

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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| LOG CABIN REPUBLICANS, | |) | |
| Appellee/Cross-Appellant, | |) | |
| | |) | |
| v. | |) | Nos. 10-56634, |
| | |) | 10-56813 |
| UNITED STATES OF AMERICA and | |) | |
| ROBERT M. GATES, Secretary of Defense, | |) | |
| | |) | |
| Defendants-Appellants/ | |) | |
| Cross-Appellees. | |) | |
| <hr/> | |) | |

MOTION TO HOLD APPEALS IN ABEYANCE

Defendants-Appellants/Cross-Appellees the United States *et al.*
hereby move to suspend the briefing schedule and to hold these appeals
in abeyance in light of the enactment of the Don't Ask, Don't Tell
Repeal Act of 2010, Pub. L. No. 111-321 (Repeal Act) (Attachment 1).

1. This case is a facial challenge to the constitutionality of 10
U.S.C. § 654, the statute entitled "Policy concerning homosexuality in
the armed forces." Section 2(f) of the Repeal Act provides that, upon
the effective date established by Section 2(b), 10 U.S.C. § 654 is
stricken from the Code. The Section (b) effective date provision
indicates that the repeal "shall take effect 60 days after the date" on

which the President transmits to Congress a certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that a number of requirements have been met. In light of this newly enacted legislation, suspension of the briefing schedule in this case and an order holding the appeals in abeyance is appropriate pending the certification process and effective date of the statute. If the Court grants this relief, the government will advise the Court within 90 days as to the status of the certification process set forth in the Repeal Act.

2. Plaintiff Log Cabin Republicans brought this suit in 2004 claiming that § 654 and its implementing regulations are facially invalid because they violate the First Amendment, as well as the rights to substantive due process and equal protection.

3. Following a trial, the district court held § 654 unconstitutional on its face as a violation of due process and the First Amendment. The court then entered a permanent worldwide injunction barring the United States and the Secretary of Defense, as well as their agents, servants, officers, employees, attorneys, and all persons acting in participation or concert with them or under their direction or command,

“from enforcing or applying” § 654 “and implementing regulations, against any person under their jurisdiction or command.” Judgment and Permanent Injunction ¶ 2 (Doc. Ent. 252, Oct. 12, 2010). The court also ordered the government “immediately to suspend and discontinue any investigation, or discharge, separation, or other proceeding, that may have been commenced under the” statute and its implementing regulations. *Id.* at ¶ 3.

4. Following the district court’s decision, the Secretary ordered that “to further ensure uniformity and care in the enforcement” of § 654, “no military member shall be separated pursuant to 10 U.S.C. § 654 without the personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense.” Memo. from Secretary of Defense (Oct. 21, 2010) (Attachment 2). The government also sought a stay of the district court injunction and filed a notice of appeal. On October 20, 2010, this Court issued a temporary stay of the injunction, while it gave

full consideration to the government's stay motion and Log Cabin's response.

5. On November 1, 2010, this Court (O'Scannlain and Trott, JJ.; W. Fletcher, J., dissenting in part) granted the government's motion for a stay pending appeal. In doing so, the Court noted, *inter alia*, the government's representation that giving the district court's injunction "immediate worldwide effect" would "seriously disrupt ongoing and determined efforts by the Administration to devise an orderly change of policy." Stay Order 2. The Court further noted the government's position that "successfully achieving this goal will require . . . the preparation of orderly policies and regulations to make the transition" and that "a precipitous implementation of the district court's ruling will result in 'immediate harm' and 'irreparable injury' to the military." *Id.* In addition, the Court relied upon the government's determination that "a successful and orderly change . . . will not only require new policies, but proper training and the guidance of those affected by the change," and the Court found persuasive the government's position that "[t]he district court's injunction does not permit sufficient time for such

appropriate training to occur, especially for commanders and servicemen serving in active combat.” *Id.* at 2-3. The Court ultimately concluded that “the public interest in ensuring orderly change of this magnitude in the military . . . strongly militates in favor of a stay.” *Id.* at 6.

6. On November 12, 2010, the Supreme Court denied Log Cabin’s application to vacate the stay pending appeal, with no recorded dissent. 2010 WL 4539545 (Justice Kagan not participating).

7. The parties then jointly moved in this Court to establish an expedited briefing schedule and argument. This Court partially granted that motion on December 1, 2010, in an order making the government’s opening brief due January 24, 2011, Log Cabin’s answering brief due February 22, and the government’s reply brief due March 8.

8. As noted above, on December 22, 2010, the President signed into law the Don’t Ask, Don’t Tell Repeal Act of 2010. Echoing the concerns that this Court expressed in staying the appeal, the Act establishes an orderly process for repeal that is contingent on a

certification by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff that three conditions have been met: First, that they have each “considered the recommendations contained in the report [of the Department of Defense’s Comprehensive Review Working Group¹] and the report’s proposed plan of action”; second, “[t]hat the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the” Repeal Act; and finally, “[t]hat the implementation of [these] necessary policies and regulations . . . is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.” Repeal Act § 2(b).

Repeal of § 654 will become effective 60 days after the date on which the certification process set forth in Section 2(b) of the Repeal Act is complete. Until such time, the Repeal Act expressly provides that § 654 “shall remain in effect.” Repeal Act § 2(c).

¹ Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell” (Nov. 30, 2010), available at:

[www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130\(secure-hires\).pdf](http://www.defense.gov/home/features/2010/0610_gatesdadt/DADTReport_FINAL_20101130(secure-hires).pdf).

Upon passage of the Repeal Act, the Secretary of Defense pledged that “[t]he Department will immediately proceed with the planning necessary to carry out this change carefully and methodically, but purposefully.” Memo. from Secretary of Defense (Dec. 22, 2010) (Attachment 3). The Secretary stated that he and the Chairman of the Joint Chiefs of Staff will “approach this process deliberately and will make such certification only after careful consultation with the military service chiefs and our combatant commanders, and when [they are] satisfied that the conditions for certification set out in the statute have been met.” *Id.* The Secretary also “endorse[d] the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation.” *Id.*

9. In granting a stay pending appeal, this Court recognized the necessity of an orderly process in the Executive and Legislative Branches regarding any repeal of § 654. Since that time, that process has been proceeding in a timely manner in both Branches. This Court should now suspend the briefing schedule and hold the case in abeyance to allow that process to continue to completion.

10. The enactment of the Repeal Act, while it has left § 654 in place until the effective date of the new law, has resulted in a significant change of law, effectively legislating the orderly process that this Court's stay of the injunction allows to take place. Judicial economy, and respect for determination by the political branches that the orderly process mandated by the Repeal Act is necessary and appropriate to ensure that military effectiveness is preserved are compelling reasons for holding the briefing in abeyance while the orderly process is allowed to proceed to completion. Indeed, if the President, Secretary of Defense, and Chairman of the Joint Chiefs of Staff make the certification contemplated by the Repeal Act, the challenge to § 654 will be moot, and the completion of the review process mandated by the Repeal Act may make it unnecessary to ever consider the impact of the enactment of the Repeal Act on the basis for the decision below.

11. The government is prepared to advise the Court within 90 days as to the status of the certification process.

12. Counsel for the government contacted counsel for Log Cabin Republicans, Dan Woods, to advise him of this motion. Mr. Woods stated that Log Cabin Republicans would oppose this motion.

For the foregoing reasons, this Court should order further proceedings in these appeals held in abeyance.

Respectfully submitted,

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DECEMBER 2010

--H.R.2965--

H.R.2965

One Hundred Eleventh Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Tuesday,
the fifth day of January, two thousand and ten

An Act

To amend the Small Business Act with respect to the Small Business Innovation Research Program and the Small Business Technology Transfer Program, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Don't Ask, Don't Tell Repeal Act of 2010'.

SEC. 2. DEPARTMENT OF DEFENSE POLICY CONCERNING HOMOSEXUALITY IN THE ARMED FORCES.

(a) Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654-

(1) IN GENERAL- On March 2, 2010, the Secretary of Defense issued a memorandum directing the Comprehensive Review on the Implementation of a Repeal of 10 U.S.C. 654 (section 654 of title 10, United States Code).

(2) OBJECTIVES AND SCOPE OF REVIEW- The Terms of Reference accompanying the Secretary's memorandum established the following objectives and scope of the ordered review:

(A) Determine any impacts to military readiness, military effectiveness and unit cohesion, recruiting/retention, and family readiness that may result from repeal of the law and recommend any actions that should be taken in light of such impacts.

ATTACHMENT 1

(B) Determine leadership, guidance, and training on standards of conduct and new policies.

(C) Determine appropriate changes to existing policies and regulations, including but not limited to issues regarding personnel management, leadership and training, facilities, investigations, and benefits.

(D) Recommend appropriate changes (if any) to the Uniform Code of Military Justice.

(E) Monitor and evaluate existing legislative proposals to repeal 10 U.S.C. 654 and proposals that may be introduced in the Congress during the period of the review.

(F) Assure appropriate ways to monitor the workforce climate and military effectiveness that support successful follow-through on implementation.

(G) Evaluate the issues raised in ongoing litigation involving 10 U.S.C. 654.

(b) Effective Date- The amendments made by subsection (f) shall take effect 60 days after the date on which the last of the following occurs:

(1) The Secretary of Defense has received the report required by the memorandum of the Secretary referred to in subsection (a).

(2) The President transmits to the congressional defense committees a written certification, signed by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff, stating each of the following:

(A) That the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have considered the recommendations contained in the report and the report's proposed plan of action.

(B) That the Department of Defense has prepared the necessary policies and regulations to exercise the discretion provided by the amendments made by subsection (f).

(C) That the implementation of necessary policies and regulations pursuant to the discretion provided by the amendments made by subsection (f) is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

(c) No Immediate Effect on Current Policy- Section 654 of title 10, United States Code, shall remain in effect until such time that all of the requirements

and certifications required by subsection (b) are met. If these requirements and certifications are not met, section 654 of title 10, United States Code, shall remain in effect.

(d) Benefits- Nothing in this section, or the amendments made by this section, shall be construed to require the furnishing of benefits in violation of section 7 of title 1, United States Code (relating to the definitions of 'marriage' and 'spouse' and referred to as the 'Defense of Marriage Act').

(e) No Private Cause of Action- Nothing in this section, or the amendments made by this section, shall be construed to create a private cause of action.

(f) Treatment of 1993 Policy-

(1) TITLE 10- Upon the effective date established by subsection (b), chapter 37 of title 10, United States Code, is amended--

(A) by striking section 654; and

(B) in the table of sections at the beginning of such chapter, by striking the item relating to section 654.

(2) CONFORMING AMENDMENT- Upon the effective date established by subsection (b), section 571 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 654 note) is amended by striking subsections (b), (c), and (d).

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END

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SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

OCT 21 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
UNDER SECRETARY OF DEFENSE FOR PERSONNEL
AND READINESS
GENERAL COUNSEL OF THE DEPARTMENT OF
DEFENSE

SUBJECT: Title 10, U.S.C., § 654

In light of the legal uncertainty that currently exists surrounding the Don't Ask, Don't Tell law and policy, including last week's injunction issued by the District Court in *Log Cabin Republicans v. United States*, Case No. CV 04-84425-VAP (C.D. Cal.), and the temporary stay of that injunction issued yesterday by the Court of Appeals, and in order to further ensure uniformity and care in the enforcement of the Don't Ask, Don't Tell law and policy during this period, effective immediately and until further notice, no military member shall be separated pursuant to 10 U.S.C. § 654 without the personal approval of the Secretary of the Military Department concerned, in coordination with the Under Secretary of Defense for Personnel and Readiness and the General Counsel of the Department of Defense. These functions may not be delegated.

A handwritten signature in black ink, appearing to read "Robert M. Gates".

cc:
Chairman of the Joint Chiefs of Staff
Assistant Secretary of Defense for Public Affairs



ATTACHMENT 2

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**THE SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000**

DEC 22 2010

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS

SUBJECT: Don't Ask, Don't Tell Repeal Legislation

The President has signed into law the Don't Ask, Don't Tell Repeal Act of 2010, which allows for repeal of 10 U.S.C. § 654, the statute establishing the Don't Ask, Don't Tell policy. The legislation provides that repeal will take effect 60 days after the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff certify that the Department is prepared to implement repeal in a manner consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and retention of the Armed Forces.

It is therefore important that Service members understand that the implementation and certification process will take an additional period of time. Until 60 days have passed after certification, 10 U.S.C. § 654, and its related implementing regulations remain in force and effect. In order to prevent any confusion, I want to be perfectly clear: at this time, there are no new changes to any existing Department or Service policies. It remains the policy of the Department of Defense not to ask Service members or applicants about their sexual orientation, to treat all members with dignity and respect, and to ensure maintenance of good order and discipline. Service members who alter their personal conduct during this period may face adverse consequences.

The Department will immediately proceed with the planning necessary to carry out this change carefully and methodically, but purposefully. I endorse the recommendations of the Comprehensive Review Working Group, which will provide the road map for a successful implementation. This implementation effort will be led by Dr. Clifford Stanley, Under Secretary of Defense for Personnel and Readiness.

As the Chairman of the Joint Chiefs of Staff and I have made clear, we will approach this process deliberately and will make such certification only after careful consultation with the military service chiefs and our combatant commanders, and when we each are satisfied that the conditions for certification set out in the statute have been met.

A handwritten signature in black ink, appearing to read "Robert M. Gates".

cc:
Chairman of the Joint Chiefs of Staff
Under Secretary of Defense for Personnel and Readiness
General Counsel of the Department of Defense
Assistant Secretary of Defense for Legislative Affairs
Assistant Secretary of Defense for Public Affairs



OSD 14731-10



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ATTACHMENT 3**

CERTIFICATE OF SERVICE

I certify that on December 29, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I further certify that the following counsel for appellee is a registered CM/ECF user and that service on him and all other counsel registered on the CM/ECF system will be accomplished by the appellate CM/ECF system:

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/s/ Anthony J. Steinmeyer
ANTHONY J. STEINMEYER
Counsel for the Appellants