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Obama Won't Go to Court Over Defense of Marriage Act

by **Marc Ambinder**

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JUSTIN SULLIVAN/GETTY IMAGES

An opponent of California's Proposition 8, which banned same-sex marriages in the state, holding an American flag and a gay-pride flag during a December demonstration outside the 9th Circuit Court of Appeals in San Francisco.

Updated at 1:36 p.m. on February 23.

CORRECTION: The original version of this report had an incorrect year for DOMA's signing by President Clinton.

President Obama believes that the Defense of Marriage Act is unconstitutional and will no longer defend the 15-year-old law in federal court, the Justice Department announced today.

The decision, which stunned and delighted gay-rights activists, means that the administration will withdraw its defense of ongoing suits in two federal Appeals Courts and will leave it to Congress to defend the law, known as DOMA, against those challenges. It will remain a party to the lawsuits. The law itself remains in effect.

DOMA, signed by President Clinton in 1996, allows states not to recognize same-sex marriages performed in other states and provides a federal definition for "marriage" that excludes same-sex couples.

In a statement, Attorney General Eric Holder said, "After careful consideration, including a review of my recommendation, the president has concluded that, given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny."

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He said that Obama also concluded that Section 3 of DOMA, which defines “spouse” as a member of the opposite sex, “fails to meet that standard and is therefore unconstitutional. Given that conclusion, the president has instructed the department not to defend the statute in such cases. I fully concur with the president’s determination.”

Holder notified Congress of the president’s decision. Members can decide whether to pursue their own challenges.

The announcement by the Justice Department came just minutes before White House press secretary Jay Carney’s regular briefing. Carney took care to press upon reporters that the president’s personal view about DOMA -- that it is unfair to gays and lesbians -- is distinct from the decision. The announcement from the administration came because of a court-imposed deadline from the 2nd Circuit.

Carney also said that the U.S. government will still be a party to these cases to allow the courts to make a recommendation about constitutionality and to allow other interested parties, such as Congress, to defend the law if they wish.

“We recognize and respect that there are other points of view,” Carney said.

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.

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.

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.

The president has won favor with the gay community recently by pushing for and winning repeal of the “don’t ask, don’t tell” policy for gays serving in the military, which the lame-duck Congress

passed in December. At that time, Obama reiterated his support for repealing DOMA but did not take further steps.

The administration has hinted, however, that its own legal strategy was evolving. According to an administration official, Robert Bauer has been reviewing the legal landscape since he became White House counsel in 2010. As the Justice Department noted today, in the 15 years since Congress passed the act, the Supreme Court has invalidated laws criminalizing gay sex, lower courts have ruled DOMA unconstitutional, and Congress agreed to abolish the ban on gays serving openly in the military.

The announcement today does not overturn the law. That would take an act of Congress or a final finding by the judicial branch, probably the Supreme Court. But it changes the vector of the legal cases considerably. Privately, the administration believes that five justices of the Court, including Anthony Kennedy, the swing vote, would find parts or most of DOMA invalid if the federal government withdrew its arguments in defense of it.

A spokesperson for the Human Rights Campaign, the largest gay-rights advocacy group, said it was notified just after 11 a.m. ET today.

“This is a monumental decision for the thousands of same-sex couples and their families who want nothing more than the same rights and dignity afforded to other married couples,” said HRC President Joe Solmonese. “As the president has stated previously, DOMA unfairly discriminates against Americans and we applaud him for fulfilling his oath to defend critical constitutional principles.”

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