never – indicates that it considers DADT to be unconstitutional on its face. Every objection by team Obama is in favor simply of study and legislative repeal; and, in

fact, they doggedly protect the *constitutionality* of DADT. There is a HUGE difference between the two concepts of saying it is simply something that should be fixed by Congress (increasingly unlikely, it should be added, in light of the massive gains conservative Republicans are poised to make) and saying the Administration fully believes the policy unconstitutional and invidiously discriminatory (the position Obama blatantly refuses to make).

It should also be noted that a refusal to acknowledge the fundamental constitutionally discriminatory nature of DADT is also entirely consistent with the recent history of Obama Administration conduct and statements on the issue. Whether it be Obama himself, official spokesman Robert Gibbs or Valerie Jarrett, every time the direct question on constitutionality of DADT is raised, it is deflected with a flimsy response framed in terms of Congressional repeal. At this point, you have to wonder if Barack Obama and his Administration even consider the blatant discrimination of DADT to be of a Constitutional level at all; the evidence certainly is lacking of any such commitment.

Congress *should* repeal DADT as Obama suggests, but the basis and harm is much deeper and more profound than simply that. The constitutionality of invidious discrimination based on sexual orientation should be argued with the government taking the lead on saying it is NOT constitutional, has no place in our society or government and that the court should so declare any such conduct invidiously discriminatory against a protected class under equal protection, due process and first amendment grounds. The Obama Administration and DOJ should should have the courage and principle to come out and say just that.

And in the meantime, Obama should help the effort along, and set a positive example, by issuing an executive order under his crystal

clear stop loss authority pursuant to 10 USC 12305 stopping all discharges from the United States Military under the pernicious DADT policy. The President has that power and should have the courage to use it.

Obama is doing none of the above and, instead, is paying cheap political lip service only by hiding and trying to frame everything in terms of Congressional repeal. When asked about the court rulings by Phillips in the LCR DADT case, by Tauro in the DOMA case, or by Walker in Perry, the response is always in terms of legislation repealing things in place. legislation affirmatively protecting something in the future, studies to see what is appropriate or some other mealy mouthed baloney.

On the other hand, not a lick of the above described baloney matters if the discrimination at issue is flat out unconstitutional. If it is unconstitutional, and DADT absolutely is, then studies are irrelevant. What generals and servicemembers wives think and respond to in answers to ginned up surveys is irrelevant. Legislation by Congress is irrelevant. Public opinion, for that matter, is irrelevant. None of that matters because it is a *fundamental right* for such citizens to be treated equally under the United States Constitution and not be discriminated against. End of story. Seriously, it either is or it is not.

However, the filing by the Obama DOJ speaks for itself as to where we stand today. (And here is a just posted article by Gerstein on the stay attempt in the 9th). As an attorney, I am inclined to agree with their position that the injunctive order by Judge Phillips is of questionable validity in its extension worldwide against the US military. As the government's brief argues, the standing granted in the Log Cabin Republican case was limited and restricted; it is hard to see how it serves as a proper foundation for the extraordinarily broad injunction she issued.

That said, Judge Phillips' decision on the root

unconstitutionality of DADT is spot on valid and correct and, as cited above, there is nothing to stop the government from voluntarily complying with the spirit of that finding or, indeed, President Obama from mandating evisceration of DADT pursuant to his stop loss authority under 10 USC 12305. What is needed is a profile in courage instead of another example of rank political triangulation.