Anthony D. Romero
EXECUTIVE DIRECTOR

October 14, 2010

The Honorable Eric Holder
United States Attorney General
950 Pennsylvania Avenue, NW
Washington, DC 20530

Re: *Log Cabin Republicans v. United States*

Dear Mr. Attorney General:

AMERICAN CIVIL LIBERTIES UNION
NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 1004-2400
T/212.549.2500
WWW.ACLU.ORG

The American Civil Liberties Union respectfully urges the United States not to appeal the District Court ruling in *Log Cabin Republicans v. United States*, ___ F. Supp. 2d ___, 2010 WL 3960791 (C.D.Cal. Oct. 12, 2010), which struck down the so-called "Don't Ask Don't Tell" military policy of discrimination against lesbian, gay, and bisexual service members.

The ACLU recognizes the Executive's duty to "take care that the laws be faithfully executed." U.S. Const., art. II, sec. 3. This duty includes the responsibility to defend Acts of Congress in court, provided there is at least a reasonable argument in favor of the Act's constitutionality. At the same time, the Executive is duty bound to "preserve, protect and defend the Constitution of the United States," which guarantees that no person is "deprived of life, liberty or property without due process of law." U.S. Const., art. II., sec. 1; amend. V.

In the context of the Don't Ask Don't Tell military discrimination policy, and the *Log Cabin Republicans* decision specifically, the Executive's obligation to defend Congressional statutes does not require the government to pursue an appeal in this case for two reasons.

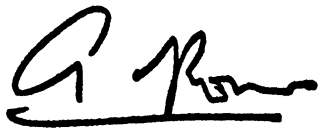
First, the constitutionality of the Don't Ask Don't Tell policy, like that of other military policies, depends in large measure on the judgment of the military under existing judicial practice. That is because courts have traditionally shown considerable deference to military judgments about whether a given statutory restriction is needed to further military readiness. *See, e.g.*, *Rostker v. Goldberg,* 453 U.S. 57, 70 (1981). But any contention that the Don't Ask Don't Tell policy advances military effectiveness is most compellingly refuted by what the United States in fact does. As the District Court found, the military keeps openly gay people in combat positions as long as it possibly can. *Log Cabin Republicans*, 2010 WL 3960791 at *32. In addition, the Chairman of the Joint Chiefs of Staff has agreed that allowing openly gay people to serve is "the right thing to do." *Id.* at *33. So here, the military judgment acknowledged and accepted by the District Court is that

the policy impedes military effectiveness. That judgment by the military itself makes the unconstitutionality of the law plain, and counsels against any appeal. In these particular circumstances, the Executive has no duty to seek appellate review.

Second, the government has had the chance to mount a full defense of the policy, and the court has spoken. The question is no longer whether the Executive will defend an Act of Congress, but whether the Executive will appeal from a well-reasoned, obviously correct federal court ruling, based on findings of fact that are exceedingly unlikely to be reversed. The government offered no factual defense of the military discrimination policy other than seventeen-year-old Congressional testimony from General Colin Powell, which was significantly undercut both by his own later statements casting doubt on the military need for the policy and by the military's practical repudiation of the policy by retaining lesbian, gay, and bisexual service members as long as possible during times of actual combat. Given these findings and the proper legal standard of review to be applied, there is no reasonable argument for the constitutionality of the policy, and no reason for the government to appeal.

AMERICAN CIVIL
LIBERTIES UNION

Very truly yours,



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