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The New York Times

September 22, 2010

Despite Setback, Gay Rights Move Forward

By JOHN SCHWARTZ

Efforts that could lead to a reversal of the "don't ask, don't tell" policy that prohibits openly gay soldiers from serving in the military may have stalled in the United States Senate, but the legal fight is advancing in the federal courts along with other important gay rights litigation.

In addition to the military policy, two laws restricting gay rights — the federal Defense of Marriage Act and the California ban on same-sex marriage — have been declared unconstitutional by federal judges in recent months.

The fact that these decisions have come from federal courts signals a shift for activists on gay legal issues. Until recently, the activists' conventional wisdom held that gay rights cases should work their way through state courts, which were viewed as more accommodating than the federal judiciary.

But the three recent decisions on gay rights issues suggest that federal judges are increasingly willing to strike down what they see as antigay bias embodied in legislation, said Erwin Chemerinsky, the law school dean at the University of California, Irvine.

"Federal judges are no longer persuaded that a moral condemnation of homosexuality justifies government discrimination," he said.

The path ahead for the litigation in all three cases is long, difficult to predict and risky, legal experts say. The ultimate question is whether a majority of justices on the United States Supreme Court will agree with the district court judges' interpretation of the court's own rulings in cases like Lawrence v. Texas, a case that struck down a state sodomy law.

That decision marked a turning point in federal litigation on gay and lesbian legal issues, said Daniel R. Pinello, a professor at the John Jay College of Criminal Justice of the City University of New York. Before Lawrence, the federal courts had seemed largely inhospitable to gay rights cases, he said.

"The most strategic approach was to look at state action, not federal action, because a United States Supreme Court and federal judiciary dominated by Republican appointees did not provide a very favorable risk analysis for litigation," Professor Pinello said.

In the 6-to-3 majority opinion in Lawrence, Justice Anthony M. Kennedy wrote of due process rights associated with "autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct."

While Justice Kennedy argued that the decision did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," Justice Antonin Scalia angrily predicted in dissent that the majority opinion would, in fact, justify homosexual marriage.

Early interpretations of that decision have been tentative — the United States Court of Appeals for the 11th Circuit said Lawrence could not even be interpreted to overturn an Alabama ban on sex toys.

Since then, judges have shown themselves more willing to interpret Justice Kennedy's opinion in Lawrence as recognizing rights regarding personal relationships. Judge Vaughn Walker, the federal district judge in San Francisco who overturned Proposition 8, the California ban on same-sex marriage, quoted Justice Scalia's dissent in his decision.

To Richard Epstein, a libertarian legal scholar at New York University, the logic of the Kennedy opinion in Lawrence inexorably leads to a grant of rights against discrimination.

"There's just no way, once you start down that road, that you're going to get off of it," he said. "If you can't criminalize it, you can't discriminate against it."

While saying that he is "no seer," he predicted that if the three cases made their way to the Supreme Court, Justice Kennedy would ultimately write majority opinions that upheld the three recent district court opinions.

He added, however, that in his view as a self-described "Constitutional fuddy-duddy," the argument for finding legal rights based on sexual orientation is not as compelling as racial rights under the equal protection clause.

"Politically, I am in sympathy with them," he said. "Constitutionally, I'm not."

The district court judges are reflecting an increasingly obvious shift in public opinion, said Andrew Koppelman, a professor of law atNorthwestern University. "The gay rights movement has been a spectacularly successful movement for cultural change," he said. "A few decades ago

these people were cultural pariahs. It was taken for granted that gay people are mentally ill, contaminated and unclean. Now the cultural valence has flipped — it is that view of gay people which is itself stigmatized."

As life-tenured appointees, judges can look beyond politics to posterity, Professor Koppelman said. "Right now it seems like a good bet that if you are friendly to gay rights claims," he said, "future generations will honor you for that."

President Obama has had an effect as well, said Jennifer Pizer, director of the national marriage project of the Western regional office ofLamba Legal, a public interest legal group for gay issues.

Activists have criticized the president for the Justice Department's defense of the federal laws being challenged, but he has also urged the repeal of laws that discriminate against gay men and lesbians.

"Having the president repeatedly say these rules discriminate and cause harm — so the discussion shifts to choice of processes for removing them rather than justifying them — seems to have changed the discussion," she said.

On that, Ms. Pizer and Tony Perkins, the head of the Family Research Council, agree, though he deplores the trend. "I think he's creating an environment in which the courts feel comfortable pushing the envelope with these decisions," Mr. Perkins said.

He argued that the change in the courts is little more than judicial activism. "As much as the courts would like to contend that they are not political, it's simply not true," he said.

Douglas NeJaime, an associate professor at Loyola Law School in Los Angeles, applauded the recent interpretations of Lawrence, but said the legal tactic involves "tremendous risk" as the cases rise to the Supreme Court.

"Eventually, the court is going to have to clarify what the court said in Lawrence," Mr. NeJaime added. "And it might not be what these judges are saying."

Professor Epstein warned that victory for gay rights advocates carried risk as well.

"I feel if you waited five years, the whole thing would go away" as public opinion continues to shift, he said. "It would be terrible if this were like the abortion cases, and for the next 40 years you were fighting a rear-guard action."