



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

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MEMORANDUM

TO: Jack Quinn
Counsel to the President

FROM: John R. Schmidt (JRS)

SUBJECT: Federal Same Sex Marriage Legislation

Attached is a copy of the federal same sex marriage statute introduced into the House this week. The statute has two components:

First, the statute provides that states shall not be obligated by the Full Faith and Credit Clause to give effect to a same sex marriage recognized by another state. As set forth in my earlier memo, it is well-established law that the Full Faith and Credit Clause does not require a state to give effect to the public act of another state if that act violates the first state's public policy. Thus, it is already clear that states which do not wish to do so will not be obligated to give recognition to a same sex marriage even if Hawaii (or some other state) recognizes such marriages. On this matter, therefore, the proposed federal statute is unnecessary, although also harmless.

Second, the statute provides that a same sex marriage will not be recognized as a marriage for purposes of any federal statute, rule, or regulation. This part of the statute does deal with a real issue. If Hawaii recognizes same sex marriages, the question will arise whether such marriages are to be recognized for the purposes of a range of federal statutes. Absent legislation like the proposed statute, it is conceivable that courts (or agencies) would determine that same sex marriages should be recognized for some or all of these federal purposes. Examples of federal statutes which make eligibility, benefits, or other matters dependent on the existence of a marriage include:

Income and estate tax laws -- under which various provisions are applicable solely to married couples;

Social security and other benefit programs -- under which the amount or eligibility for various benefits depends upon the status of being currently married or upon being the survivor of a marriage;

Family leave act -- which has various provisions specifically applicable to situations involving spouses or other family members;

ERISA -- which has various provisions for required coverage of surviving spouses under pension plans;

Student loan programs -- which provide for consolidation of loans to married couples under certain circumstances.

There are many other instances of federal statutes which utilize marriage (or married couples or spouses) as an applicable category.

Given the President's opposition to same sex marriage, it would seem to follow that he would support a federal statute denying recognition to such marriages for federal purposes. Put another way, it is hard to see how one could say one is against same sex marriages, but nevertheless support the recognition of such marriages for various federal purposes.

Conceivably one could try to say one opposes same sex marriages but believes that the issue of recognition should be left to the states. However, the federal government inevitably must make a decision for itself on whether to recognize such marriages for various federal purposes. If one says that the federal government will recognize such marriages when they are validated by a particular state such as Hawaii, then one is saying that the federal government -- unlike the overwhelming majority (perhaps all) of the other states -- does not have a public policy against such marriages.

One might try to narrow any federal recognition down further by saying that the federal government would recognize such a marriage only for couples located within the particular state where it has been validated. However, that would still put the federal government in the position of recognizing such marriages, which it would not do if it has a public policy against them. Moreover, as a practical matter it would be unworkable for most federal purposes to have the recognition of married status depend upon where a couple (or a current member or the survivor of a marriage) is located -- that would mean, for example, that someone might be entitled to certain benefits as long as he was living in Hawaii, but lose them if he moved to Montana.

The second part of the statute, therefore, raises a real issue which cannot be evaded. Given the President's opposition to same sex marriage, it would seem to me to make sense to make clear as quickly as possible that, in light of that opposition, he supports enactment of the proposed statute.

Attachment