

FILED

UNITED STATES COURT OF APPEALS

JUL 22 2011

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

LOG CABIN REPUBLICANS, a non-
profit corporation,

Plaintiff - Appellee/
Cross-Appellant,

v.

UNITED STATES OF AMERICA; LEON
E. PANETTA, Secretary of Defense, in his
official capacity,

Defendants - Appellants/
Cross-Appellees.

Nos. 10-56634, 10-56813

D.C. No. 2:04-cv-08425-VAP
Central District of California,
Los Angeles

ORDER

Before: KOZINSKI, Chief Judge, WARDLAW and PAEZ, Circuit Judges.

The government's emergency motion for reconsideration of this court's July 6, 2011, order lifting the stay entered November 1, 2010, is granted. *See* 9th Cir. R. 27-10(a)(3). This court's July 6, 2011, order is withdrawn except with respect to (a) the substitution of Leon E. Panetta, Secretary of Defense, as an appellant/cross-appellee and (b) the expedited calendaring of oral argument.

The motion of Log Cabin Republicans to lift this court's November 1, 2010, stay of the district court's judgment pending appeal is granted in part. *See Hilton*

v. Braunskill, 481 U.S. 770, 776 (1987) (stating standard); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (same). The circumstances have changed since November 1, 2010, and the standard for issuance of a stay is demanding.

In its briefs, the government does not contend that 10 U.S.C. § 654 is constitutional. In addition, in the context of the Defense of Marriage Act, 1 U.S.C. § 7, the United States has recently taken the position that classifications based on sexual orientation should be subjected to heightened scrutiny. *See Golinski v. U.S. Office of Pers. Mgmt.*, No. C 3:10-00257-JSW (N.D. Cal.) (Doc. 145, July 1, 2011) (“gay and lesbian individuals have suffered a long and significant history of purposeful discrimination”); Letter from Attorney General to Speaker of House of Representatives (Feb. 23, 2011) (“there is, regrettably, a significant history of purposeful discrimination against gay and lesbian people, by governmental as well as private entities”).

The government states that the process of repealing Section 654 pursuant to the Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-322, 124 Stat. 3516 (Dec. 22, 2010), is almost complete. The President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff have now certified that the implementation of repeal of Don’t Ask, Don’t Tell is consistent with the standards of military readiness, military effectiveness, unit cohesion, and recruiting and

retention of the armed forces. In addition, the government represents that only one servicemember has been discharged under Section 654 since the passage of the Repeal Act.

After consideration of the government's likelihood of success on the merits, the likelihood of irreparable harm, the balance of hardships, and the public interest, we conclude that the stay entered November 1, 2010, shall remain in place in all respects save the following. The district court's judgment shall continue in effect insofar as it enjoins the government from investigating, penalizing, or discharging anyone from the military pursuant to the Don't Ask, Don't Tell policy.

Briefing is completed.