



Last week, I sent an update that the federal government would soon be weighing in on how to defend the Defense of Marriage Act in two upcoming cases, one of which was brought by the ACLU and the Paul Weiss law firm on behalf of widow Edie Windsor<<http://www.aclu.org/lgbt-rights/windsor-v-united-states>>.

Today, we received incredible news:

- 1) The Obama administration agrees with what we've been saying for years - that when the government treats gay people differently than straight people, it's got to have a very good reason for the discrimination (this is what courts call applying "heightened scrutiny").
- 2) The administration agrees that it doesn't have a good reason for respecting the marriages of heterosexual couples while pretending that married same-sex couples aren't actually married (which is what DOMA does, after all).
- 3) Since the administration doesn't have a good reason for the discrimination, it's going to stop defending DOMA, both in our case and in others.

Up until now, the federal government has taken the position that discrimination against lesbians and gay men is almost always OK, that it's presumed to be constitutional. Today they've recognized that, under the proper constitutional analysis, the government needs a good reason to treat gay people differently from everyone else.

The shift is quite simply amazing. Amazing to have a government that decides an important issue of constitutional law based on principle rather than politics. Amazing to see a government switch gears when faced with a case that requires it to address the legal issues head-on. And amazing because of what this means not just for DOMA, but for LGBT rights more broadly.

If the courts ultimately agree that heightened scrutiny applies whenever the government treats gay people badly, then it's not just DOMA that becomes hard to defend. So do state adoption and foster parenting laws that exclude gay people. And states' refusals to provide health care benefits or pension protections to the domestic partners of state workers. And public schools' decisions to ignore anti-LGBT harassment or exclude same-sex couples from the prom. And government rules like the military separation pay disparity that we've challenged in court. Heightened scrutiny will affect every nook and cranny of LGBT rights law.

For a constitutional lawyer, moments like this don't come around very often. Today is a day when America's commitment to the rule of law has been reaffirmed. Our Constitution

promises that the government will treat everyone equally, and today's announcement is a recognition that that constitutional promise applies to LGBT people, too. It doesn't get much better than that.

What's next in the short run for the DOMA cases is that the House gets to decide whether to hire its own lawyer to defend DOMA now that the Department of Justice no longer will. Assuming the House does that, we'll soon be in court pressing our case, regardless of what defense they conjure up.

The Attorney General's letter to House Speaker John Boehner is available here: <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>, and a statement is pasted below.

Thank you so much for your support of the ACLU, which allows us to push forward like this. It means a lot to all of us here.

Best,  
James