

Lawyers in US Gay Marriage Cases Aim Pitches at Obama

On separate occasions in recent days, lawyers on opposite sides of a U.S. Supreme Court fight over same-sex marriage took an elevator to the fifth floor of the Department of Justice, entered a large conference room and made a pitch to Solicitor General Donald Verrilli and other top Obama administration lawyers.

Each side wants the administration's support in a late-March showdown on the fundamental rights of gay men and lesbians.

On Jan. 18, Theodore Olson and David Boies, the well-known duo representing gay couples challenging California's ban on **same-sex marriage**, asked the administration to back their claim of a constitutional right to such unions nationwide. On Thursday, attorney Charles Cooper, who has long represented defenders of the ban known as Proposition 8, asked the government to stay out of the case.

These advocates and others in the dispute over same-sex marriage joined a common but little-known ritual of Supreme Court litigation. Parties seeking outside "friend of the court" briefs they hope will sway the court's nine justices often try to get the weight of the federal government behind them. Justice Department officials regularly hear out both sides, with such meetings concerning a couple dozen cases each court term.

Lawyers who attended the private sessions on **gay marriage** said the government attorneys, while nodding at some points made by both sides, did not tip their hand. In these sessions, which have some attributes of an informal courtroom argument, officials do not make up their minds on the spot. It might be weeks before a party knows whether the valued government

brief, with its distinctive gray cover, will be filed on its behalf.

Deadlines Approach

Any outside group that sides with defenders of Proposition 8 must submit its amicus curiae, or “friend of the court,” brief by Tuesday under Supreme Court deadlines. Gay rights groups and others backing the challengers have until Feb. 28.

While **President Barack Obama** has vigorously endorsed gay marriage, as recently as in his second inaugural speech last Monday, he also has suggested that the federal government should not take the lead. White House Press Secretary Jay Carney said the day after the inauguration ceremony that while Obama’s “personal view” favors same-sex marriage, he “believes that it’s an issue that should be addressed by the states.” The administration has never taken a position on Proposition 8, which California voters adopted on Nov. 4, 2008, the day Obama was first elected president.

Under laws passed since 2004, nine states and the District of Columbia allow same-sex couples to wed.

Presidents generally do not become involved in a solicitor general filing to the Supreme Court. But in this politically charged dilemma, lawyers on both sides say it is all but certain that Obama, a Harvard Law School graduate who was once a constitutional law professor, will play a big role in directing the administration’s stance.

Verrilli ran the meetings around a large rectangular table in a plain conference room near his ornate office. Lawyers who took part would not speak publicly because the meetings are confidential but they said the Jan. 18 session for the Olson-Boies team and Thursday’s session for the Cooper group lasted an hour each. About 20 government lawyers, mainly from the Justice Department, attended. The advocates’ assertions were at times passionate and animated. For their part, government

attorneys were methodical in their questioning, focusing on legal analyses.

Opposing Views

Both sides' arguments largely reflected their briefs in earlier proceedings.

Olson and Boies, former opponents from the landmark Supreme Court case that decided the 2000 presidential election for George W. Bush, urged the government to enter the case and assert that gay and lesbian couples have the same right to marry as a man and a woman. According to lawyers in the room, Olson stressed that the administration's voice should be heard at this historic moment.

Olson, who as solicitor general under Bush from 2001-04 once ran such meetings, was especially fervent. He compared the contention that states need more time to resolve the gay-marriage dilemma to arguments half a century ago that states needed more time before blacks and whites could share the same public accommodations such as drinking fountains.

A former Reagan administration lawyer, Cooper argued in his session that marriage is the business of the states, so no federal constitutional interest can be asserted. Cooper referred to Obama's own comments suggesting that states should decide the matter and echoed much of what he had written in his recently submitted brief to the Supreme Court. In that, Cooper included Obama's remarks from a May 2012 interview with ABC News referring to the "healthy process and ... healthy debate" occurring in the states.

The court will hear two cases over two days. In the Proposition 8 case of *Hollingsworth v. Perry*, to be heard on March 26, the justices could decide the constitutionality of same-sex marriage or rule on narrower grounds. In a related case to be heard the following day, *United States v. Windsor*, the justices are reviewing a 1996 U.S. law that denies federal

benefits, such as Social Security survivor payments when one partner dies, to gay couples in states that permit their marriage.

Defense of Marriage Act

While the Obama administration has never taken a stand on Proposition 8, it has in recent years opposed the provision in the 1996 law, known as the Defense of Marriage Act (**DOMA**), forbidding married gay couples from obtaining benefits that heterosexual couples receive.

Yale Law Professor Drew Days, who was a U.S. solicitor general in the Clinton administration from 1993 to 1996, said that as Obama lawyers weigh a federal interest in the **Proposition 8** dispute, they are likely considering how it would intersect with the administration's nuanced stance in the DOMA case. Days is not involved in either case and said he has no direct information about the administration's position.

The administration in early 2011 said it would no longer defend DOMA's disparity in marriage benefits. It also has suggested there be a heightened constitutional standard for assessing laws that treat gay people less favorably. Only when the Department of Justice files its brief in the case of *United States v. Windsor* in late February will it indicate how the administration thinks such constitutional scrutiny should apply to various laws based on sexual orientation, from limits on marriage benefits to an outright ban on same-sex unions.

Closely watching to see what Obama does on Proposition 8 are groups such as the National Organization for Marriage, whose president, Brian Brown, derided Obama's emphasis on gay marriage in the inaugural speech. On the other side, the Human Rights Campaign yearns for an Obama assertion of a constitutional right to same-sex marriage now, and not after more state action. Fred Sainz, Human Rights Campaign's vice president for communications, said the Proposition 8 case was "the game for us."

Reporting by Joan Biskupic; Editing by Howard Goller, Amy Stevens and Douglas Royalty.

© 2013 Thomson Reuters. All rights reserved.