Judge’s opinion on gay rights was inappropriate

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For decades, conservatives have professed the need for courts to avoid judicial activism and practice judicial restraint. These phrases are never defined and it usually seems that “judicial activism” is simply a label for decisions that people don’t like. However, if anything is judicial activism, surely it is a judge dismissing a case as moot, but nonetheless gratuitously expressing his views on its merits.

This is exactly what 9th Circuit Judge Diarmuid O’Scannlain did in Log Cabin Republicans v. United States, 2011 WL 4494225 (9th Cir. Sept. 29, 2011), when he went out of his way to argue against constitutional protections for gays and lesbians. However, because the case has been dismissed, it is highly unlikely that there will be the occasion for any court to review Judge O’Scannlain’s attempt to keep lower courts from protecting the rights of gays and lesbians. Hopefully, judges will simply ignore it.

The case involved a challenge to the federal "don’t ask, don’t tell" law. 10 U.S.C. Section 654. The law provided that any member of the U.S. Armed Forces who engages in homosexual conduct is subject to discharge unless the service member is able to demonstrate that he or she has no propensity to engage in "homosexual conduct." Under the law, homosexual conduct includes sexual acts with persons of the same sex, admissions that one is homosexual or bisexual, and attempts to marry a person of the same sex.

A year ago, the U.S. District Court for the Central District of California declared this law unconstitutional as violating the due process and free speech rights of service personnel. Log Cabin Republicans v. U.S., 716 F.Supp.2d 884 (C.D. 2010). The case was tried before Judge Virginia Phillips who began her opinion by carefully reviewing the evidence that had been presented and summarizing the testimony of the witnesses.

She concluded that the evidence failed to show that the law significantly furthered the government’s interest in military readiness or unit cohesion. She looked at every report and the testimony of each witness and found that there was no basis for the government having discharged 19,000 service members under the law. In fact, she concluded that “don’t ask” harmed the military by denying it qualified personnel at a time of a serious personnel shortage.

Judge Phillips held that the law violated both the due process rights of service personnel by infringing their right to privacy and also their free speech rights. As to the latter, she explained that "don't ask" was a content-based restriction on speech; gays and lesbians were excluded from the military for expressing their sexual orientation. Content-based restrictions on speech must meet strict scrutiny and Judge Phillips ruled that the government failed to meet this heavy burden.

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Criminal

Executives charged in bank failure
Several federal agencies announced the filing of criminal and civil charges Tuesday against former United Commercial Bank executives in connection with the bank’s failure during the height of the financial crisis.

Mergers & Acquisitions

99 Cents Only Stores go private
The 99 Cents Only Stores on Tuesday agreed to be taken private by affiliates of Los Angeles-based private equity firm Ares Management LLC and the Canada Pension Plan Investment Board for $1.6 billion.

Obituaries

Robert Boochever
Senior Circuit Judge Robert Boochever of the 9th U.S. Circuit Court of Appeals, a former chief justice of the Alaska Supreme Court, died Sunday at his home in Pasadena. He had turned 94 on Oct. 2.

U.S. Supreme Court

High court leans in favor of arbitration once again
Consistent with its pattern of rulings supporting arbitration, the U.S. Supreme Court appeared ready Tuesday to say a law guaranteeing the right to sue doesn’t stop a business from forcing a class action into arbitration.

U.S. Supreme Court grants and denials
A roundup of cases granted or denied for review by the U.S. Supreme Court

Environmental

Groups sue over smog standard
Environmental and public health groups sued the Obama administration Tuesday - a month after his office reversed itself and refused to ratchet down smog pollution levels.

Criminal

Real estate mogul sentenced to 7 years
A businessman whom critics labeled the Bernie Madoff of Beverly Hills was sentenced Tuesday to 7 years in federal prison for stealing nearly $21 million from four of his investor-clients.

Law Practice

Gibson Dunn team lands NASA space
If anything is judicial activism, surely it is a judge dismissing a case as moot, but nonetheless gratuitously expressing his views on its merits.

While the government’s appeal of Judge Phillips’s ruling was pending, Congress enacted and President Barack Obama signed the Don’t Ask, Don’t Tell Repeal Act of 2010. Pub.L. No. 111–321, 124 Stat. 3515 (2010). It provided for the end of “don’t ask” 60 days after a certification from the president, the secretary of defense, and the chair of the joint chiefs of staff that its repeal would not harm military readiness or unit cohesion. This certification occurred on July 21, and “don’t ask” thus was repealed as of Sept. 20.

On Sept. 29, the 9th U.S. Circuit Court of Appeals, in a per curiam opinion, dismissed the appeal before it as moot on the grounds that the challenged statute had been repealed. Nonetheless, Judge O’Scannlain wrote a concurring opinion addressing the merits. He said that he was doing this “[b]ecause ‘guideposts for responsible decisionmaking’ on matters of substantive due process are ‘scarce and open ended’...[and that it would be] useful to explain how courts should approach the application of [Lawrence v. Texas] in appropriate cases.”

He sharply criticized the district court’s decision as resting on an “unsupported foundation” and urged “judicial restraint” in protecting rights under the due process clause. He said that Lawrence v. Texas, 539 U.S. 558 (2003), which invalidated a Texas law prohibiting private consensual adult homosexual activity, was a narrow decision and did not support the heightened scrutiny used by the district court. He concluded: “When judges sacrifice the rule of law to find rights they favor, I fear the people may one day find that their new rights, once proclaimed so boldly, have disappeared because there is no longer a rule of law to protect them.”

First, Judge O’Scannlain’s opinion was unnecessary and inappropriate. The panel, of which he was a part, dismissed the case as moot. There was no reason for him to address the merits of the case or his views about the appropriate level of scrutiny under Lawrence v. Texas. It is ironic that an opinion, which expressly invoked the need for “judicial restraint,” so patently departed from it.

Second, Judge O’Scannlain’s opinion was an explicit rebuke of the district court decision. Yet, he ignored almost the entire content of Judge Phillips’ 73-page opinion. For example, nowhere does Judge O’Scannlain mention, let alone address, the detailed factual findings that Judge Phillips made after hearing a trial of the case. Judge O’Scannlain wrongly characterizes Judge Phillips as doing no more than finding a right that she favors and ignores the detailed factual premise for her decision.

Moreover, Judge Phillips found that “don’t ask” violates the First Amendment as a content-based restriction on speech. This, of course, would be sufficient by itself to invalidate the law. Judge O’Scannlain never mentions this.

Third, Judge O’Scannlain adopts a narrow reading of Lawrence v. Texas and presents it as if his view were the settled law. Lawrence found that the right to privacy protects the right for same-sex adults to engage in consensual, sexual activity, but the U.S. Supreme Court did not say what level of scrutiny is to be used for that right. Judge O’Scannlain reads it as using only rational basis review and says that the "broad language" of the opinion cannot be seen as creating a fundamental right.

That is one way of reading Lawrence v. Texas. But another, and I think better way of understanding it, is that it holds that there is a fundamental right for consenting adults to engage in private consensual homosexual activity. Lawrence essentially says that if privacy means anything, it is what consenting adults do in their bedrooms.

But Judge O’Scannlain did not see Lawrence v. Texas as being silent as to the level of scrutiny; he read it as using only rational basis review. In doing so, he read his own preference into the law, exactly the practice he criticized in his conclusion. Besides, a careful reading of Judge Phillips' opinion supports the conclusion that "don't ask" failed even rational basis review; the evidence before Judge Phillips showed that the policy did far more harm than good to the military.
Judge O'Scannlain is regarded as one of the most conservative appellate judges in the country and it is no surprise that he opposes constitutional protection for gays and lesbians. Unfortunately, he may well be on panels where this issue comes before him. But there was no reason for him to write a concurring opinion that addressed this issue once the court dismissed the challenge to “don’t ask” as moot. Judge O'Scannlain’s opinion was unnecessary and wrong.

Litigation
Ad company sues Akin Gump
A legal malpractice lawsuit filed in Los Angeles Superior Court against Akin Gump Strauss Hauer & Feld claims the firm is responsible for more than $1 million in damages for giving bad advice to an advertisement company.

Judge tentatively dismisses Bratz suit
A federal judge tentatively dismissed a $3 billion antitrust suit in which Bratz manufacturer MGA Entertainment Inc. accused Mattel of filing "baseless" litigation over the dolls to try to crush MGA's business.

Labor/Employment
Department of Fair Employment and Housing's new procedural regulations
The new rules govern how the agency accepts and processes complaints of unlawful discrimination, harassment and retaliation under various laws. By D. Gregory Valenza of Shaw Valenza

Letter to the Editor
An unfortunate, misleading article
A reader responds to "Sheriff’s watchdog has eyes elsewhere," (Oct. 5).

Judicial Profile
Jacqueline M. Stern
Superior Court Judge San Diego County (Vista)

Labor/Employment
Employers looking up job candidates online carry risk
Although employers generally have the power to hire, and not hire, whomever they please, technology is making the process trickier by giving bosses information their lawyers would never have advised them to seek.