



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
 Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Gibson Dunn's Unlikely Gay Rights Advocate: Theodore Olson

By **Gavin Broady**



Law360, New York (June 10, 2014, 8:02 PM ET) -- At first glance, the collaboration between superstar appellate litigators Theodore Olson and David Boies in the fight to overturn Proposition 8 was straight out of an old-school spaghetti Western: two rival gunslingers, veterans of one of the most divisive battles in recent history, teaming up to take down a mutual enemy.

It's a compelling storyline, but one that overlooks the fact that the two men — who suited up on opposing sidelines in the 2000 Bush v. Gore Supreme Court battle — are actually close friends. The kind of friends who bicycle across Europe together during the summers and who can find themselves sparring in the courtroom in the afternoon and sharing a meal at a nearby restaurant a few hours later, according to Olson.

Olson suggests that this very presumption — that ideological opponents, in our era of partisan division, must be de facto enemies — is precisely why he set out to enlist his old friend in the fight against Prop 8.

"I wanted to get David Boies involved because I was known as a conservative, and I thought some people might be concerned about what I was doing in a case like that," Olson says. "We wanted to convey the message that this wasn't about liberals or conservatives, it wasn't about Democrats or Republicans."



"We wanted to show that it was about American values, and human rights, and the Constitution," he says. "We wanted to send the message that we're both on the right side of this issue, and we can't let this continue any longer."

An Improbable Ally Joins the Fight

Though it's been almost a year since Olson helped **convince the Supreme Court to effectively overturn Proposition 8** on standing grounds, the impact of that win — both positive and negative — continues to loom large.

The 73-year-old litigator has lately been rubbing elbows with Hollywood elite in connection with an upcoming HBO documentary about the fight against Prop 8, and his office has been overrun by stacks of "Redeeming the Dream," a book he co-authored with Boies about the case that is set for release next week.

Olson is fully aware that he was hardly a model ambassador for modern marriage equality, as

a lifelong Republican who campaigned for Ronald Reagan and has notched wins in several court cases typically reviled by the political left — particularly 2010's controversial *Citizens United v. Federal Election Commission*, which protected corporate political spending on First Amendment grounds.

Unlike many of his party-line colleagues, however, Olson views equal marriage as an essentially conservative cause and a matter of fundamental constitutional rights, and he saw the invitation to spearhead the Prop 8 challenge as an opportunity to make that case on a larger stage.

"I grew up in California, and I remember I was surprised that, in such a usually tolerant place for people of different perspectives, so many Californians would vote to ostracize so many of their fellow citizens," Olson says. "So while I wasn't expecting that call, in my own mind I was emotionally ready for it."

I choked up a little, and responded, 'In that case, I declare you to be an honorary lesbian.' He laughed and said he would wear the distinction with honor.

— Kate Kendall
Executive Director,
National Center for Lesbian Rights

The selection of a longtime denizen of the political right wing was nonetheless met with some resistance.

Kate Kendall, executive director of the National Center for Lesbian Rights — an early player in the Prop 8 challenge — recalls both an acute awareness of the need to find counsel who would demonstrate the nonpartisanship of the marriage equality issue and suspicions over Olson's selection.

"This is certainly an individual who pretty much stands for everything I disagree with, and in some cases — *Citizens United* perhaps principal among them — actually despise," she recalled.

Shortly after the case was filed, however, Kendall had the opportunity to question Olson directly about his motivations for getting involved in the case, and she experienced the litigator's considerable powers of persuasion firsthand.

"He made a very eloquent case that this was, for him, an issue of absolute fundamental fairness, and he went on to say he believed this would be the most important case of his career," she says. "I choked up a little, and responded, 'In that case, I declare you to be an honorary lesbian.' He laughed and said he would wear the distinction with honor."

A Power Player in the Grand Old Party

Unlike many of his colleagues on the appellate bar who come from families with legacies in law, Olson was the son of an airline engineer and grew up with no real exposure to law, only coming to his true calling after discovering his skill for debate in high school forensics.

After studying law at the University of California, Berkeley, he joined Gibson Dunn's Los Angeles office in 1965, practicing there for 15 years while becoming increasingly involved in Republican politics.

"I had always been interested in that side of the political spectrum," Olson says. "One of our partners at Gibson Dunn was prominently connected with the Republican Party — he was one of the people involved in encouraging Reagan to run for governor and, later, president — and I went to him and got involved in those campaigns."

“It’s a big deal, and people who say they don’t get nervous aren’t telling themselves the truth.

— Theodore Olson
Gibson Dunn partner

That partner was William French Smith, who went on to become attorney general for Reagan. Smith and Reagan both leaned on Olson to join them in the capitol, successfully convincing him to take a post with the U.S. Department of Justice as an assistant attorney general and remain in Washington when he rejoined Gibson Dunn three years later.

He quickly became a fixture at the high court, where has argued 60 cases to date, and was thrust into the national spotlight when he successfully ended the standoff in Florida over the 2000 presidential election and secured the inauguration of George W. Bush — who would later name him solicitor general.

Despite his extensive track record arguing at the Supreme Court, Olson admits that the thrill — and anxiety — of arguing before “The Nine” never truly goes away.

“It’s a big deal, and people who say they don’t get nervous aren’t telling themselves the truth,” Olson says. “But that translates into adrenaline, and once you get started, that helps you to think better, to respond more quickly. Nervousness is a good thing.”

Olson says high court first-timers riding that wave of adrenaline will occasionally commit one of the cardinal sins of the practice: forgetting they are in an appeals court rather than a jury trial, and letting emotion dictate the tenor of their argument.

“You don’t ever want to get overly emotional, because appellate judges are only looking to articulate what they believe is the right answer as far as matters of law,” he cautions. “So you can get passionate and play the violin, and they will just tune you out.”

Attorneys should adopt a conversational tone with the justices and take the time to clearly articulate their strongest points, rather than racing the clock to offer up a kitchen-sink oral argument, Olson says.

“If you go slowly, people will listen to you,” he says. “When you get in a hurry, you speed up, your voice gets higher, you become less articulate. If any appellate lawyer needs something to write on a piece of paper in front of them, it should say ‘Slow Down!’”

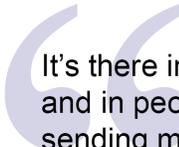
Weathering Barbs from Both Sides of the Aisle

While Olson does not dispute that his reputation as a loyal conservative is well-earned, he argues that many of his signature accomplishments are unfairly portrayed in the media at least in part because of those political associations — and none more so than the much-reviled Citizens United ruling.

“The New York Times — and I hate to pick on them, but just as an example — is an organization that speaks out on public issues, that has opinions in their editorial page about who should be elected president, who should be elected senator, and so on,” he says. “So they are a corporation expressing their views on issues and candidates, and I think other corporations should also have the right to do that.”

Olson argues that while organizations like the Times frequently editorialize against Citizens United, they are nonetheless corporations themselves and have frequently availed themselves of the rights afforded to corporations both in and out of the courtroom.

"And thank God The New York Times has constitutional protections as a corporation," Olson says. "More speech is better, and the most protected speech under the First Amendment should be speech about political issues. Congress shouldn't decide who speaks too much or too little, or how they speak or where they speak or when they speak. The American people decide that."



It's there in conversations I have, and in people I don't know sending me emails, and in people who I just don't hear from anymore. Some of that can be rough, but that's the way it goes.

— Theodore Olson
Gibson Dunn partner

He notes that a number of organizations considered to be left-leaning — including the American Civil Liberties Union, the AFL-CIO and the Sierra Club — filed amicus briefs in support of his position in *Citizens United*.

"All of those groups are corporations," he says. "Even Floyd Abrams was speaking out on our side, and who's a better-known First Amendment lawyer in the country than Floyd Abrams? So yes, I think that decision is not properly understood at all."

While the rightward tilt of Olson's resume may have raised eyebrows among liberals when he was announced as co-lead of the Prop 8 case, he admits that crossing the GOP's party line on same-sex marriage also spurred a backlash from members of his party that he continues to feel today.

"I see it in various different ways," he says. "It's there in conversations I have, and in people I don't know sending me emails, and in people who I just don't hear from anymore. Some of that can be rough, but that's the way it goes."

Nonetheless, he says the response he has gotten has been overwhelmingly positive. Even a year later, even amid the sort of chaotic, 10-meeting day that is de rigeur for one of America's top litigators, there is a catch in Olson's voice as he describes the tide of well-wishers who have asked to shake his hand and offer up their thanks.

"Everybody needs to be in this battle," he says. "So many people have expressed appreciation that we took the case on, and it means so much when you realize that, in some small way, you've touched people's lives."

Law360's Appellate A-List is a regular feature presenting in-depth profiles of the nation's leading appellate litigators.

--Editing by Kat Laskowski.

All Content © 2003-2015, Portfolio Media, Inc.