



*A new beginning: Policy recommendations to improve the lives of LGBT people and eliminate discrimination from federal policies*

## OFFICE OF THE PRESIDENT

### ISSUE: JUDICIAL NOMINEES

#### THE IMPORTANCE OF THE JUDICIARY

During the next presidential administration, the nomination of judges to the federal bench will have a great impact on a variety of issues that affect every aspect of LGBT people's lives. There are 871 judgeships with lifetime appointment in the federal court system. With 36 of these lifetime judgeships currently vacant as of October 28, 2008, the next president will likely have that many, if not more, federal judicial appointments to make upon taking the oath of office on January 20, 2009. One of the first issues the next president will face is making nominations to fill vacancies in the District, Appellate, and Supreme Court level federal courts. As more federal judgeships become vacant during the president's term in office, his impact on the federal judiciary widens tremendously. These judges often will remain on the bench many years after the president leaves office.

#### ISSUES THE FEDERAL JUDICIARY WILL LIKELY CONSIDER

During the coming administration, a number of key issues that significantly impact the LGBT community are likely to arise in the federal courts. Ensuring that federal judges are fair-minded and approach the decisions they make without prejudice is of utmost importance both for our legal system and for the rights of those who our legal system has the highest obligation to protect. Some of the issues federal courts may consider during the new administration's tenure are:

- The proper application of *Lawrence v. Texas*, 539 U.S. 558 (2003);
- The constitutionality of attempts to prohibit the passage or enforcement of laws protecting LGBT people against discrimination;
- The availability of religious freedom defenses to antidiscrimination laws;
- The scope of federal preemption of state antidiscrimination laws;
- The ability to sue individuals for violation of federal constitutional rights;
- The scope of Title VII's prohibition on discrimination against those who are perceived as not conforming to gender stereotypes;
- The right of prison inmates to receive necessary gender identity-related treatment.



*A new beginning: Policy recommendations to improve the lives of LGBT people and eliminate discrimination from federal policies*

- The Full Faith and Credit due adoption and custody decrees;
- Adjudication of who is a person's child for purposes of Social Security benefits;
- The constitutionality of the military's "Don't Ask, Don't Tell" policy and the law on which it is based;
- The constitutionality of the Uniform Code of Military Justice's criminalization of sodomy;
- The coverage of and defenses available under the Americans with Disabilities Act;
- The ability of schools to condition certain benefits sought by campus organizations on compliance with school nondiscrimination requirements;
- The availability of Gay-Straight Alliances (GSAs) to meet on school campuses;
- The free speech rights of LGBT students; and,
- The availability of asylum for LGBT and HIV-positive people persecuted in their home countries.

### **THE JUDICIAL PHILOSOPHY OF A FAIR-MINDED JUDICIAL NOMINEE**

When nominating people to the federal bench, the president should take a variety of considerations into account. The first and foremost consideration should be the judicial philosophy of the judges, which should include a commitment to render decisions impartially and in accordance with the U.S. Constitution and the laws of the United States. The President's judicial nominees should be able to:

- Rule fairly and impartially in cases involving LGBT litigants.
- Comply with legal precedent established in *Lawrence v. Texas* that the right to liberty under the due process clause gives individuals the right to engage in private, adult, consensual, noncommercial sex without interference by the government, and that this right belongs as much to lesbians and gay men as it does to heterosexuals.
- Adhere to legal precedent, established in *Lawrence v. Texas*, that under our U.S. Constitution religious beliefs about sexuality and the "traditional family" cannot be the sole basis for the enactment and enforcement of criminal laws. Judicial nominees also should adhere to *Lawrence's* holding that lesbians and gay men are entitled under the U.S. Constitution's protection of liberty to the same autonomy as heterosexuals in making personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education.



*A new beginning: Policy recommendations to improve the lives of LGBT people and eliminate discrimination from federal policies*

- Follow the legal precedent established in *Romer v. Evans*, 517 U.S. 620 (1996), that when a law can be explained only by antigay bias, it violates the equal protection clause.
- Adhere to legal precedent established in *Roe v. Wade*, 410 U.S. 113 (1973), that the constitutional right to privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.
- Follow legal precedent established in *Tennessee v. Lane*, 541 U.S. 509 (1978), that Congress acted within its power in providing disabled individuals the right to sue in state courts under the Americans with Disabilities Act, which was subsequently codified by the ADA Amendments Act of 2008.
- Observe legal precedent established in *Bragdon v. Abbott*, 524 U.S. 624 (1998), that HIV infection is a disability that limits one or more major life activities, and therefore HIV discrimination is covered by the Americans with Disabilities Act.
- Carry out legal precedent established in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that treating employees differently in the workplace based on whether they conform to sexual stereotypes is a form of sex discrimination that is prohibited by Title VII of the Civil Rights Act of 1964.

The importance of these tenets of judicial philosophy extend far further than the impact that they have on the LGBT community. Indeed, adherence to these ideals of judicial precedent and impartiality are the very foundation on which this country's judicial system is built. Selecting judges that fail to meet these simple criteria undermines the system as a whole by establishing a biased judiciary. Making educated and qualified selections for the federal bench is one way that a president's legacy lasts long after his or her tenure as leader of this country.