

**Testimony of Jeh Charles Johnson  
General Counsel, Department of Defense  
Hearing Before the Senate Armed Services Committee  
On Don't, Ask, Don't Tell  
Presented On  
December 2, 2010**

Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

By now you have had an opportunity to read the report General Ham and I have co-authored. The report is voluminous and comprehensive, but we hope it speaks for itself. Our basic assessment is that our military **can** make this change, provided we do so in an orderly and reasonable manner, in accord with the recommendations for implementation we offer in the report.

This morning I would like to take a moment to talk to you, not in my capacity as co-author for this report, but as the lawyer for the Defense Department. I want to echo what Secretary Gates has said, and plead to the Congress that you not leave our military's fate on this issue in the hands of the courts. I offer no view about the constitutionality of Don't Ask, Don't Tell, or prediction about the outcome of the litigation that is underway.

But, regardless of how you feel about gays serving openly in the military, the fact that there is increased litigation in the courts on matters of gay rights is **undeniable**.

Since 2003 when the Supreme Court decided *Lawrence v. Texas*, the courts have become increasingly receptive to gay rights claims. Within the last year alone, federal district courts have for the first time declared California's gay marriage ban, the federal Defense of Marriage Act, and Don't Ask, Don't Tell all unconstitutional. We have appealed the lower court decisions on Don't Ask, Don't Tell. But, after years in which Don't Ask, Don't Tell was upheld in the courts, the constitutionality of this law is now in litigation once again, and we in the Department of Defense face the possibility that we must repeal Don't Ask, Don't Tell, not on the terms and timetable of the President, the Congress and the Department of Defense, but on the terms and timetable of a court and a plaintiff.

We got a taste of our possible future in October and November, in the *Log Cabin Republicans* case. On Monday, October 11, we had a law and a policy in place that required separation of members of the military who are found to have engaged in homosexual conduct. On Tuesday, October 12, a federal district judge in California issued an order to the Secretary of Defense to suspend enforcement of that law on a worldwide basis. Eight days later, on October 20, the appellate court issued a temporary stay of the injunction while it considered whether to grant a more permanent stay. On Monday, November 1, the Ninth

Circuit agreed to keep the stay in place during the pendency of the appeal in that court. On Friday, November 5, the Log Cabin Republicans asked the Supreme Court to reverse the stay. On Friday, November 12, the Supreme Court denied that request.

Thus, in the space of 8 days, we had to shift course on the worldwide enforcement of the law twice, and in the space of a month, we faced the possibility of shifting course four different times.

This legal uncertainty is not going away any time soon. The *Log Cabin Republicans* case is on an expedited appeal. Meanwhile, new lawsuits are being filed.

Our plea to the Congress is to not leave the fate of this law to the courts. As Secretary Gates has stated, if repeal of this law occurs, it should be done by the elected representatives in the political branches of government, not by the courts. Indeed, in the course of our review, we learned of other nations that acted to change their policies on gays in their militaries to head off adverse outcomes in court.

The virtue of the legislation pending before the Senate is that, if passed, repeal of Don't Ask, Don't Tell will be done on **our** terms and **our** timetable, upon the advice of our military leadership. As our Working Group report makes clear, there are many ancillary issues that must be addressed in connection with

any repeal of Don't Ask, Don't Tell – education and training, the core messages to be delivered as part of that education and training, same-sex partner benefits, berthing and billeting, a policy on re-accession, related changes to the UCMJ, and so forth.

The Secretary and Chairman have both made it clear that that they will not sign the certification contemplated by the current legislation until we've written new post-repeal policies and regulations, and have at least begun our education and training of the force – in other words, that repeal is brought about in a responsible and orderly manner. In all likelihood, this will not be possible if repeal is imposed on us by judicial fiat.

For these reasons, we urge the Senate to act now on the pending legislation.