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'Don't Ask, Don't Tell' Enforcement Must Be Halted, Federal Judge Rules

JULIE WATSON | 10/12/10 05:47 PM | **AP**

SAN DIEGO — A federal judge issued a worldwide injunction Tuesday immediately stopping enforcement of the military's "don't ask, don't tell" policy, suspending the 17-year-old ban on openly gay U.S. troops.

U.S. District Judge Virginia Phillips' landmark ruling also ordered the government to suspend and discontinue all pending discharge proceedings and investigations under the policy.

U.S. Department of Justice attorneys have 60 days to appeal. Pentagon and Department of Justice officials said they are reviewing the case and had no immediate comment.

The injunction goes into effect immediately, said Dan Woods, the attorney who represented the Log Cabin Republicans, the gay rights group that filed the lawsuit in 2004 to stop the ban's enforcement.

"Don't ask, don't tell, as of today at least, is done, and the government is going to have to do something now to resurrect it," Woods said. "This is an extremely significant, historic decision. Once and for all, this failed policy is stopped. Fortunately now we hope all Americans who wish to serve their country can."

Legal experts say the Obama administration is under no legal obligation to appeal and could let Phillips' ruling stand.

Phillips' decision was widely cheered by gay rights organizations that credited her with getting accomplished what President Obama and Washington politics could not.

"This order from Judge Phillips is another historic and courageous step in the right direction, a step that Congress has been noticeably slow in taking," said Alexander Nicholson, executive director of Servicemembers United, the nation's largest organization of gay and lesbian troops and veterans.

He was the sole named veteran plaintiff in the case along with the Log Cabin Republicans, a gay rights organization that filed the lawsuit in 2004 to stop the ban's enforcement.

Gay rights groups warned gay troops not to make their sexual orientation public just yet. Aaron Tax, the legal director for the Servicemembers Legal Defense Network, said he expects the Justice Department to appeal. If that happens, the case would be brought to the U.S. Court of Appeals for the 9th Circuit, where the decision could be reversed.

"Service members must proceed safely and should not come out at this time," Tax said in a statement.

Supporters of the ban said Phillips overstepped her bounds.

"The judge ignored the evidence to impose her ill-informed and biased opinion on our military, endangering morale, health and security of our military at a time of war," said Wendy Wright, president of Concerned Women for America, a women's group on public policy. "She did not do what Congress did when it passed the law and investigate the far-reaching effects of how this will detrimentally impact the men and women who risk their lives to defend us."

The case put the Obama administration in the awkward position of defending a policy it wants Congress to repeal.

Defense Secretary Robert Gates, a Republican, and Chairman of the Joint Chiefs of Staff Adm. Mike Mullen, the military's top uniformed officer, have both said they support lifting the ban. But Gates and Mullen also have said they would prefer to move slowly.

Gates has ordered a sweeping study, due Dec. 1, that includes a survey of troops and their families.

President Obama agreed to the Pentagon study but also worked with Democrats to write a bill that would have lifted the ban, pending completion of the Defense Department review and certification from the military that troop morale wouldn't suffer.

That legislation passed the House but was blocked in the Senate by Republicans.

Gates has said the purpose of his study isn't to determine whether to change the law – something he says is probably inevitable but up for Congress to decide. Instead, the study is intended to determine how to lift the ban without causing serious disruption at a time when troops are fighting two wars.

"The president has taken a very consistent position here, and that is: 'Look, I will not use my discretion in any way that will step on Congress' ability to be the sole decider about this policy here,'" said Diane H. Mazur, legal co-director of the Palm Center, a think tank at the University of California at Santa Barbara that supports a repeal.

Government attorneys had warned Phillips that such an abrupt change might harm military operations in a time of war. They had asked Phillips to limit her ruling to the 19,000 members of the Log Cabin Republicans, which includes current and former military service members.

The Department of Justice attorneys also said Congress should decide the issue – not her court.

Phillips disagreed, saying the law doesn't help military readiness and instead has a "direct and deleterious effect" on the armed services by hurting recruiting during wartime and requiring the discharge of service members with critical skills and training.

"Furthermore, there is no adequate remedy at law to prevent the continued violation of

servicemembers' rights or to compensate them for violation of their rights," Phillips said in her order.

She said Department of Justice attorneys did not address these issues in their objection to her expected injunction.

Phillips declared the law unconstitutional after listening to the testimony of discharged service members during a two-week nonjury trial this summer in federal court in Riverside.

She said the Log Cabin Republicans "established at trial that the Don't Ask, Don't Tell Act irreparably injures servicemembers by infringing their fundamental rights." She said the policy violates due process rights, freedom of speech and the right to petition the government for redress of grievances guaranteed by the First Amendment.

Phillips is the second federal judge in recent weeks to throw the law into disarray.

A federal judge last month in Tacoma, Wash., ruled that a decorated flight nurse discharged from the Air Force for being gay should be given her job back as soon as possible. Barring an appeal, Maj. Margaret Witt who was suspended in 2004, will now be able to serve despite being openly gay.

Gay rights advocates have worried they lost a crucial opportunity to change the law when Senate Republicans opposed the defense bill last month because of a "don't ask, don't tell" repeal provision.

If Democrats lose seats in the upcoming elections, repealing the ban could prove even more difficult – if not impossible – next year.

The "don't ask, don't tell" policy prohibits the military from asking about the sexual orientation of service members but bans those who are openly gay. Under the 1993 policy, service men and women who acknowledge being gay or are discovered engaging in homosexual activity, even in the privacy of their own homes off base, are subject to discharge.

Associated Press Writer Anne Flaherty contributed to this report from Washington, D.C.