

THE HUFFINGTON POST

THE INTERNET NEWSPAPER: NEWS BLOGS VIDEO COMMUNITY

Five (or So) Questions I Put to Superlawyer Ted Olson About Gay Marriage and Prop 8

By: Michelangelo Signorile

June 23, 2014

Superlawyers Ted Olson and David Boies have a new book, *Redeeming the Dream: The Case for Marriage Equality*, their account of taking on California's Proposition 8, getting it ruled unconstitutional and moving marriage equality forward. And since the publication of Jo Becker's controversial *Forcing the Spring*, it's fair to say that the Prop 8 legal team, and, more so, Human Rights Campaign president Chad Griffin, who formed the American Foundation for Equal Rights and hired Olson and Boies to take on Prop 8, have been on the defensive.

Becker came under fire for not giving credit to Evan Wolfson, Mary Bonauto, Andrew Sullivan and others who were at the forefront of the marriage-equality movement, while comparing Griffin to Rosa Parks. She was accused in various reviews of compromising distance and criticism in return for access. I too criticized Becker not only for ignoring grassroots and netroots activists in the fight but for making the Prop 8 case seem so pivotal when in fact it was the case of Edie Windsor and the striking down of the Defense of Marriage Act that has led to federal judges ruling state gay-marriage bans unconstitutional almost every week. Becker also claimed, without quoting any legal scholars, that it was, in essence, Olson's arguments on Prop 8 before the Supreme Court that won the Defense of Marriage Act case for Roberta Kaplan, Windsor's attorney (for more on that, see my review), portraying Kaplan's argument as narrow. A lot of us have wondered what Olson and Boies thought about Becker's book.

Some legal scholars have also privately told me that it surprised them to read that more than \$6 million was paid to the firm where Olson is a partner, Gibson, Dunn & Crutcher, since high-powered firms almost always take civil-rights cases *pro bono*. Kaplan, for example, a partner at Paul, Weiss, Rifkind, Wharton & Garrison, took on the *Windsor* case *pro bono*.

Another question people are wondering about: Olson and Boies joined Lambda Legal and the ACLU in a case challenging Virginia's gay-marriage ban, and they prevailed when it was ruled unconstitutional last February. In May the appeal was heard before the Fourth Circuit Court of Appeals, but, as in the Prop 8 case, the governor and the attorney general did not appeal the ruling. The Supreme Court decided that the Prop 8 proponents, whom Chief Justice John Roberts, in his majority opinion, compared to "concerned bystanders," didn't have legal standing to appeal. So the court didn't rule on Prop 8. Of course, Olson and Boies had hoped that the court would do so and strike down all gay-marriage bans across the country (though they still see it as a big win that the lower court ruling stood, returning marriage equality to California). So some

legal observers have wondered whether the county clerks who are appealing in Virginia will have standing at the Supreme Court.

I interviewed Ted Olson, a lifelong Republican and former solicitor general under George W. Bush, last week on SiriusXM Progress and put these and other questions to him. This is a condensed version of that interview.

Things have changed in the culture dramatically. Not so much in the Republican Party -- I mean, a bit. How do you see this issue moving forward when so much of the conservative base of the party, the religious base of the party, is still opposed to gay marriage?

Well, I think we're making lots of progress. But it's gradual. But it is discernible. In the first place, I think, as you know better than anyone, if you take a poll of the younger people in this country, including younger citizens who identify themselves as Republican, the numbers of people who support marriage equality is growing reasonably rapidly. In the conservative part of the Republican Party, or the conservative portion of this country that thinks of themselves as libertarians, that's moving fairly rapidly. The Cato Institute, one of the most prominent think tanks of conservative libertarian America, is very much supportive of our case, including the chairman, Bob Levy, who went on the board of our foundation [American Foundation for Equal Rights] that we created to move forward with this. Some Republicans, including three Republican senators, came out for marriage equality. Some Republicans just don't want to talk about it anymore because they realize the public is in front of them on this. So I think that things are changing.

Are you worried about the standing issue [in *Bostic v. McDonnell*], because again, there [in Virginia], the governor and the attorney general are not defending the case [as in California with Prop 8, in which the Supreme Court denied standing to the Prop 8 proponents].

It's a good point. But it's slightly different because in an unusual quirk, in Virginia the clerks in the counties have individual standing with respect to the issuance of marriage licenses. So two of the clerks in Virginia have appealed. And so far it's been acknowledged that they do have standing to bring the appeal. And it really didn't become any issue at all in the Fourth Circuit Court of Appeals. So we think the standing situation is different there, and that their standing would be upheld, so we don't have that problem. But at the same time there are challenges going on all over the United States. As you know, 13 federal district judges, appointed by Republican and Democratic presidents, all over the country -- Texas, Kentucky, Oklahoma, Utah, Pennsylvania -- have uniformly struck down bans on marriage to a person of the same sex. So there's a tide coming in California [with the striking down of Prop 8], and one of those cases are almost surely to come to the United States Supreme Court.

You and David discuss history [in *Redeeming the Dream*]. David Boies, in a chapter, talks about the history of the marriage movement, obviously before Prop 8. As you know, *Forcing the Spring*, the book by Jo Becker -- the author, a woman who had worked with you as she wrote the book, a *New York Times* reporter -- she came under a lot of criticism for not presenting that prior history, not talking about some of those people. As I said, your

book -- David Boies does talk about it. But Nathaniel Frank reviewed the book on Slate, and he feels that your book still does not give the credit to the history before, and that you're critical of the incrementalist approach of the gay advocates at Lambda Legal and Gay and Lesbian Advocates and Defenders, who were winning cases in the states, and that their plan, he says, *was* to eventually move to the federal level. They just wanted to win enough states to take it to the federal. And I guess some would argue, "Isn't that what happened with the Defense of Marriage Act? A federal case was won and now the states are being won." So I guess he's taking issue with what you're saying about the incrementalist approach because in the end [that worked], with DOMA actually helping to be the first federal case that then helped with that incremental approach.

Well, there's two parts to that, and I think it's a fair point. With respect to all the lawyers and pioneers who have gone before with respect to marriage equality, we possibly could have addressed that more in this book, although our publishers wanted us to write a story of this case. But every time we had an opportunity, we talked about the barriers that had been broken before, the cases that had been won before. We read those briefs. We cited those articles. We cited those books. We used assistance from the lawyers who had worked on those cases in marshaling the evidence that we put on in the Prop 8 case. We don't think for a moment that we could have done any of this without the work that was done before. And that was prodigious work. And people are working all across the country hopefully to get to the same goals.

With respect to the incremental approach, we did address that in the book. We knew, and the people that asked us to take this case, that someone was going to file a lawsuit in California challenging Proposition 8. One of the things that people who contacted us were concerned about, that if there was such a challenge -- and surely there would be in California, I mean, it was inevitable -- that if there was going to be a challenge, that it be done with the proper plaintiffs, in the proper court, with the proper foundation, with the proper resources, so that if it did get to the Supreme Court of the United States, it would have the proper foundation that would best enable it to be a successful case. And we felt that, when we talked before we filed the suit, by people that were interested in going back and raising money and putting the issue back to the ballot in California, they had raised some \$40 million and had lost. And there was some talk about, "Well, there might be a better Supreme Court in the future; there might be different justices on the Supreme Court." But no one knows when someone is going to resign from the Supreme Court. No one knows when there's going to be a vacancy. There's a lot of uncertainties here. And by the end of the day, the groups that were reluctant to join this case and go forward ultimately did support the case.

You do agree that the Defense of Marriage Act case, the *Windsor* case, really was enormously pivotal? If we didn't have that, and we [just] had the Prop 8 [proponents] not [getting] standing at the Supreme Court, we certainly wouldn't have seen the momentum we've seen now with all of these states and all of these federal judges using the Defense of Marriage Act ruling, the *Windsor* ruling, right?

Oh, absolutely. The record that was built before, in the California case, with all the witnesses and the 134 pages of finding of fact and conclusions of law, have been an important part of the

federal district decisions that have come since then. But the decision in the *Windsor* case, the Defense of Marriage case, was absolutely extremely important. Justice Kennedy's language in that case is extremely powerful, and every single one of these judges has cited that case for very, very good reasons. I think the combination of the two cases advanced the legal frontier, but it also helped advance the frontier of public opinion, so that the changes that have occurred in public opinion have been attributable to the work of a lot of people. And I think -- but I don't know, I just think -- that a lot of that has been contributed by both of those cases and particularly the combination of the two, in a way that the sum of the parts is greater than the parts.

The Jo Becker book [*Forcing the Spring*] -- it got a lot of criticism, and certainly it was very contentious with a lot of people. One thing she said -- and I wanted to get your thoughts on it -- one thing she posited was that the arguments by Roberta Kaplan in the Defense of Marriage Act case, in the *Windsor* case, before the court were very narrow, and that she was sort of almost attributing her win to your arguments in [the] Prop 8 [case]. And it was something I criticized her on in a review I wrote of the book. [I] wanted to get your thoughts on that, because Roberta Kaplan has always talked about that case as very much about gay rights, not just a narrow tax issue, but the way that Becker described it, [Kaplan] made it narrow and you really made the case with Prop 8 that convinced the justices on DOMA.

Well, I agree that Robbie Kaplan did a fabulous job. And we read her briefs. And she was, from the very beginning, anxious to take this case. She took this case on because she believed extremely strongly in the right of individuals to be treated equally under the Constitution of the United States. She made those arguments very, very forcefully. We worked together with her. She participated in the moot courts that we employed to get me prepared for the arguments in the Supreme Court. And we participated in the moot courts helping her get prepared for the Supreme Court. [A]nd the ACLU was involved, other organizations were involved. Paul Smith, who is a fabulous lawyer in this field from Lambda, was very much involved in our preparation and was on the moot court that I prepared. I think it's important that the fundamental issues of decency, equality, liberty, association, and the end of discrimination in this country is all over her briefs and was very much in her arguments, and I felt that they were very strongly in our arguments. I looked at the brief that we filed -- I just looked at it again today -- and that's how we started and ended the briefs. But she did too. I think it was very important. It was two straight days of argument. We argued on a Tuesday, and she argued on a Wednesday. We were both making the same points. And it was important that two different perspectives were coming together to achieve the same end.

As I said earlier, I supported bringing Prop 8 to federal court, as did many people. ... I think it did change, dramatically, a lot of public opinion as well. I'm curious about your response to the criticism about your firm taking money for the case. People have said that when you have a civil-rights case, they're done *pro bono* by law firms such as yours, and that in this case it was done differently. Chad Griffin formed a group, the American Foundation for Equal Rights, and they hired you guys to do this. How do you respond to that criticism from some in the legal circles?

Well, I understand the point. [B]y the way, David Boies and his firm contributed every bit of their time and energy. Of the 32,000 hours of legal time [my firm contributed], most of it was lawyers, and most of it was partners in our firm; there were paralegals and so forth. Of the 32,000 hours, three fourths of it was contributed. But we also knew going into this case that it was going to be exceedingly expensive. We ultimately had eight expert witnesses from all over the world testify for this case. And we wanted a community coming together for this so that it wasn't just lawyers involved in this case. It turned out that was a good thing to do to encourage other people to invest in the case, to become owners in the case, so to speak, because the people in the entertainment world in southern California, for example, came together. They encouraged other people to do it. We received a lot of funding that helped with all of these expenses from people in the financial community in New York City. They, in turn, because they were involved in the case, and persuading other people, helped persuade the New York Legislature, including some Republican senators in New York, to change the laws in New York. Looking back at it, we could have done it a different way. But it's very hard to put that kind of investment in something like this unless you have some support along the way. And I found that it was very valuable. The list of our investors, the American Foundation for Equal Rights, the people that wrote things, the people that helped solicit *amicus* briefs and that sort of thing, all felt that they were part of a team, bringing this all to fruition at the end of the day, and I think that was healthy.

I think the figure in the end, the figure I've seen, was \$6 million. Do you agree with that?

It was something south of that. But ... if you would have looked at what the charge for our services would have been had we been using our normal billing rights to a corporate client, was something approaching \$22 million. So three fourths of it was contributed.

This has obviously changed your life. Just reading the book, you see that, the whole direction, certainly, in your trajectory as an attorney. Where do you see it going now?

Obviously you may be headed to the Supreme Court, although nobody seems to know what the path will be. I'm curious about what you think the path will be.

I think that one of these cases, the two cases in the 10th Circuit, which involve Utah and Oklahoma, might get to the Supreme Court. The Virginia case might get to the Supreme Court. There are other federal cases that, depending upon when they're decided, might get to the Supreme Court, or there might be some combination of these cases presented to the Supreme Court. It has affected me enormously. I've learned so much about myself. I've learned so much about my fellow citizens. The people involved in this case, the plaintiffs involved in the case, have touched me deeply.