

COURTS

A rollercoaster ride through the U.S. court system

by Lisa M. Keen

1985 took Gay legal activists on a breathtaking roller-coaster ride—the grand finale of which is bound to be played out next spring and to send spirits either soaring to the skies or limping back to the drawing boards.

The most dramatic ups and downs, twists and turns of the calendar year, took place on Capitol Hill where the U.S. Supreme Court threw in its grand two-cents worth on four Gay-related cases in five weeks.

The first two cases sent legal activists diving to the trenches. In February, the high court refused to hear the appeal of a Michigan inmate who had been denied access to a pastor from the Metropolitan Community Church, a predominantly Gay denomination. One week later, the Supreme Court refused to hear another Gay-related appeal from the Sixth Circuit—this one from a high school guidance counselor in Ohio who had lost her job because she mentioned to several colleagues that she is bisexual.

The only bright spot in the court's docket for the month was an 11-page dissent to the denial of the Ohio case. In that dissent, Justices William Brennan and Thurgood Marshall said the guidance counselor case "raises serious and unsettled constitutional questions relating to this issue of national importance [Gay rights], an issue that cannot any longer be ignored."

The constitutional questions in the Ohio case were free speech and equal protection. The court finally cast its opinion on a free speech question involving Gay teachers in Oklahoma one month after it refused to hear the Ohio case. The case in March was *NGTF v. Oklahoma*, a case challenging an Oklahoma law which prohibited teachers from "advocating" homosexuality. The high court's decision? A tie. (Justice Lewis Powell was out for surgery.)

Nevertheless, the 4-4 tie vote in March



Constitutional law expert Laurence Tribe (at the microphones) helped support Gays in one of the four Gay-related cases before the U.S. Supreme Court this year.

actually gave legal activists a boost. The vote affirmed a 10th Circuit decision which had declared the anti-Gay teacher law unconstitutional. The rollercoaster ride continued upward one week later when the Supreme Court refused to hear yet another Gay-related case. This time, the case was being appealed by Texas A&M University, which didn't want to grant official recognition to a campus Gay group.

And speaking of campus Gay groups, two such groups on the campus of Georgetown University in the District were taking their own rollercoaster ride through the courts this year.

In July, a three-member panel of the D.C. Court of Appeals handed a 2-1 victory to two campus groups who said that Georgetown University's refusal to grant

them equal access to campus benefits was unconstitutional. But the victory was yanked away immediately, as the full court called for a rehearing on the matter. That rehearing took place in a lively exchange in October, and the decision is still pending.

But the biggest pending question before any U.S. court right now is the Georgia sodomy law challenge. The challenge is being made by an Atlanta Gay man, Michael Hardwick, who was arrested on the sodomy charge in his own bedroom. The 11th Circuit gave Gays an historic win in May when it ruled that homosexual activity is protected by the constitution's right to privacy provision. Three months later, the 5th Circuit pulled spirits back down when it ruled that a similar law in Texas was constitutional. So far, the Supreme Court

has agreed to hear the Georgia case, and Gay activists are holding the Texas case in the wings as a follow-up if the Supreme Court rules that the broader Georgia law (which applied to both Gays and heterosexuals) is constitutional. The more specific Texas law (which applies only to Gays) may give another crack at getting a high court ruling favorable to Gays, they say.

Whatever the Supreme Court's eventual ruling on the sodomy challenges, activists agree, its impact will affect Gays and the perception of the Gay movement for many years to come.

Other ups:

- In January, a U.S. District Court judge ruled that the CIA acted improperly when it fired a Gay man in 1982 without providing him with an opportunity for a hearing. The judge ordered CIA Director William Casey to reinstate the employee—referred to as John Doe to maintain his CIA-required confidentiality—to administrative leave status.

- In February, Brig. Gen. Paul Harvey, commander of Andrews Air Force Base, dismissed charges against an Air Force colonel accused of engaging in homosexual activity with a lieutenant.

Other downs:

- The Virginia Supreme Court ruled in February that a Fairfax County Gay man had to give up custody of his 10-year-old daughter because exposing the child to "his immoral and illicit relationship" with his lover "rendered" him an unfit and improper custodian as a matter of law.

- New York State's highest court ruled in June that N.Y. Mayor Ed Koch's executive order prohibiting discrimination against Gays by private agencies doing business with the city exceeded his authority under the separation-of-powers principle.