



TODAY IN 1789

Benjamin Franklin wrote in a letter to a friend, "In this world nothing can be said to be certain, except death and taxes."

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Justices let 'don't ask' stand

Gay group sought halt during appeal

By **David G. Savage**
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WASHINGTON — The Supreme Court refused Friday to halt enforcement of the military's "don't ask, don't tell" policy while its constitutionality is under appeal in federal court in California.

The justices, in a brief order, denied an appeal filed by the Log Cabin Republicans, who insisted that the ban on openly gay service members is unconstitutional and should be ended immediately.

The high court noted that Justice Elena Kagan did not participate in the decision. There were no dissents.

Kagan served as the administration's chief Supreme Court lawyer before she became a justice.

The court's refusal to take up the issue now means it will be a year or two at least before the constitutional challenge can be finally resolved. Congress could vote to repeal "don't ask, don't tell" in the lame-duck session, but Senate Republicans have so far blocked the issue from coming to a vote.

Six years ago, the Log Cabin Republicans, a gay and lesbian political group, sued and contended the policy was unfair to gays who wanted to serve in the military and was also harmful to the military, which had lost the service of thousands of qualified officers.

In September, U.S. District Judge Virginia Phillips agreed and ruled the policy unconstitutional.

A few weeks later, she went a step further and ordered the Defense Department to immediately suspend enforcement of the policy. The Justice Department appealed, and the U.S. 9th Circuit Court of Appeals lifted the judge's injunc-

tion Nov. 1 and said the military may continue to enforce its policy while the appeals go forward.

It is typical for federal judges to permit federal laws to stay in force while their constitutionality is challenged.

But the Log Cabin Republicans filed an appeal last week that urged the Supreme Court to reinstate Phillips' order. That plea was lodged with Justice Anthony M. Kennedy, who oversees the 9th Circuit. Friday's order said the motion had been referred to the full court, which in turn denied it.

The government appealed Phillips' ruling that declared "don't ask, don't tell" unconstitutional, and the 9th Circuit is expected to hear the case early next year.

The Obama administration has been sharply criticized by gay-rights advocates for appealing the district court's ruling. Justice Department lawyers stressed the "don't ask" policy was written into

federal law in 1993 and can't be removed by the administration. Under the Constitution, the president has the duty to ensure the laws are "faithfully executed."

The law says a service member will be discharged if he or she has "engaged in (or) attempted to engage in ... a homosexual act" or has "stated that he or she is a homosexual or bisexual or words to that effect." Military regulations, however, say a "service member's sexual orientation is considered a personal and private matter and is not a bar to continued service."

Opinion surveys have found that most Americans favor repealing the ban and allowing openly gay persons to serve in the armed forces. By Dec. 1, Secretary of Defense Robert Gates is due to receive a survey of military members and their families on the issue, and early reports say most respondents would not be troubled by having openly gay soldiers in the ranks.