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BLUEPRINTS FOR SOUND PUBLIC POLICY

EXECUTIVE DISCRETION TO DECLINE TO DEFEND FEDERAL LAW AGAINST CONSTITUTIONAL CHALLENGE

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Conclusion

The Department of Justice has discretion to decline appeal of Judge Phillips's September 9, 2010 Memorandum Opinion in *Log Cabin Republicans v. United States* holding "don't ask, don't tell" unconstitutional. No mandatory duty or obligation requires the government to appeal.

Introduction

As a general or default rule, the Department of Justice (DOJ) assumes an obligation to defend congressional enactments against constitutional challenge, even when the executive branch does not agree with the law as a policy matter. The DOJ Office of Legal Counsel summarized its traditional practice in this way:

> The Department of Justice has a duty to defend the constitutionality of an Act of Congress whenever a reasonable argument can be made in its support, even if the Attorney General concludes that the argument may ultimately be unsuccessful in the courts. *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 Op. Off. Legal Counsel 25 (1981).

The general expectation that DOJ will defend federal laws from constitutional challenge is accepted and uncontroversial. There are good reasons for this practice. Once Congress passes a bill, and the president signs that bill into law, it normally makes sense —as a matter of comity, respect, and civility—for the elected branches of government to speak with one voice in defense of its constitutionality.

However, it would be inaccurate to characterize this common practice as a mandatory requirement that DOJ must always defend federal laws in all cases, without exception. There are well-recognized, standard exceptions that give the executive branch discretion in deciding whether or not to defend a law in some circumstances, and they would apply in deciding whether to appeal a court ruling finding that "don't ask, don't tell" is unconstitutional. The most authoritative and most frequently cited work of legal scholarship on the duty to defend federal law is *Defending Congress*, 79 N.C. L. Rev. 1073 (2001), an article written by former Solicitor General Seth Waxman.

Exceptions to the Usual Duty to Defend

In *Defending Congress*, Mr. Waxman describes two situations in which the duty to defend has not been absolute. First, there is executive discretion to decline to defend federal law when the president believes the law intrudes upon his express constitutional authority, such as the commander-in-chief authority. In those instances, DOJ may decline to defend a law that reaches too broadly and inappropriately restricts, for example, the president's ability to direct military forces.

The second circumstance in which DOJ has discretion to choose not to defend a federal law is the most important for purposes of this memo, although the first is complementary and supports the conclusion that discretion exists. Under the second exception, the executive branch has discretion to choose not to defend a federal law when that defense would involve asking the Supreme Court to disregard or alter one of its constitutional rulings. "Most commonly," Mr. Waxman explained, "cases falling under this exception involve statutes whose constitutionality has been undermined by Supreme Court decisions rendered *after* the law's enactment."

Executive Discretion to Decline Appeal in the *Log Cabin Republicans* Case

Under the second exception, the constitutionality of "don't ask, don't tell" has been seriously undermined by the Supreme Court's ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that the Constitution protects the liberty of all persons, straight and gay, to enter into private, intimate relationships without interference by the government, unless there is sufficient justification for government regulation. *Lawrence* was the basis for Judge Phillips's ruling in *Log Cabin Republicans*. She held that, after *Lawrence*, the government could no longer rest on unsupported congressional and military opinion alone. Before the government could impose sweeping restrictions on personal intimacy and autonomy, it had to offer evidence that "don't ask, don't tell" significantly furthered the government's interest in military readiness, and that the policy was necessary to further that interest. However, in *Log Cabin Republicans* the government was unable to produce any evidence beyond the opinions offered in support of the law back in 1993. In contrast, the plaintiffs' evidence established that "don't ask, don't tell" was actually causing the military significant harm today.

The usual reasons for DOJ's customary practice of defending federal law against constitutional challenge fall away when an intervening decision of the Supreme Court, issued after the law was passed, calls the law's constitutionality into serious question. In this situation, DOJ has discretion to make a constitutional judgment, and it can do so within the traditional structure of how these decisions to defend, or not to defend, are typically made. Now that the government has had full opportunity in *Log Cabin*

Republicans to introduce evidence in justification of "don't ask, don't tell"—and has had none to offer beyond the law's legislative history—DOJ is in a position to make a discretionary constitutional judgment that continued appeal is unwarranted.

While the president has a constitutional obligation to "take care that the laws be faithfully executed" (Art. II, Sec. 3), he also takes an oath to "preserve, protect and defend the Constitution of the United States" (Art. II, Sec. 1). Both the president and Congress have an independent duty to ensure their actions conform to the Constitution.

Although the second exception—an intervening Supreme Court decision that upsets the constitutional assumptions under which the law was enacted—is sufficient to justify a DOJ decision to not appeal in *Log Cabin Republicans*, the first exception supports the same use of discretion. The president has discretionary authority to conclude that the law intrudes too deeply on commander-in-chief authority because it can remove valuable service members from the chain of command, normally without warning and without needed replacements.

Declining Appeal Would Be Consistent With Other Executive Action Related to "Don't Ask, Don't Tell"

1. Declining to appeal would be consistent with the president's authority under 10 U.S.C. § 12305 to issue an executive order suspending "don't ask, don't tell" during periods of national emergency. If the president has statutory authority to suspend the law in its entirety, he has discretionary authority to direct DOJ to not appeal a ruling that the law is unconstitutional.

2. Declining to appeal would be consistent with DOJ's litigation decisions in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). In *Witt*, DOJ declined to seek Supreme Court review so the government could first present its strongest case at the trial court level. The government has now had that opportunity in *Log Cabin Republicans*.

3. Declining to appeal would be consistent with the president's belief that "don't ask, don't tell" harms national security. On July 29, 2009, President Obama stated: "As I said before—I'll say it again—I believe 'don't ask, don't tell' doesn't contribute to our national security. In fact, I believe preventing patriotic Americans from serving their country weakens our national security."

4. Declining to appeal would be consistent with the mission of the current Department of Defense study group on "don't ask, don't tell," which is to determine how best to implement an end to the policy. An appeal would extend legal proceedings beyond the Pentagon's assigned reporting date of December 1, 2010.