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From: Richard Socarides [mailto:]
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December 19, 2011

Obama, the Courts, and Gay Marriage

Posted by *Richard Socarides*

After a year in which we saw a number of high-profile gay-rights victories, including the repeal of “don’t ask, don’t tell” and the legislative enactment of same-sex marriage in New York, it’s hard to imagine that more big news is on the immediate horizon. But it is. Two highly significant court rulings in gay-rights cases pending in federal appellate courts are expected soon. Moreover, President Barack Obama’s self-described “evolution” on same sex-marriage appears likely to end with a strategically timed (if low-key) pre-election announcement of his support for marriage equality.

In *Perry v. Brown*, the Ninth Circuit Court of Appeals is being asked to address a lower court decision striking down California’s voter-approved Proposition 8. If the court upholds the earlier ruling, it would restore same-sex marriage in California, making that right available to a total of almost twenty-five per cent of all Americans, in seven states and the District of Columbia.

Gill v. Office of Personnel Management, which is before the First Circuit, asks whether the Defense of Marriage Act should be declared unconstitutional. That law prohibits the federal government from recognizing same-sex marriages legally preformed in states which allow them.

Many of the lawyers who follow these cases closely—and as one who served as an adviser to President Clinton on gay rights, I include myself in that category—believe that the odds favor marriage advocates. If so, these twin rulings from influential courts will have a substantial impact. The Supreme Court would likely hear final appeals by 2013.

The potential for those decisions, together with a rapid change in public opinion in favor of marriage equality, have clearly become factors in President Obama’s thinking. As a result, I believe that he will announce his support for same-sex marriage before the 2012 election.

Until now, the President’s position has been based on political expediency. He has tried to have it both ways. He articulated a kind of a “separate but equal” policy—in support of “full rights” without

endorsing marriage. This may have provided a useful middle ground for a brief period, but it has now outlived its usefulness. Plus, most believed that the President was being disingenuous, since he actually supported same-sex marriage before he opposed it.

Obama wouldn't be doing this to energize his gay supporters. He accomplished that with the repeal of "don't ask, don't tell" and with new Justice Department policies that put the government on the side of equality advocates. Moreover, gay voters understand and dread all of the Republican alternatives.

Fifteen years ago, when I was on the White House staff, part of our challenge was figuring out how to give meaning and substance to President Clinton's opposition to any form of discrimination while steering clear of gay marriage, which at the time was too much of a political liability. Clinton often did that by speaking boldly about gay equality, connecting on an emotional level with Americans who cared about the issue. In doing so, he sent an important message of inclusion that still resonates.

During the Clinton years, gay marriage was a relatively new issue and most Americans did not yet understand it. No one could be "gay-married" anywhere. When the Republican-led Congress presented Clinton with the Defense of Marriage Act a few short months before the 1996 election, I and members of the White House staff struggled in vain to come up with ways the President could veto it and stay consistent with what was then his stated opposition to the granting of marriage rights. (Clinton has since changed his mind.)

But now, the remarkable new reality for Obama in this election is that supporting marriage equality is smart politics. A majority of independents and young voters already favor equal marriage rights. These are important voting blocks, and a key part of the President's reelection strategy. Support for gay rights will also help him energize liberals in the Party and others who think he has not acted boldly around core progressive issues such as immigration and the environment and on other civil-rights issues. Hard-right conservatives who strongly oppose marriage rights, meanwhile, will never support Obama anyway.

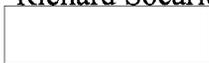
Moreover, just as an earlier court decision striking down "don't ask, don't tell" (*Log Cabin Republicans v. United States*) dramatically accelerated the President's push to repeal it, the pending marriage cases are having a substantial impact on his strategy.

If these federal appellate rulings come down in favor of gay rights, and especially if they are unambiguous in holding that the Constitution requires full access to civil marriage, the President will need to honor and abide by those rulings. Having a Democratic President, an African American at that, on the "wrong" side of federal-appeals-court rulings on civil rights is an untenable situation.

President Obama was, after all, a constitutional law scholar before he was President, and he has an important opportunity here to articulate his "evolved" view on same-sex marriage in a legal context. He needs to remind people that respect for the Constitution, the rule of law, and the courts are principles upon which this country was founded. As Americans living in a society that is dynamic and changing, we have always looked to the courts to interpret what it means to be part of our democracy.

Those principles should apply when it comes to marriage rights for gay and lesbian Americans. Having the President publicly endorse marriage equality will be an important symbolic and substantive turning point. It would likely accelerate the pro-equality shift in public opinion, including in minority communities. It will make it easier for federal judges, including Supreme Court justices, to rule in favor of gay rights in the face of arguments that doing so is out of the mainstream of American political thought. And it might just help get President Obama reelected.

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Richard Socarides



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