

U.S. Sen. Gordon Smith's top candidate for a federal judge position played a key role in a major court decision restricting gay rights.

At issue is Mike Mosman's involvement in *Bowers vs. Hardwick*, a 1986 case that denied the right to privacy for gay men and lesbians and that upheld state sodomy laws. Smith, R-Ore., recommended the U.S. attorney to replace U.S. District Judge Robert E. Jones, who took senior status in 2001.

At the time of the *Bowers* decision, Mosman was a clerk for U.S. Supreme Court Justice Lewis Powell. Mosman wrote two influential memos to Powell stating his belief that the U.S. Constitution offered no privacy rights for homosexuals.

Powell proved to be the swing vote in this decision, which he later publicly renounced as his biggest regret as a justice. Biographers and historians have written extensively about Mosman's key role in this decision.

Roey Thorpe, Basic Rights Oregon executive director, sent a letter to Smith outlining her group's position: "I am concerned about Mr. Mosman's interpretation of the law and how his views might affect his legal decisions if he were to be appointed to a federal judgeship. Given your own support for the Employment Nondiscrimination Act and other pro-gay civil rights legislation, I do not understand your recommendation of Mr. Mosman."

Mosman is said to be Smith's top pick for the position; also in the running are federal magistrate judge Dennis Hubel and Portland lawyer Tom Tongue. The Bush administration is reviewing the candidates, who then must receive Senate confirmation. This is the second go-round for Smith, whose first pick, former state Rep. Ray Baum, R-La Grande, was rejected by the White House.

MIXED MESSAGES

Gordon Smith taps questionable judge, protects queer Senate employees

by Jim Radosta

The issues raised in *Bowers vs. Hardwick* are particularly timely. The Supreme Court has agreed to hear oral arguments this month on *Lawrence vs. Texas*, a case that expressly seeks to overturn the decision made in *Bowers*.

Sodomy laws are widely used to justify discrimination against gay men and lesbians in everyday life. They're invoked in denying employment, in refusing custody or visitation for parents and even in intimidating people out of exercising their First Amendment rights.

"Understanding and acceptance of gay and lesbian people have increased dramatically since the time of *Bowers vs. Hardwick*," Thorpe said. "It would be a huge step backward to knowingly appoint a federal judge who would actively seek legal justification for discrimination. The fact of the matter is, if Mosman had not been Justice Powell's clerk in 1986, our nation might have rid itself of sodomy laws all those years ago."

Although Smith opposes sodomy laws, spokesman Chris Matthews said he could not comment on the Mosman matter at this time. "Until and if he's the nominee, I don't think anybody's gonna be really responding to this."

Meanwhile, Smith made a push for equality by introducing a resolution to prohibit employment discrimination in the U.S. Senate based on sexual orientation. Chamber rules currently pro-



U.S. Sen. Gordon Smith has taken one small step forward and one giant leap back

hibit bias based on race, color, religion, sex, national origin, age or state of physical handicap.

"I believe that it is time for us to add sexual orientation to that list," Smith said. "As a co-sponsor of the Employment Nondiscrimination Act, I have stood behind the principle that employment discrimination against any person is hurtful to society as a whole, and if I am going to hold the private sector accountable for its actions, I should certainly promote the same principles here in the U.S. Senate."

Smith said the Senate is lagging behind the rest of the federal government in prohibiting workplace discrimination based on sexual orientation. Since 1996, 13 Cabinet-level agencies and the White House have had anti-discrimination policies, and in 1998, President Bill Clinton issued an executive order prohibiting sexual orientation discrimination in the federal executive branch, including civilians in the military. "That executive order now covers 2 million federal employees, but people who work in the U.S. Senate do not enjoy those same protections," Smith said.

Although 65 senators have adopted nondiscrimination policies that include sexual orientation within their own offices, the resolution would protect all Senate employees. "Many of my colleagues already have written policies indicating that sexual orientation is not a factor in their employment decisions, and it is past time that we make this nondiscrimination policy a part of the Standing Rules of the Senate," Smith said.

If the resolution is adopted, the U.S. Senate will join the federal government, 23 state governments and 262 local jurisdictions that have approved similar measures. In a competitive job market where public service must compete with the private sector for job talent, the resolution will help the Senate keep pace with 308 of the Fortune 500 companies that have implemented similar nondiscrimination policies. □

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