

OBAMA AND THE CONSTITUTIONALITY OF DADT AND OTHER LGBT DISCRIMINATION

After nearly two years of ignoring, scorning, demeaning and lecturing the progressive blogosphere that provided substantial and critical portions of the fuel propelling him into office, President Obama suddenly found time to sit down with five carefully chosen token representatives of the unwashed dirty hippy community five days before the coming mid-term election. An election increasingly looking quite catastrophic to his own Democratic party, and due in large part to his performance and policy selection in office. How thoughtful of Mr. Obama to finally have a dialect with his base now that he is desperate and less than a week out from the electoral tsunami.

Courtesy of Duncan Black (Atrios), one of the participants, here is a transcript of the festivities. You can draw your own conclusions as to how large of a dog and pony show this was, but I would like to focus on the portions of the meeting dealing with LGBT discrimination and the government's relentless DADT policy.

Asked by Joe Sudbay of Americablog whether he actually had any real plan to accomplish passage of repeal legislation for DADT, Obama responded:

...And my hope is that will culminate in getting this thing overturned before the end of the year.

Now, as usual, I need 60 votes. So I think that, Joe, the folks that you need to be having a really good conversation with – and I had that conversation with them directly yesterday, but you may have more influence than I do – is making sure that all those Log Cabin Republicans who helped to finance this

lawsuit and who feel about this issue so passionately are working the handful of Republicans that we need to get this thing done.

...

You're financing a very successful, very effective legal strategy, and yet the only really thing you need to do is make sure that we get two to five Republican votes in the Senate.

And I said directly to the Log Cabin Republican who was here yesterday, I said, that can't be that hard. Get me those votes.

Asked to describe his plan to pass critical legislation he has long promised one of his core constituencies, this is the pathetic drivel Barack Obama comes up with? The President of the United States and leader of the entire Democratic party pleads powerlessness to accomplish the goal, but demands the *Log Cabin Republicans* go forth and deliver him intransigent GOP Senators on a golden platter? Seriously, that is his plan? Perhaps Mr. Obama has mistaken the LCRs for the NRA or something, but if there is any entity with less sway over the entrenched and gilded GOP Senate leadership than Obama, it is the Log Cabin Republicans. Absurd and lame is too kind of a description for such tripe. I honestly don't know what is worse, that this is Obama's response or that he has the politically incompetence to state it on the record.

But there was more, oh yes there was more. Asked by Sudbay the straightforward yes or no question as to whether he considered DADT to be unconstitutional, the self proclaimed "Constitutional scholar" President came up with the following bucket of blarney:

And one of the things I'd like to ask you – and I think it's a simple yes or no question too – is do you think that

“don’t ask, don’t tell” is unconstitutional?

THE PRESIDENT: It’s not a simple yes or no question, because I’m not sitting on the Supreme Court. And I’ve got to be careful, as President of the United States, to make sure that when I’m making pronouncements about laws that Congress passed I don’t do so just off the top of my head.

I think that – but here’s what I can say. I think “don’t ask, don’t tell” is wrong. I think it doesn’t serve our national security, which is why I want it overturned. I think that the best way to overturn it is for Congress to act. In theory, we should be able to get 60 votes out of the Senate. The House has already passed it. And I’ve gotten the Secretary of Defense and the Chairman of the Joint Chiefs of Staff to say that they think this policy needs to be overturned – something that’s unprecedented.

And so my hope and expectation is, is that we get this law passed. It is not just harmful to the brave men and women who are serving, and in some cases have been discharged unjustly, but it doesn’t serve our interests – and I speak as Commander-in-Chief on that issue.

Let me go to the larger issue, though, Joe, about disillusionment and disappointment. I guess my attitude is that we have been as vocal, as supportive of the LGBT community as any President in history. I’ve appointed more openly gay people to more positions in this government than any President in history. We have moved forward on a whole range of issues that were directly under my control, including, for example, hospital visitation.

On “don’t ask, don’t tell,” I have been as systematic and methodical in trying to move that agenda forward as I could be given my legal constraints, given that Congress had explicitly passed a law designed to tie my hands on the issue.

And so, I’ll be honest with you, I don’t think that the disillusionment is justified.

First off, let’s be clear, this is a patently duplicitous and cowardly answer. Whether it is on Equal Protection, Due Process, First Amendment or some combination of the three, you either do or do not consider DADT unconstitutional. It IS a yes or no answer. Irrespective of whether or not you feel there are collateral constraints on your ability to act on it, you should summon the minimal intellectual honesty to state your opinion. But, and I will return to this shortly, this is an answer that Barack Obama and his various spokesmodels, such as Robert Gibbs and Valerie Jarrett, never give; in fact they have consistently demonstrated they will go to any length and contort into any position to refuse to answer the question of whether they believe DADT is unconstitutional.

Secondly, let us put an end to the collateral constraints Obama bleats prevent him from taking a stand or actively impacting the court process on DADT. It is pure horse manure. There are multiple modalities through which President Obama could proceed to eliminate the pernicious DADT policy in the court litigation currently pending.

As Tony Mauro explains in the National Law Journal, directly contrary to Obama’s statements, there is no absolute duty to defend the Constitutionality of DADT in cases such as the *Log Cabin Republicans v. USA and Gates* decision entered by Judge Virginia Phillips in the Central District of California. Describing

the refusal of the Clinton Administration, and its Solicitor General Drew Days III, to defend the constitutionality of a statute in *Hornell Brewing Co. v. Brady*, Mauro relates:

So much for the vaunted governmental “duty to defend” acts of Congress, which has been invoked often in recent weeks in connection with the “don’t ask, don’t tell” law barring gays from the military – a law that the Obama administration opposes but still is poised to defend. In cases much bigger than Crazy Horse – think *Buckley v. Valeo* and *INS v. Chadha* – SGs have been throwing provisions of federal laws under the bus for decades. And Senate records show that, 13 times in the past six years, during both the Bush and Obama administrations, the Justice Department has told Congress it is not defending an act of Congress.

So, the vaunted “duty to defend” Mr. Obama so blithely relies on is not nearly the impenetrable constraint he lets on. Yes, there is indeed a presumption the government will defend the statutes passed by Congress; but, directly contra to Mr. Obama, in limited and appropriate circumstances that has always given way to doing the right thing. You have to wonder if LGBT discrimination rises to the level of “being the right thing” to Obama.

Mauro’s National Law Journal article goes on to completely eviscerate the Obama White House’s stated rationale for being unable to assist in effecting cessation of the invidiously discriminatory DADT policy through the court challenges and legal system as opposed to mere standing by and saying Congress should change the law. You should read it for the full discussion of the various arguments, it is not long and well worth the time.

One of the points Mauro discusses is the position of Walter Dellinger, President Clinton’s Solicitor General, on the matter.

Dellinger in a recent New York Times Op-Ed sagely noted:

However, Mr. Obama may have another option: while appealing the lower court's decision, he could have the Justice Department tell the appellate court that the executive branch believes the law is unconstitutional.

In other words, the Justice Department would take the formal steps necessary to defend the law, but it would also make substantive arguments about why the law should be struck down. The Supreme Court could still vote to uphold the law, but the president's position could significantly influence how the court rules.

Doing so wouldn't unfairly strip the law of adequate defense: if the administration took a stand against the law, the appellate courts would very likely allow lawyers for Congress or outside groups to appear and argue on its behalf.

This approach is not unprecedented. In 1943, Congress passed a law prohibiting the payment of salaries to three particular government employees. Arguing that the law was unconstitutional, the employees sued and won in claims court. The solicitor general asked the Supreme Court to review the lower court's decision, but he also told the justices that the administration agreed with the original ruling; the court ultimately struck down the law.

That case and others like it provided a precedent for President Bill Clinton in 1996 both to comply with a law requiring the military to discharge service members who had H.I.V., and at the same time inform the courts that he found it to be unconstitutional. Thanks in part

to support from the military, Congress repealed the law before litigation ensued.

Exactly. I have argued this precise point in relation to the appeal on the *Perry v. Schwarzenegger* Prop 8 case; the state can give the nominal cover for the appeal and still strongly weigh in that it believes the proposition unconstitutional. Mr. Obama could, and should, appeal but advise the court of his opinion that DADT is unconstitutional.

Therein lies the rub for Barack Obama, there is no compelling evidence whatsoever that Obama actually believes that LGBT discrimination is unconstitutional. Maybe Mr. Obama and his closest advisors and spokespeople like Jarrett really do NOT believe there is a constitutional nexus for LGBT discrimination; maybe instead they are aligned with the thoughts expressed by Huffington Post columnist Earl Ofari Hutchinson in a deplorable and divisive piece saying Obama and Jarrett owed no apologies because:

The one other stumbling block that the gay rights activists that pound Obama must come to grips with and that is that a majority of blacks still bristle at the notion that the fight to legalize gay marriage is in any way comparable to the fight for black rights.

As disappointing and unenlightened as it is, this is entirely consistent with Mr. Obama's stated words and positions at his meeting with the liberal bloggers Wednesday afternoon:

I think it's a fair question to ask. I think that – I am a strong supporter of civil unions. As you say, I have been to this point unwilling to sign on to same-sex marriage primarily because of my understandings of the traditional definitions of marriage.

But I also think you're right that

attitudes evolve, including mine. And I think that it is an issue that I wrestle with and think about because I have a whole host of friends who are in gay partnerships. I have staff members who are in committed, monogamous relationships, who are raising children, who are wonderful parents.

Obama clings to the sham of “civil unions” but still cannot bring himself to think in terms of equality. He is trying to “evolve” because he now sees “trendlines”. To Mr. Obama, equality for LGBT citizens is nothing more than a political trendline he is starting to pay ever more attention to; it, however, clearly appears to be something he does not consider to rise to Constitutional protection the way racial civil rights did for his heritage.

It is time to stop the two faced dithering Mr. President. There is a difference between mouthing some self serving cheap political rhetoric that “all people should be able to serve in the military” and recognizing that the reason they cannot is because of unconstitutional discrimination against a protected class of citizens. There is a HUGE difference.

When asked about the court rulings by Judge Virginia Phillips in the LCR DADT case, by Judge Tauro in the DOMA case, or by Judge Vaughn Walker in *Perry v. Schwarzenegger*, the response is always in terms of legislation repealing laws in place. legislation affirmatively protecting something in the future, studies to see what is appropriate or some other mealy mouthed hollow rhetoric. On the other hand, not a lick of that matters if the discrimination at issue is flat out unconstitutional. If it is unconstitutional, and it absolutely is (as held by nearly every Federal judge considering it), then studies are irrelevant. What generals and servicemembers wives think and respond to in answers to opinion surveys is irrelevant. Legislation by Congress is irrelevant. Public opinion, for that matter,

is irrelevant. None of that matters because it is a fundamental right for such citizens to be treated equally and not be discriminated against. End of story. Seriously, it either is or it is not. Where do you stand Mr. President?

But Obama *never* talks about it in those terms does he? No, he does not. And all the other stuff he mouths is nothing more than code for "I don't believe this is a Constitutionally guaranteed right and it is nothing more than a political issue for me". There simply is no other interpretation to Obama's dithering, statements and position.

The Constitution and its fundamental equality, due process and first amendment protections is not a political issue football to be tossed around, nor is it properly enforced by degree of popularity in the latest Gallup poll trendline.