THE NEW OBAMA POLICY ON CONSTITUTIONALITY OF DOMA & BOIES/OLSON REACTION

Liberty & Justice by Mirko Ilic

As Marcy Wheeler pointed out, the Obama Administration this morning made an abrupt and seismic shift in its legal policy and position on DOMA (Defense of Marriage Act). There are two documents of note in this regard, the Attorney General's press announcement and the detailed letter to speaker John Boehner announcing the change in policy and describing the legal foundation therefore.

Marc Ambinder explains what this means to the two key cases in question:

> The decision means the Justice Department will cease to defend two suits brought against the law. The first was a summary judgment issued in Gill et al. v. Office of Personnel Management and Commonwealth of Massachusetts v. United States Department of Health and Human Services last May by the U.S. District Court of Massachusetts. The plaintiffs challenged the constitutionality of the law's definition of "marriage" as a legal union between a man and a woman.
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> District Judge Joseph Louis Tauro ruled Section 3 of the act unconstitutional on the grounds that it violated states' rights to set their own marriage policies and violated the rights of same-sex couples in the states that permitted marriages. But the president felt compelled to defend the law,

> reasoning that Congress had the ability to overturn it. The Justice Department entered into an appeal process on October 12, 2010. Tauro stayed implementation of his own ruling pending the appeal. The department filed its defense in the U.S. Court of Appeals for the 1st Circuit on January 14.
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> The second lawsuit, involving the cases of Pedersen v. Office of Personnel Management and Windsor v. United States, would have been appealed in the Appeals Court for the 2nd Circuit, which has no established standard for how to treat laws concerning sexual orientation.

I would like to say this is not only a welcome, but extremely strong position that has been taken by President Obama, Attorney General Holder and the Administration. You can say they are late to the dance, that it is political opportunism because the boat was already sailing, or that it is a "bone to the base" with an election looming. To varying degrees, all would have some validity. However, the bottom line is that they have done it, it was extremely bold in its forcefulness and it was the right thing to do. Mr. Obama and his Administration deserves credit where due. This is an area where I have expressed extreme disagreement with Mr. Obama and his policy, and he has met exactly the issues that were faulty, and in a strong way.

Another thing should be noted here. From what I know of the 2nd Circuit, and what others very knowledgable about it confirm, the 2nd is going to find this music to their ears. They may not be the equivalent of the 9th Circuit on everything, but their disposition was going to be to knock down DOMA to start with. With this extra ammunition provided today, expect them to write VERY strong opinions knocking back DOMA and finding clear cut Constitutional protection for sexual identity equality. Couple that with the clear position evinced by the 9th Circuit, and the tide is turning. Fast and hard.

I simply do not see how Anthony Kennedy, based both on what I know of him and his clear opinion in Lawrence v. Texas, will not find for sexual identity equality if and when these cases reach the Supreme Court. This is why I have always maintained that Boies and Olson should stipulate to standing in Perry and get the case to the Supremes.

The above linked documents speak for themselves in most regards, but I would like to point out a couple of things. First, the Administration is not just going to cease defending DOMA, they are doing so on the express ground that it "violates the equal protection component of the Fifth Amendment". That is huge. Not just that it is wrong, but that it flat out violates the most fundamental protections within the United States Constitution. Secondly, and to a legal eye every bit as important, if not more so, they have concluded:

> …that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.

Again, huge. They lay out a detailed analysis under *Bowen v. Gilliard* why this is so, discuss *Lawrence v. Texas, Romer v. Evans, Fontiero v. Richardson* and conclude:

> Each of these factors counsels in favor of being suspicious of classifications based on sexualorientation.

and

> In other words, under heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent o f the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend

> Section 3 only by invoking Congress' actual justifications for the law.
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> Moreover, the legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny.

Ballgame.

And why do I say ballgame?? Because this is far more reaching than just the pending DOMA cases in the 2nd Circuit. No, this seismic change will filter into any LGBT Constitutional rights case pending in federal or state courts. The first case that came to my mind was the Log Cabin Republican case out of the Central district of California (CACD).

I had no sooner started writing about the applicability of today's Obama Administration announcement to the LCR case, when an even better example of the far ranging consequences came across my desk straight from the 9th Circuit Court of Appeals. David boies and Ted Olson, on behalf of the plaintiffs in *Perry v. Schwarzenegger*, have filed a Motion to Lift the Stay Pending Appeal on marriage equality in California. Speaking of huge, this instantaneous and hard edged aggressive action by the *Perry* plaintiffs fits the bill:

> Moreover, events of this morning demonstrate that proponents likely cannot prevail even if this lengthy procedural detour were resolved in their favor. In a letter to Congress, the Attorney General of the United States announced the view of the United States that "classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of" the Defense of Marriage Act ("DOMA")—which defines "marriage" under federal law to be "a legal union between one man and one woman"—"is

> unconstitutional.” Letter from the Attorney General to Congress on Litigation Involving the De- fense of Marriage Act at 2 (Feb. 23, 2011) (attached as Exhibit A).
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> These new developments—this Court’s certification order, the California Supreme Court’s response to it, and the Attorney General’s announcement that the gov- ernment will no longer defend DOMA—are materially changed circumstances that warrant vacatur of this Court’s decision to grant a stay pending appeal. See SEACC v. U.S. Army Corps of Eng’rs, 472 F.3d 1097, 1101 (9th Cir. 2006).

The long and short of this is that Boies and Olson argue that between today’s announcement of the quantum shift in policy by President Obama and Attorney General Holder and the direction the California supreme Court is heading creates a situation is which there is simply no resolution of the appeal that favors the challengers – the h8ters – actually winning on the merits. There are several ways the case could go down, as pondered through by Boies and Olson, but *none of them* favor the bigoted proponents of Proposition 8.

Boies and Olson have a pretty compelling point if you total up the legal considerations extant at this point. The other thing I think should be noted here is just how fast the Boies and Olson motion came on the heels of the Obama/Holder announcement. I first heard rumor of the coming announcement of the new Obama policy at 9:15 am PST. Boies and Olson filed their motion and had it entered on the 9th Circuit ECF (Electronic Court Filing) system by 9:56 am PST, a mere 40 minutes later. Trust me, this is not possible, even for ace attorneys like David and Ted.

What the above shows is that there was at least some advance notice to and/or cooperation between the AG/DOJ and the *Perry* Plaintiffs, and

far more than the press got. The Administration should be commended for this as well, when they finally decided to ante in on the right side of the Constitutionality argument, they went all in. Bravo!

[The absolutely incredible graphic, perfect for the significance and emotion of the *Perry* Prop 8 case, and the decision to grant marriage equality to *all citizens* without bias or discrimination, is by Mirko Ilić. Please visit Mirko and check out his stock of work.]