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Don't Ask, I'll Just Tell You What the Law Should Be: *Log Cabin Republicans v. United States*

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In *Log Cabin Republicans v. United States*, the Obama Administration sought to win a policy victory by losing a case. By failing to adequately defend the "Don't Ask, Don't Tell" (DADT) statute—a bipartisan act of Congress that provides that members of the military are subject to separation for engaging in a homosexual act, stating that he or she is a homosexual, or marrying a person of the same sex—President Obama is able to undermine or do away with a statute that he opposes. He can do so while shifting any blame for the change in policy to the courts. And a Clinton appointee, Judge Virginia Phillips, proved more than willing to accommodate the Administration, issuing an activist opinion that reads more like a press release than a legal judgment.

A Thrown Case. One would have to go back to the 1919 World Series to find a Chicagoan throwing a game so flagrantly. The court noted that the Obama Justice Department "called no witnesses, put on no affirmative case, and only entered into evidence the legislative history of the Act."[1] Indeed, the Justice Department failed to present witnesses from the Department of Defense who could have testified about the policy behind DADT, its importance to military readiness and unit cohesion, and the deleterious effects of DADT being eliminated.

If the Obama Administration's inaction was not bad enough, when the Administration did speak, it *undermined* the case for DADT. The court quoted the President's unsupported and unsubstantiated views at length in support of the position that DADT should be struck down because it supposedly "doesn't contribute to our national security."[2] Of course, no national security experts who could testify on this issue were presented to the court by the Justice Department.

The Justice Department's behavior in this case violates basic rules of professional conduct that require lawyers to do their utmost on behalf of a client, even if they disagree with a client's views on a matter.

Regrettably, this is not the first time this has occurred. As Ed Whelan of the Ethics and Public Policy Center points out, "The court's ruling is the latest step in the Obama administration's sabotage of the Don't Ask, Don't Tell law."[3]

This was also evidenced in the failure of former Solicitor General (and now Supreme Court Justice) Elena Kagan to appeal another Ninth Circuit Court of Appeals decision[4] that violated Supreme Court precedent by applying the wrong (higher) standard of scrutiny to the DADT policy. Despite the fact that Kagan admitted that a lower standard of review applied, she did not seek Supreme Court review of the *Witt* decision "in violation of her commitment to vigorously defend" DADT.[5]

An Activist Case. With the Administration falling on its sword, all that remained was finding a

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judge willing to hand it a policy victory through legal defeat. Judicial activism occurs when judges write their own subjective preferences into the law rather than apply the law impartially according to its original meaning. Typically, they usurp the powers of the legislature to implement their own views of social policy, overriding the will of the public expressed through their elected representatives. The dubious and ill-considered opinion of Judge Virginia Phillips fits the very definition of an activist judge. Her opinion ignores the law and the bipartisan congressional finding that "military life is fundamentally different from civilian life" in order to implement the policy preferences of the President—and presumably the judge.

The issue before the court was not the wisdom or morality of the DADT policy—but one would never know that from reading Judge Phillips's opinion, which reads like what it is: a consideration of the policy alternatives and outcomes rather than an assessment of the law. The fact is that the DADT policy was mandated by Congress through legislation signed into law by President Bill Clinton. The core issue before the court was the authority and power of Congress and the President to implement such a policy, a policy in an area in which the legislative and executive branches are given their greatest power by the Constitution: the duty and responsibility to protect and defend the United States by organizing, arming, disciplining, and commanding all of this nation's military. This is also the area in which the judicial branch has not only the least amount of experience and knowledge but the minimal authority and power under the Constitution to affect.

Judge Phillips makes many serious errors in her opinion. Among the worst, she wrongly suggests that the Supreme Court has abandoned the rule that a party like the Log Cabin Republicans, who are challenging the DADT rule—an attempt to have a law struck down not just as applied to a particular person but to the nation as a whole—must show that "no set of circumstances exist under which the Act would be valid" in order to succeed.[6] But the Supreme Court made it clear just this year that it has not abandoned that rule and therefore Judge Phillips was not justified in rejecting cases that adhered to the rule in upholding DADT.[7]

The *Log Cabin Republicans* decision is simply another example of a rogue, activist, and liberal federal judge ignoring the law and prior precedent and of a Justice Department that has no problem only putting up a token defense for political reasons in order to throw the case in a fashion that has not been seen since the 1919 Chicago White Sox baseball scandal.

An Unconstitutional End Run. This case demonstrates once again how important the federal judicial nomination process has become, as well as how willing the Obama Administration seems to be to abandon its duty and responsibility to vigorously defend federal laws that it dislikes. Whether or not one agrees with the DADT law, it was well within the authority of Congress to implement such a policy under its authority to regulate America's military forces. Trying to change it through the courts is simply an unconstitutional end run around the legislative process.

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1. *Log Cabin Republicans v. United States*, CV 04-08425 (C.D. Cal. Sept. 9, 2010), Slip Op. at 84.
2. *Log Cabin Republicans*, Slip Op. at 64–65.
3. Ed Whelan, "Yesterday's Anti-DADT Ruling," National Review Online, September 10, 2010, at *http://www.nationalreview.com/bench-memos/246208/yesterday-s-anti-dadt-ruling-ed-whelan* (September 10, 2010).
4. *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008).
5. Whelan, "Yesterday's Anti-DADT Ruling."
6. *United States v. Salerno*, 481 U.S. 739 (1987).
7. *United States v. Stevens,* ___ U.S. ___, 130 S.Ct. 1577, 1587 (2010).