

# Legal experts disagree over Obama action on 'Don't Ask'

[Lou Chibbaro Jr.](#) | Oct 21, 2010 | [Comments 0](#)

Nan Hunter, a Georgetown University law professor and prominent gay rights attorney, says President Obama has done the right thing in appealing a decision by a federal judge that overturned the 'Don't Ask, Don't Tell' law.

Hunter's view contradicts the position of nearly all national LGBT rights groups, which have urged Obama not to appeal the decision. But she is joined by a number of other legal and constitutional experts who oppose 'Don't Ask, Don't Tell' but believe U.S. presidents are obligated to defend laws passed by Congress under most circumstances.

"I think the president, through the Justice Department, should defend federal laws, including this one," Hunter said. "Otherwise you just get way too much. You get the president being able to ignore laws that are passed by Congress, and that's not a good situation."

Hunter cautioned LGBT activists that dismantling the longstanding tradition that presidents should defend duly enacted laws — even unpopular ones — could result in the refusal by a different president to enforce laws beneficial to LGBT people.

Other legal experts, including constitutional specialists with the American Civil Liberties Union and the LGBT litigation group Lambda Legal, agree that presidents generally should defend federal laws. But they say the obligation to defend a law should not apply to cases where strong evidence exists that the law is unconstitutional and a court issues a ruling overturning the law on constitutional grounds.

"The ACLU recognizes the Executive's duty to 'take care that the laws be faithfully executed,'" said ACLU Executive Director Anthony Romero in an Oct. 14 open letter to Attorney General Eric Holder.

"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," Romero said. "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.'"

Romero noted that U.S. District Court Judge Virginia Phillips in California ruled in September that the 'Don't Ask, Don't Tell' law is unconstitutional on those same grounds.

"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,” he said in his letter.

“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,” he said.

Hunter, who personally opposes ‘Don’t Ask, Don’t Tell,’ said following that course could become a “political disaster” that prompts a possible Republican Congress next year to take action to reinstate the law or attempt to force the president to continue to enforce it.

A far better course of action, according to Hunter, would be for the administration to appeal the decision and use a careful, strategic approach to presenting its arguments before the appeals court.

“There are many, many possibilities for how the administration could respond,” she said. “It could respond by filing the appeal so that the case goes to the appeals court and then making arguments that represent the president’s view that it’s a bad law...And then the court of appeals will decide, and that will have much more authority than one District Court judge.”

Susan Sommer, director of constitutional litigation for Lambda Legal, says Obama should not have appealed Judge Phillip’s decision to overturn ‘Don’t Ask, Don’t Tell.’

“It’s really a shame that the Obama administration is appealing this decision,” Sommer said. “The president is in no position to appeal a decision on a policy that the courts say is unconstitutional. He has an obligation to uphold the Constitution.”

Sommer said she agrees that Obama has an obligation to uphold laws as well as the Constitution.

“But he does not have an obligation to defend a statute whose constitutionality is being challenged in court,” she said. “There have been precedents of a president not defending a law under court challenge. The Justice Department exercises discretion all the time on whether to take cases or not, both civil and criminal.”

David Rittgers, legal policy analyst for the Cato Institute, a libertarian think tank, and an attorney with the Army Reserves, called the ‘Don’t Ask, Don’t Tell’ case a “unique situation” that involves all three branches of the federal government.

Saying he’s speaking for himself and not the Army, Rittgers said he sides with those who believe the president should defend laws, including this one.

“Congress ultimately has to answer this question,” he said. “This will not be a settled issue until Congress acts. This is constitutionally within the realm of Congress.”

Susan Low Bloch, a Georgetown University law professor who specializes in constitutional law, said presidents have refused to enforce laws or chosen not to appeal court decisions overturning them mostly in cases where the law interferes with the president's or the executive branch's ability to carry out its duties.

“That’s not the situation with ‘Don’t Ask, Don’t Tell,’” she said. “And that’s why it’s not at all surprising to me that the administration has chosen to defend the law, even though they don’t like it. The way to get rid of it is to undo it the proper way—to get Congress to undo it.”

“Now if the court strikes it down, I’m sure behind the scenes the president will be very happy. But he’s not supposed to go into court and undermine it,” she said.

Asked whether she believes a president should wait for the Supreme Court to strike down a law before he or she can stop enforcing it, Bloch said, “Yes, that’s right.”

“People really shouldn’t be surprised at this course because ... clearly this is the way the system has worked and I think should work,” she said.