

Appeals court: Gay ban can stay, for now

By Lisa Leff - The Associated Press

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SAN FRANCISCO — A federal appeals court has frozen a judge's order halting the military's "don't ask, don't tell" policy, even as the Pentagon has announced it will accept openly gay recruits.

A three-judge panel of the 9th U.S. Circuit Court of Appeals on Wednesday temporarily granted the U.S. government's request for a freeze on the judge's order.

The appellate court instructed lawyers for the gay rights group that brought the lawsuit successfully challenging the policy to file arguments in response by Monday.

The judges would then decide whether to extend the temporary stay while it considers the government's appeal of U.S. District Judge Virginia Phillips' ruling that the policy was unconstitutional.

The 1993 "don't ask, don't tell" rule says gays may serve but only if they keep secret their sexual orientation.

The Pentagon says it's working to come up with new guidelines regarding gays serving in the military after the court's ruling restored the law, at least for now.

Defense Department spokesman Col. Dave Lapan said Thursday that he expects the guidelines be announced later in the day.

President Obama said last week that the Clinton-era law "will end on my watch" but added that "It has to be done in a way that is orderly, because we are involved in a war right now." He said he supports repeal of the policy, but only after careful review and an act of Congress.

A new CBS News Poll says a majority of respondents supports allowing gays and lesbians to serve openly in the military.

The survey conducted Oct. 6-8, found 56 percent of those questioned were in favor of open service, compared with 31 percent in opposition. CBS said that result was similar to a February poll on the same topic, which found 58 percent favored and 28 percent opposed.

The poll's margin of error was plus or minus 4 percentage points.

It was unclear what effect the temporary freeze would have on the Pentagon, which has already informed recruiters to accept openly gay recruits and has suspended discharge proceedings for gay service members.

Cynthia Smith, a Pentagon spokeswoman, said “for the reasons stated in the government’s submission, we believe a stay is appropriate.”

She declined to say whether the Defense Department would roll back its guidance to military lawyers and recruiters that they must abide by last week’s injunction. It has been assumed, however, that the Pentagon would revert to its previous policy of “don’t ask, don’t tell” if a stay were to be granted throughout the appeals process.

The White House referred questions to the Justice Department. Alisa Finelli, a spokesperson for the Justice Department, declined to comment Wednesday.

A lawyer for the Log Cabin Republicans said the group was disappointed, but called it a minor setback. The group, which brought its lawsuit in 2004, argues that forcing gays in uniform to remain silent about their personal lives violates their First Amendment rights and that the military’s reluctance to end the policy was based on unfounded fears, not facts.

“We hope that the 9th Circuit will recognize the inherent contradiction in the government’s arguments for a longer stay in light of eight full days of non-enforcement with no ‘enormous consequences,’” said Alexander Nicholson, a gay veteran who also was a plaintiff in the Log Cabin lawsuit.

Government lawyers argue that striking down the policy and ordering the Pentagon to immediately allow openly gay service members could harm troop morale and unit cohesion when the military is fighting two wars.

The brief order was signed by the three 9th Circuit judges hearing emergency motions this month: Diarmuid F. O’Scannlain and Stephen S. Trott, who were appointed by President Reagan, and William A. Fletcher, an appointee of President Clinton.

Associated Press writers Julie Watson in San Diego, and Anne Flaherty in Washington, D.C., contributed to this report.