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Washington, D.C. 20530

DATE: May 31, 1996

FACSIMILE TRANSMISSION SHEET

FROM: Walter Dellinger OFFICE (202) 514-2051
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TO: Jack Quinn OFFICE (202) 456-2632
Kathleen Wallman ✓
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**U. S. Department of Justice****Office of Legal Counsel**

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

May 31, 1996

**NOTE FOR JACK QUINN
COUNSEL TO THE PRESIDENT**

From: Randolph D. Moss *RD*
Deputy Assistant Attorney General
Office of Legal Counsel

Re: Section 2 of the "Defense of Marriage Act"

Walter asked that I send you and Kathy copies of the attached memorandum, which we have prepared principally for internal OLC use. We do not currently anticipate any broader circulation of the memorandum. Please feel free to call if we can answer any questions raised by the memorandum.

cc: Kathleen Wallman
Deputy Counsel to the President



U. S. Department of Justice

Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D. C. 20530

May 31, 1996

**MEMORANDUM FOR WALTER DELLINGER
ASSISTANT ATTORNEY GENERAL**

From: Randolph D. Moss *ROM*
Deputy Assistant Attorney General

H. Jefferson Powell *JP*
Deputy Assistant Attorney General

Re: Section 2 of the "Defense of Marriage Act"

As you know, the President has stated that he intends to sign the Defense of Marriage Act (the "Act"), if and when it is presented to him. Although we have previously indicated that we believe that the Act, if challenged, will withstand judicial scrutiny, a recent short article in the New York Times by Professor Laurence H. Tribe appears to take issue with that conclusion. See Laurence H. Tribe, Toward a Less Perfect Union, N.Y. Times, May 26, 1996 at E11 ("N.Y. Times"). We have studied the article and have reviewed our prior analysis, and we remain convinced that the courts will uphold the Act against constitutional challenge. Professor Tribe's article reaches a contrary conclusion only by reading the Act -- inappropriately, we believe -- to permit a state to decline to recognize same sex marriages even where the state has not manifested a strong public policy against same sex marriage.

I.

The Defense of Marriage Act would add a new section to the portion of the United States Code that implements the Full Faith and Credit Clause of the Constitution, see U.S. Const. art. IV, § 1. That section would, in relevant part, provide:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that

is treated as a marriage under the laws of such other State, territory, possession or tribe, or a right or claim arising from such relationship.

H.R. 3396, sec. 2(a); S. 1740, sec. 2(a).¹

Professor Tribe argues that Congress lacks authority, under the Full Faith and Credit Clause or otherwise, to enact such a provision. Although he concedes that a state may "decline to enforce certain determinations of another on 'public policy' grounds," such as declining to recognize a bigamous marriage entered in another state, the states may do so, as Professor Tribe notes, without any special "Congressional license." See N.Y. Times at B11. The Act, in Professor Tribe's view, must thus be construed to do more than this, and to permit a state to refuse to give effect to same sex marriages entered in another state, even where the forum state lacks a sufficient public policy ground for doing so. In short, Professor Tribe construes the Act to grant states "authority to treat a sister state's binding acts as though they were the acts of a foreign nation -- authority that Congress has no constitutional power to confer." Supra.

Without reaching the question whether Congress has authority to set full faith and credit standards that might fall short of those that would apply without an act of Congress, we conclude that Professor Tribe's analysis is flawed. In our view, section 2 of the Act is properly construed simply to permit states that have a strong public policy opposed to same sex marriage, as manifested, for example by a statute declaring such a policy, to decline to recognize such marriages entered in other states. Under this construction, the provision raises no serious constitutional issue, but simply implements the long-settled rule that the Full Faith and Credit Clause makes the conflict of law rules enforceable as a matter of constitutional law. This approach, moreover, properly construes the Act so as to avoid a serious constitutional issue, and does not, as Professor Tribe suggests, render the Act meaningless.

II.

Article IV, section 1 of the Constitution contains two separate clauses.² The first, which we will refer to herein as the "Full Faith and Credit Clause," states:

¹ The Act would also amend title 1 of the United States Code to provide that, for the purpose of interpreting "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." H.R. 3396, sec. 3; S. 1740, sec. 3. We believe that, if challenged, the courts would also uphold this provision, which establishes a uniform definition of marriage for purposes of federal law. Because the Tribe article does not take issue with the constitutionality of this provision, we do not address it herein.

² Although all of section 1 of Article IV is sometimes referred to as the "Full Faith and Credit Clause," for purposes of clarity, we will refer to the two sentences separately.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

The second sentence, which we will refer to as the "Effects Clause," adds:

And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effects thereof.

It is clear that the first sentence of Article IV, section 1 cannot be construed literally. As the Supreme Court observed in Alaska Packers Ass'n v. Industrial Accident Commission, 294 U.S. 532, 547 (1935), "[a] rigid and literal enforcement of the full faith and credit clause, without regard to the statute of the forum, would lead to the absurd result that, wherever the conflict arises, the statute of each state must be enforced in the courts of the other, but cannot be in its own." See also Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law, 92 Colum. L. Rev. 249, 295-96 (1992). It has long been recognized that the Full Faith and Credit Clause does not require such an absurdity, but rather makes "conflicts principles enforceable as a matter of constitutional command rather than leaving enforcement to the vagaries of the forum's view of comity." Sun Oil Co. v. Wortman, 486 U.S. 717, 723 n.1 (1988).

The Supreme Court, moreover, has repeatedly held that the governing conflict of laws rules -- and thus the Full Faith and Credit Clause -- do "not require a State to apply another State's law in violation of its own legitimate public policy." Nevada v. Hall, 440 U.S. 410, 422 (1979); see also Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493, 502 (1939); Alaska Packers Ass'n, 294 U.S. at 546; Hood v. McGehee, 237 U.S. 611 (1915); Olmsted v. Olmsted, 216 U.S. 386 (1910). Although the Supreme Court has never had occasion to decide whether the public policy exception provides a constitutionally adequate basis for a state to decline to recognize a marriage validly entered in a sister state,³ numerous state courts have applied the exception in this context. These courts have concluded that a marriage valid in the state where it was entered need not be given effect in the forum state, if to do so would contravene a strong public policy of that state.⁴ Indeed, as far as we are aware, no judicial

³ Cf. Loughran v. Loughran, 292 U.S. 216, 223 (1934) ("Marriages not polygamous or incestuous, or otherwise declared void by statute, will, if valid by the law of the State where entered into, be recognized as valid in every other jurisdiction").

⁴ See, e.g., Smith v. Goldsmith, 134 So. 651 (Ala. 1931); State v. Graves, 307 S.W.2d 545 (Ark. 1957); Colbert v. Colbert, 169 P.2d 633 (Cal. 1946); Spencer v. People, 292 P.2d 971 (Colo. 1956); Catalano v. Catalano, 170 A.2d 726 (Conn. 1961); Godt v. Godt, C.A. 90C-JA-5Z, 1990 WL 123047 (Del. Super. Ct. Aug. 7, 1990); Goldman v. Dithrich, 179 So. 715 (Fla. 1938); Christopher v. Christopher, 31 S.E.2d 818 (Ga. 1944); Stevens v. Stevens, 136 N.E. 785 (Ill. 1922); In the Matter of the Estate of Owen C. Loughmiller, 629 P.2d 156 (Kan. 1981); Mangrum v. Mangrum, 220 S.W.2d 406 (Ky. 1949); Succession of Gabisso, 44 So. 438 (La. 1907); Henderson v. Henderson, 87 A.2d 403 (Md. 1952); Green v. Kelley, 118 N.E. 235 (Mass. 1918); People v. Steerc, 151 N.W. 617 (Mich. 1915); Laikola v. Engineered Concrete, 277

decision -- state or federal -- has reached a contrary conclusion. States have declined to recognize on public policy grounds bigamous and polygamous marriages, incestuous marriages, and for some period of time, interracial marriages.⁵

We note that the Act does not provide the forum state with authority to invalidate a marriage entered in a sister state, but rather provides only that the forum state is not "required to give effect to" a same sex marriage entered in another state. This distinction is an important one under the controlling conflict of laws rules. In general, a forum state may only declare a marriage entered in another state invalid if the forum state "had the most significant relationship to the spouses and the marriage at the time of the marriage." Restatement (Second) of Conflict of Laws § 283(2). In contrast, regardless of whether the forum state had significant contacts with the individuals or marriage at the time of the marriage, "[a] state [need] not give a particular incident to a foreign marriage when to do so would be contrary to its strong local policy." Id. at 284, cmt. c (emphasis added). Examples of the "incidents" of marriage include the rights lawfully to cohabit, to share in marital property, and to obtain an intestate share of the estate of a deceased spouse. See id. at cmt. a.

We are left with little doubt that the courts would not construe the Full Faith and Credit Clause to require a state, in contravention of its own strong public policy, to give effect to a same sex marriage entered in another state. See Joseph W. Hovermill, A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same Sex Marriages, 53 Md. L. Rev. 450, 481-93 (1994); Barbara J. Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 Wis. L. Rev. 1033, 1082-98.

III.

Professor Tribe does not take issue with this conclusion, and, indeed, appears to concede that the case law under the Full Faith and Credit Clause permits a state to decline, on the basis of a strong public policy, to recognize a marriage recognized in another state. Rather, he seems to argue that the Act must be construed to do more than this. We disagree.

N.W.2d 653 (Minn. 1979); In re Matter of May's Estate, 114 N.E.2d 4 (N.Y. 1953); Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958); Sturgis v. Sturgis, 93 P. 696 (Or. 1908); Commonwealth v. Case, 189 A.2d 756 (Pa. 1963); Johns v. Johns, 420 S.E.2d 856 (S.C. 1992); Rhodes v. McAfee, 457 S.W.2d 522 (Tenn. 1970); In re Vetas' Estate, 170 P.2d 183 (Utah 1946); Toler v. Oakwood Smokeless Coal Corp., 4 S.E.2d 364 (Va. 1939); Johnson v. Johnson, 106 P. 500 (Wash. 1910); Spradlin v. State Compensation Commissioner, 113 S.E.2d 832 (W.Va. 1960).

⁵ The Supreme Court has held that the Fourteenth Amendment prohibits states from refusing to recognize interracial marriages. See Loving v. Virginia, 388 U.S. 1 (1967). The Court's holding in Loving, however, is premised, inter alia, on the strict scrutiny given to racial classifications in equal protection analysis. The Supreme Court has not afforded classifications based on sexual preference this heightened level of scrutiny. Cf. Romer v. Evans, No. 94-1039, 1996 WL 262293 (U.S. May 20, 1996) (applying rational basis scrutiny to a classification based on sexual orientation).

(at)

The Defense of Marriage Act neither validates nor invalidates same sex marriages. Instead, the Act simply provides the "[n]o State . . . shall be required to give effect to" same sex marriages. H.R. 3396, sec. 2(a); S. 1740, sec. 2(a). The word "required" suggests that Congress sought to make clear that states may not be forced, against their own public policy, to recognize same sex marriages. The question is whether the Act is properly construed to allow a state to decline to recognize a same sex marriage under any circumstances or whether the state must, as a prerequisite for doing so, have a strong public policy against same sex marriages. In our view, courts will almost certainly adopt the latter construction. Significantly, the broader reading of the statute would do little more than address a difficult, hypothetical scenario that is unlikely ever to arise. Moreover, as discussed in greater detail below, this construction of the Act is not only consistent with, but is compelled by, traditional rules of statutory construction.

A.

At base, Professor Tribe seems to argue that the Act is unconstitutional because it cannot reasonably be construed simply to repeat what the Full Faith and Credit Clause already requires and because to do more would exceed Congress' power. This argument, however, is inconsistent with the apparent views of the First Congress.

On May 26, 1790, the First Congress enacted what is now 28 U.S.C. § 1738. The Act of May 26, 1790 set forth the substantive standard to be applied by the states under the Full Faith and Credit Clause. See Act of May 26, 1790, ch. 11, 1 Stat. 122. In particular, Congress provided that properly authenticated records and judicial proceedings should be accorded the same "faith and credit" as they would receive "by law or usage in the courts of the state from whence the said records are or shall be taken." *Id.* It is unclear whether this provision was intended simply to repeat the self-executing rule embodied in the Full Faith and Credit Clause or whether it was intended to give the rule some additional force through the exercise of Congress' power under the Effects Clause. Under either reading, however, the First Congress was plainly doing what Professor Tribe says Congress cannot now do: It was either clarifying for the states its understanding of the meaning of the Full Faith and Credit Clause -- as we believe Congress would be doing in enacting the Defense of Marriage Act -- or it was using its power under the Effects Clause to modify the operative rule. Given the special weight given to early congressional enactments in interpreting the Constitution, see *Myers v. United States*, 272 U.S. 52, 175 (1926); *Lynch v. Donnelly*, 465 U.S. 668, 674 (1984), it seems clear that Professor Tribe's argument proves too much.

We also disagree with Professor Tribe's suggestion that our construction of the Act would render the Act meaningless. As an initial matter we note that it is not meaningless for Congress to pass a law that seeks to clarify existing constitutional standards. As discussed above, the Full Faith and Credit Clause works to constitutionalize existing conflict of law rules. These rules, however, are by no means clear. In Federalist No. 42, Madison noted that the meaning of the Full Faith and Credit Clause, which had appeared in substantially the same form in the Articles of Confederation, was "extremely indeterminate" and that the power conferred on Congress under the Effects Clause would accordingly work "an evident and valuable improvement on the

clause," apparently by empowering Congress to render the Clause more determinate. The Federalist No. 42, at 271 (James Madison) (Clinton Rossiter ed., 1961). It is thus apparent that the Framers envisioned, at a minimum, that Congress would have the power to clarify the effect of the Full Faith and Credit Clause. The Act serves this purpose by making clear to the states that they are not required, as a matter of federal constitutional law, to give effect to same sex marriages.

Second, although it is unsettled whether Congress may enact legislation under the Effects Clause that restricts the measure of full faith and credit that one state must accord the acts, judgments or records of another state, Congress has enacted legislation that expands upon the protection of full faith in particular circumstances,⁶ and at least four justices of the Supreme Court have indicated that Congress has the power to do so.⁷ Courts have at times, moreover, applied section 1738 in a manner that was arguably more expansive than required by the text of the Full Faith and Credit Clause standing alone. See, e.g., Thomas v. Washington Gas Light Co., 448 U.S. 261, 270 (1980) (four Justice plurality) ("This rule, if not compelled by the Full Faith and Credit Clause itself, . . . is surely required by 28 U.S.C. § 1738"). To the extent any question exists as to whether section 1738 requires more than would be required by the Full Faith and Credit Clause alone, Congress surely has authority to clarify that, in the case of same sex marriages, this greater measure of full faith and credit will not apply.

B.

Professor Tribe asserts that "Congress has no constitutional power to confer" authority on the states to decline to recognize acts, records or judicial proceedings of other states where, absent legislation, the Full Faith and Credit Clause would require recognition. This conclusion is not self-evident. N.Y. Times at E11. Yet, even if Professor Tribe is correct, his argument simply provides support for our belief that the courts will reasonably interpret the Act in a manner that avoids this constitutional issue.

⁶ See 28 U.S.C. § 1738A (child custody determinations); 28 U.S.C. § 1738B (child support orders); and 18 U.S.C. § 2265 (protection orders).

⁷ In Thomas v. Washington Gas Light Co., 448 U.S. 261, 273 n.18 (1980) (four Justice plurality), Justice Stevens wrote:

[W]hile Congress clearly has the power to increase the measure of faith and credit that a State must accord to the laws or judgments of another State, there is at least some question whether Congress may cut back on the measure of faith and credit required by a decision of this Court.

In Thompson v. Thompson, 484 U.S. 174 (1988), moreover, the Court assumed, without discussing, that Congress acted within its power when it enacted the Parental Kidnapping Prevention Act, which was intended to provide greater full faith and credit protection to child custody determinations than required by the common law rules given constitutional force through the Full Faith and Credit Clause. See id. at 182-84.

Professor Tribe seems to argue that, as he construes it, the Act would limit the scope of the full faith and credit one state need afford another state's law. The Supreme Court has observed that the question whether the Effects Clause authorizes Congress to "cut back on the measure of faith and credit required by" judicial interpretation of the Full Faith and Credit Clause is unsettled. Thomas, 448 U.S. at 273 n.18. It can be reasonably argued, however, that the Full Faith and Credit Clause constitutionalized conflict of laws principles, see Sun Oil Co., 486 U.S. at 723 n.1; that "[t]he conflicts law embodied in the Full Faith and Credit Clause allows room for common-law development;" id. at 724 n.1 (dicta); and that Congress may, in fact, alter the conflicts laws under the Effects Clause, see id. at 729 (dicta). See also Pacific Employers Ins. Co., 306 U.S. at 502 (Congress has not prescribed "extra-state effect" of statutes, but "may [do so] under the constitutional provision").

Concededly, such a construction would confer a substantial power on Congress that to date has gone without clear recognition, and it would allow Congress to adopt laws arguably inimical to the "very purpose of the full faith and credit clause" of "alter[ing] the status of the several states as independent foreign sovereignties," Milwaukee County v. M.E. White Co., 296 U.S. 268, 276-77 (1935). The failure of early Congresses to enact national conflict of laws statutes pursuant to the Effects Clause is arguably relevant as evidence of the Framers' intent. However, as Justice Robert Jackson wrote, "it cannot be doubted that Congress is invested with a range of power greatly exceeding that which it has seen fit to exercise," and the failure of early Congresses to enact conflict of laws statutes is not at all surprising in light of the "hazy knowledge" that the Framers had regarding the subject. Robert H. Jackson, The Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 6, 21 (1945). The constitutional goal of "alter[ing] the status of the several states," similarly, does not compel the conclusion that Congress may not enact conflict laws that give effect to the competing policies of different states. Rather, the status of the states as separate sovereigns was altered by giving Congress the authority to dictate the governing law. See Sun Oil Co., 486 U.S. at 723 n.1.

Regardless of which argument in the end prevails, there can be little doubt the constitutional issue presented is the sort of difficult question of first impression that courts, where possible, avoid through statutory construction.⁸ As the Supreme Court has observed:

"Federal statutes are to be so construed as to avoid serious doubt of their constitutionality. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly

⁸ Assuming that Congress may alter the conflicts laws under the Effects Clause, we are still left with the difficult question whether the Full Faith and Credit Clause establishes some fundamental, overriding principles of conflicts that are beyond common-law or congressional development or modification. See, e.g., Robert H. Jackson, Full Faith and Credit -- The Lawyer's Clause of the Constitution, 45 Colum. L. Rev. 1, 30 (1945). The existence of this substantial question, however, simply reinforces our conclusion that the Act should be construed in a manner that is consistent with settled law.

possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 62 [(1932)]." Machinists v. Street, 367 U.S. 740, 749-750 (1961). Cf. Parsons v. Bedford, 3 Pet. 433, 448-449 (1830) (Story, J.) (a construction that would render a statute unconstitutional should be avoided); Murray v. Schooner Charming Betsy, 2 Cranch 64, 118 (1804) (Marshall, C.J.).

Concrete Pipe & Prods. Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602, 629 (1993). This is not to say that a statute may be construed in a manner that "is plainly contrary to the intent of Congress," Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988), but unless left with "no reasonable alternative," courts will avoid "serious constitutional questions," United States v. Five Gambling Devices, 346 U.S. 441, 448-49 (1953) (plurality opinion).

Here, we believe that Professor Tribe's construction of the Act would raise a serious constitutional question and that our proposed reading of the Act reasonably avoids this question. Thus, even if Congress cannot enact substantive conflicts rules that limit the measure of full faith and credit that the courts would otherwise require, the courts will almost certainly construe the Act in a constitutional manner.

file:
gay marriage

May 2, 1996

MEMORANDUM FOR JACK QUINN
KATHY WALLMAN ✓

FROM: STEVE NEUWIRTH

Attached is a copy of The Advocate story on gay marriage. Jack, as you will see, you are quoted.

Wedding bell

Campaign '96

Clinton's stated opposition to same-sex marriage places the president squarely on the horns of a political dilemma

By J. Jennings Moss

Back when he was Arkansas's governor as well as a presidential candidate, Bill Clinton went on record as being opposed to same-sex marriage. More than three years into his presidency, Administration officials repeat that Clinton remains convinced that marriage is an institution to be shared by a man and a woman. The White House is said, however, to be undertaking a sympathetic review of the legal problems encountered by same-sex couples.

The issue is a risky and sensitive one for Clinton. Stick to a flat "Gay marriage is wrong" answer, and the gay and lesbian voters who proved a crucial force in his 1992 victory could stay home. Appease guys and lesbians by calling for changes in federal laws to help same-sex couples, and the religious right will scream in protest. Try to find a compromise, and risk another "gays in the military" fiasco where neither side is pleased and those in the middle see the president as waffling and weak.

"The gay and lesbian marriage issue is striking fear into the hearts of the political handlers at the White

GREGG NEWTON/HLUI/FR

MAY 14, 1996

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House," said Bob Hattoy, an openly gay Department of the Interior official who rose to national prominence through his 1992 Democratic convention speech as a gay man with AIDS. "This is a loser, politically."

Knowing that at some point Clinton will be forced to address the increasingly newsworthy subject, officials at the White House and the Justice Department are getting ready. At the White House, gay and lesbian political liaison Marsha Scott and others have looked at the options available to the president. Justice staffers in the office of policy development also have worked on the subject.

Hattoy described the debate as one between the "straight white boys," who consider any steps toward gay marriage as steps to the political gallows, and social progressives, who believe gays and lesbians in relationships face unfair discrimination. A small percentage within the White House support same-sex marriage, he said. "To me, the straight white boys always win at the White House," Hattoy added. "To me, the president will lessen their impact. He struggles with those kinds of profound issues, like hospital-visitation rights."

On the political front Scott has met with openly gay administration appointees and congressional staffers as well as others inside and outside government. The meetings have at times been hostile, especially when Scott has stated Clinton's opposition to same-sex marriage. "If this is the president's position, then I find it insulting," Jim Jones, an openly gay member of Sen. John Kerry's staff, recalled telling Scott during one such meeting.

Several sources said the Administration had initiated a probe of legal issues faced by same-sex couples and that the White House counsel's office was closely involved in the review. But the president's head counsel,

Jack Quinn, said his office was doing no work on the issue. "The president feels strongly that in these days of various and sundry stresses in society, the institutions of traditional marriage and the family face tremendous pressures and we need to do everything we can to strengthen those relationships," Quinn said—adding, however, that Clinton is well aware of what some governments, corporations, and institutions have done to acknowledge same-sex couples in providing some of the same benefits extended to married couples. Said Quinn: "He believes those are important issues that can be addressed in a way that remains sensitive to traditional values while preserving the federal right to live free from unjustifiable discrimination."

Quinn also argued that in modern times, issues surrounding marriage "have exclusively been the domain of other levels of government." Several sources, however, said that White House officials have been advised about a number of steps the federal government could take to help out gay couples. One would be to change immigration law so that same-sex relationships are treated the same as traditional families. Another would be to make tax laws the same for couples regardless of marital status. But none of these sources said they believe the Administration will come close to adopting such ideas.

"The Administration has made no commitments at all on this, and I think, quite frankly, none will be made," said one gay official who was consulted by the White House on the marriage issue but asked not to be identified. "They don't want to box themselves in." The main task for Administration staffers working on the issue is to find the right mix of words for Clinton to speak, said

the official: "He has to have an answer. He needs to be able to speak consistently when the issue comes up, and it will come up. If he shows any signs of waffling or inconsistency, it will become an issue."

Such a concern is very real in view of Clinton's track record on gay issues. He promised to open the military's doors to gays and lesbians but then fell back on a policy that keeps them nearly closed. He went on record opposing antigay initiatives that appeared in several states, yet his administration stayed out of the Supreme Court fight on a Colorado measure. "They don't want any hemorrhaging going on," Hattoy said. "They feel very nervous about this being another major mistake or rift with the gay community."

In Jones's view "the White House is very concerned that this is going to be an issue driven by the radical right. The White House is not going to be caught off guard, and the gay community ought not be caught off guard," he said. Even though he was upset by Clinton's position, Jones said he felt that gays and lesbians need to "pick our fights judiciously."

Gays and lesbians need to figure out how to divert public attention away from the image of homosexuals storming churches and toward the issue of benefit rights for same-sex spouses, said Brian Bond, lesbian and gay outreach director for the Democratic National Committee. "We have to figure out what we're going to do, what we're going to say about it," said Bond. "We can't make this a litmus-test issue."

Even Evan Wolfson, senior staff attorney for the gay group Lambda Legal Defense and Education Fund and one of the nation's most passionate supporters of same-sex marriage, believes the White House needs

"The straight white boys always win at the White House."

space. "Trying to put Clinton on the spot right now is a mistake," Wolfson said. "Our struggle is going to be education and reaching out to the public, not the president. Right now, he has no role in this other than as a moral leader."

But some gay political leaders think that a crucial way of getting the public's support is to get the White House's backing. "Clinton has to say he backs gay marriage," said Helen Gonzales, public policy director for the National Gay and Lesbian Task Force. "It's an issue of 'Do you in fact feel that gays and lesbians should have any support if they want to have families?' This really comes down to gays and children."

Politically, the model President Clinton could follow is the one Colorado governor Roy Romer established when he became the first governor to veto a bill banning same-sex marriages. In his veto message Romer said that while he backed the idea of keeping marriage the way it is now, he described the legislative move as "mean-spirited and unnecessary" and called for a commission to look at the legal and policy issues that same-sex marriages raise. "Let's find out how we can live together with our differences rather than divide over the issue of sexual orientation," Romer wrote. Other governors, however, have gone the other way, with Governor Bill Graves making Kansas the fifth state to ban recognition of same-sex marriage.

Some of Clinton's opponents would like nothing more than to link him with gay marriage, a concept a vast majority of the public opposes. After a White House spokeswoman made the comment late last year that Clinton "doesn't think that same-sex marriages should be outlawed," some conservative groups concluded that Clinton eventually would endorse gay marriage. "Mark my words, if Bill Clinton is reelected, he will fight for this tooth and nail," said Martin Mawyer, president of the Christian Action Network, a conservative group that is heavily involved in efforts to stop gay marriage.

Mawyer is encouraging Sen. Bob Dole, who will be the Republican presidential nominee, to raise the issue in the coming debate with Clinton. In fact, Mawyer says that if Dole steers clear of the topic, he will lose the elec-

tion. "We already see that Dole wants to make this an election about competence, not ideology. The last guy who tried that is slucking clams on Martha's Vineyard," Mawyer said.

Like Clinton, Dole opposes same-sex marriage. But unlike Clinton, Dole publicly supported a campaign to ban gay marriages across the United States. And he sent a letter to gay-marriage opponents saying the pledge "does not go far enough" to strengthen the family. Dole's point here had nothing to do with homosexuality—he went on to say, for example, that government should lower the tax burden for families with children—but gay rights leaders remain angry over his choice of words.

But will Dole make gay marriage a campaign issue? Rond said Republicans "are going to have to turn to wedge issues." But Daniel Zurzale, political director of the Human Rights Campaign, a gay political group, said he was not convinced Dole would go that far. He noted, nevertheless, that "time and time again his response is to pander" to the religious right.

"Fortunately, we've already won the nomination," said Vin Weber, a former Wisconsin congressman who is now a national cochairman of the Dole campaign, when asked if the party's socially conservative wing could push Dole to campaign against gay marriage. "Dole's history tells us that this is not the sort of issue he would like to elevate to high-profile status," Weber added that Dole does not want to see the Republican convention in San Diego be overwhelmed with divisive social matters such as gay rights or abortion.

James Pinkerton, a White House aide during the Reagan and Bush administrations who is a heterosexual Republican backing gay marriage, agreed. Pinkerton said Dole will leave the issue alone if it leaves him alone. "It's sort of like abortion," said Pinkerton. "Unprompted, you don't hear Dole say a lot about abortion"—or about gay marriage.

And if Dole won't talk about it, neither will Clinton—leaving gays and lesbians who want to support both Clinton and same-sex marriage wondering what to do next. Hattoy's answer: "Grab your boyfriend or girlfriend by the hand, run off to church, and 'get married.' But don't expect the president to come to the wedding." ●

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When writing to us, please

THE WHITE HOUSE
WASHINGTON

April 25, 1996

MEMORANDUM FOR JACK QUINN

FROM: KATHLEEN WALLMAN^{hw} AND STEPHEN NEUWIRTH

SUBJECT: GAY MARRIAGE

This was sent in response to the questions from Harold that were relayed to DOJ at the meeting with them last week.

We need to convey the information to Harold, and we also need to anticipate what to say when we are asked, as we soon may be, whether we oppose or support state legislative initiatives to stave off recognition of Hawaii marriages.

How do you want to convey this information to Harold? Should we just send him a copy of the memo? *(Maybe to George, also - kw)*

Do you agree that we should start working with Marsha Scott and others to develop a position on state initiatives?



U. S. Department of Justice

Office of the Associate Attorney General

The Associate Attorney General

Washington, D.C. 20530

April 24, 1996

MEMORANDUM

To: Jack Quinn
Counsel to the President

Kathleen Wallman
Deputy Counsel to the President

From: John R. Schmidt *(JRS)*

Re: Same-Sex Marriage/Full Faith and Credit Clause

You have asked us to take a quick look at whether the Full Faith and Credit Clause of Article IV of the Constitution would require states to recognize Hawaiian same-sex marriages (assuming that such relationships soon may be authorized under the laws of Hawaii).

The Full Faith and Credit Clause provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." Recognition by the courts and legislature of Hawaii of the validity of same-sex marriages would constitute "Acts, Records, and judicial Proceedings" within the meaning of the Full Faith and Credit Clause. However, applying basic principles set forth by the U.S. Supreme Court, the Full Faith and Credit Clause would not obligate the other 49 states to give effect to Hawaiian same-sex marriages if such action would contravene the public policy of those states.

A complete assessment of the Full Faith and Credit Clause implications of the recognition of same-sex marriages by Hawaii would require a state-by-state inquiry. Based on our limited research into the matter, it appears that a large number of states would be able to show an existing public policy against same-sex marriages. This would obviously be the case in states that, by statute, bar same-sex marriage -- either through an explicit statutory prohibition or through other provisions that limit the scope of permissible marital relationships. Even where the issue cannot be resolved through an analysis of relevant state statutes, a public policy against same-sex marriage might also be reflected in state administrative rules and practices and state court decisions refusing to recognize such relationships.



U. S. Department of Justice

Office of the Associate Attorney General

file:
gay
marriage

The Associate Attorney General

Washington, D.C. 20530

April 24, 1996

MEMORANDUM

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Counsel to the President

Kathleen Wallman
Deputy Counsel to the President

From: John R. Schmidt *TRS*

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file:
gay marriage

THE WHITE HOUSE
WASHINGTON

April 18, 1996

MEMORANDUM

TO: Kathleen Wallman
FROM: Marcia L. Hale *MLH*
SUBJECT: Governor Romer

Please call me about the attached letter. Thank you.

Attachment

STATE OF COLORADO

EXECUTIVE CHAMBERS

136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471



March 25, 1996

Roy Romer
Governor

The Honorable Colorado House
of Representatives
Sixtieth General Assembly
Second Regular Session
Denver, CO 80202

Ladies and Gentlemen:

I am returning to you House Bill 96-1291, "Concerning the Invalidity of Marriages Between Persons of the Same Sex", which I vetoed today at 12:41 P.M. This letter sets forth my reasoning for vetoing this bill.

I want the people of Colorado to clearly understand that my veto does not mean that same sex marriages will be legal in Colorado. It does not mean that a church or anyone else will be forced to perform or recognize same sex marriages. Colorado law is very clear that marriage is reserved for the union of a man and a woman. That is our policy. I support it. It does not change by my action today.

The expressed motive for this bill is to preserve the definition of marriage in Colorado from the actions of Hawaii, which may some day extend marriage to include persons of the same sex. This issue may arise because, under the Full Faith and Credit Clause of the U.S. Constitution, states honor and recognize certain actions of other states, marriage being one of the most obvious examples.

However, HB 1291 does not adequately resolve this issue. In fact it raises, but does not properly address, other important constitutional issues, including the possibility of discrimination against gays and lesbians.

Three principles underlie my action today:

First, I believe that marriage in Colorado should be reserved for the union of a man and woman. That is our current law and I think it should remain our law. There is a long standing, historic, cultural, religious and civil tradition for the institution of marriage. We should continue that tradition, preserving the institution of marriage for the union of a man and a woman.

Second, I believe that decisions on this subject should be made by Coloradans and not by people in other states. We should not permit our law to be altered by the action of

The Honorable House of Representatives
March 25, 1996
Page 2

another state. We should take whatever appropriate steps may be necessary to protect our policy.

Third, I believe that those members of our society who join in a long-term, committed relationship with a person of the same sex should be acknowledged as fellow human beings and fellow citizens. I believe, for example, that they should have access to each other in a hospital room when one partner is dying. We need a discussion on how our law should evolve to give stability and protection to their relationship in situations like this.

I believe these principles are shared by most Coloradans. What are we to do when we look across the church congregation, our service clubs, or our workplace and see a gay or lesbian person, a human being who wants to live his or her life in the most responsible and caring way possible, and commits to sharing life with a person of the same sex? What are we to say as a society about that relationship? Do we condemn them? Shouldn't they be able to live their lives to the fullest, in a responsible and caring way?

These are the questions I am putting on the table. They don't readily lead to simple or bumper sticker solutions, but life is not always simple, and complex problems are rarely solved by bumper sticker slogans.

It is one thing to believe -- as I do -- that marriage is for the union of a man and woman. It is quite another to believe that committed same sex relationships do not exist and should not be recognized by society. We cannot prohibit or ban these relationships, and we shouldn't use our law to attempt to do so.

Let's find out how we can live together with our differences, rather than divide over the issue of sexual orientation.

I'm making this simple appeal to the Legislature and the people of Colorado: let's come to terms with this issue, as elected officials, as friends, as neighbors, as members of a community, as members of a church, as Coloradans.

There is a right way to proceed, and a wrong way. There is a unifying way, and a divisive way. There is a thoughtful way, and a simplistic way.

I believe HB 1291 fails on all these counts.

HB 1291 does not adequately do the job. I know some support this bill because they believe it deals with the constitutional issues raised by the courts in Hawaii. Some support it because they view it as a re-affirmation of our traditional structure of

The Honorable House of Representatives
March 25, 1996
Page 3

marriage. But let's be honest: some support this bill because it is a way to single out and condemn the lifestyle of gay and lesbian people.

Regardless of motivation, the bill I have before me now is simplistic and divisive. It is simplistic because it ignores important legal and constitutional questions and addresses only one part of the issue. It is divisive because it singles out a group of Coloradans for condemnation, equating their relationships with incest and bigamy. That is hurtful, and it is counter to Colorado's rich tradition of tolerance and freedom.

We can be pro-family, without being unfair to gay and lesbian people.

We can re-affirm our commitment to marriage between a man and a woman without condemning those who have different relationships.

The proponents of this bill say they want to ensure that same sex marriages from Hawaii or some other state are not recognized in Colorado under the Full Faith and Credit Clause of the U.S. Constitution. But the way the bill is drafted is to ban same sex marriages in the "prohibited marriages" section of our marriage statute, alongside bigamy and incest. This is mean-spirited and unnecessary. We do not need to forbid or "ban" same sex relationships to protect ourselves under the Full Faith and Credit Clause. Moreover, structuring legislation this way may invite lawsuits against Colorado based on discrimination and the Equal Protection Clause.

In fact, I am not entirely convinced we need any new statutory language. Colorado law already clearly states that marriage is between a man and a woman. But if some believe we need to reaffirm and strengthen our current law to make it absolutely clear that marriage is between a man and a woman, we can do just that. To preserve our law as it is, the Full Faith and Credit Clause only requires us to indicate that our "strong public policy" is that marriage is between a man and a woman. To strengthen that posture, we may want to specify that conflicting out-of-state marriages will not be recognized as against this public policy.

I would sign legislation that does two things: (1) States that "It is the strong public policy of Colorado that marriage shall only be between a man and a woman. It is the policy of Colorado only to recognize marriages from other states that are between a man and a woman." This will give us more than enough protection against a Full Faith and Credit challenge from Hawaii or any other state. And it does so with language that is constructive and not discriminatory.

(2) The second change I would require before I sign legislation is language based on an amendment introduced by State Senator Dottie Wham, which would provide a commission to review and evaluate the legal and policy issues involved in recognizing same-sex relationships. This commission, which would be composed of members

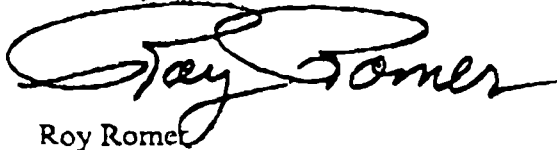
The Honorable House of Representatives
March 25, 1996
Page 4

appointed by the Legislature and myself, would report back to Colorado on its findings by a date certain. I am open to working with the Legislature on when such a report would be issued.

Why do I think a commission is important? Because this is a serious issue, and it requires a thoughtful and thorough debate. We have not yet had such a debate. We must come together as a community to have a rational discussion about these issues and attempt to find some common ground upon which we can agree.

Send me a bill with the two changes I've outlined and I will sign it. The approach I have outlined will strengthen our legal posture against challenges under the Full Faith and Credit clause and other constitutional challenges. Most important of all, it will allow us to act on reason and not out of fear. That is in the best tradition of Colorado and our people. It is an approach that will unite, and not divide us.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy Romer", with a large, stylized flourish at the end.

Roy Romer
Governor

file per.

K. Wallman

THE WHITE HOUSE
WASHINGTON

April 8, 1996

MEMORANDUM FOR THE PRESIDENT

FROM: JACK QUINN 
COUNSEL TO THE PRESIDENT

SUBJECT: GAY MARRIAGE

The White House has received numerous inquiries concerning your position on gay marriage. In addition, The Advocate, a widely-read gay and lesbian newspaper, is planning to publish a story on this issue and would like to include a statement of your position. The deadline for that story is *tomorrow -- Tuesday, April 9.*

With input from Marsha Scott, we have prepared the attached talking points. George Stephanopoulos has reviewed and approved them.

- The institutions of traditional marriage and family face tremendous pressures in today's society. We must do everything we can to support and strengthen these institutions. The President has previously said that he does not personally support same-sex marriages.
- The President is aware that many communities and institutions are considering whether certain basic benefits can be provided outside the context of traditional marriage. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination.
- In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. The President believes that these issues continue to be best resolved at this level of civil discourse.

Recommendation

That you approve the talking points set forth above.

___ AGREE ___ DISAGREE ___ DISCUSS

*file: gay marriage ✓
cc: Steven N.*

THE WHITE HOUSE
WASHINGTON

March 29, 1996

*Kathy -
I called Marcia
about this. Turns
out it was supposed
to be sent to you.
- Kathi*

MEMORANDUM

TO: Kathleen Whalen
FROM: Marcia L. Hale *MHB*
SUBJECT: Governor Romer

Please call me about the attached letter. Thank you.

Attachment

STATE OF COLORADO

EXECUTIVE CHAMBERS

136 State Capitol
Denver, Colorado 80203-1792
Phone (303) 866-2471



March 25, 1996

Roy Romer
Governor

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of Representatives
Sixtieth General Assembly
Second Regular Session
Denver, CO 80202

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The Honorable House of Representatives
March 25, 1996
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The Honorable House of Representatives
March 25, 1996
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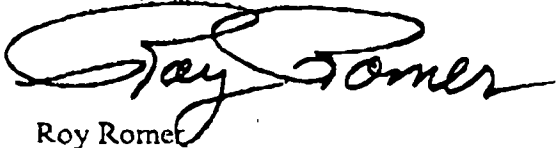
The Honorable House of Representatives
March 25, 1996
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Sincerely,

A handwritten signature in black ink, appearing to read "Roy Romer", with a large, stylized flourish at the end.

Roy Romer
Governor

file:
THE WHITE HOUSE
WASHINGTON

March 28, 1996

MEMORANDUM FOR THE PRESIDENT

FROM:

KATHLEEN WALLMAN *KW*
DEPUTY COUNSEL TO THE PRESIDENT

SUBJECT:

GAY MARRIAGE

In the event that you are asked about gay marriage at tomorrow morning's coffee, Jack Quinn recommends that you respond along the following lines. These talking points were prepared with input from Marsha Scott.

- The institutions of traditional marriage and family face tremendous pressures in today's society. We must do everything we can to support and strengthen these institutions. I have previously said that I do not personally support same-sex marriages.
- I am aware that many communities and institutions are considering ways, outside the context of traditional marriage, to address issues relating to same-sex partnerships, including whether certain basic benefits can be provided to same-sex partners. The challenge in addressing these issues is to remain sensitive to the traditional values of our communities while preserving the fundamental right to live free from unjustified discrimination.
- In our country's history we have, for good reason, looked first to state and local governments, as well as the private sector, to consider issues like these involving community values and matters of conscience. I believe that issues relating to same-sex partnerships continue to be best resolved at this level of civil discourse.

file: gay marriage

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