

AMERICAN BAR ASSOCIATION
LAW STUDENT DIVISION
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
JOINT REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

BE IT RESOLVED, that the American Bar Association 1
opposes any efforts by government to withhold funds from, 2
or otherwise penalize, educational institutions for 3
denying access to campus placement facilities to 4
government employers who contravene university policies by 5
discriminating on the basis of sexual orientation. 6

REPORT

The American Bar Association has historically taken a strong stand against discrimination on the basis of sexual orientation. Nonetheless, it is the policy of the Department of Defense and other governmental agencies to deny employment and security clearances on the basis of sexual orientation. In response, many of our nation's finest educational institutions have taken steps to deny discriminating employers access to university recruitment facilities.² This resolution opposes legislative attempts to punish educational institutions that pursue their non-discrimination policies. Such legislation would unfairly force schools to choose between their principles and their economic survival.

The American Bar Association has passed numerous resolutions opposing discrimination on the basis of sexual orientation. In August 1973, the American Bar Association resolved, "that the legislature of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors and public decorum." In February 1989, the House of Delegates adopted the following historic resolution by a two to one margin:

¹Department of Defense Directive 1332.14; Department of Defense Directive 1332.30; Department of Defense Directive 5200-2-R; U.S. Army Regulation 635-200; SECNAVINST 1900.9C; SECNAVINST 1920.6A; NAVMILPERSCOMINS 1910.1C; MILPERSMAN 3630400; Marine Corps Separation and Retirement Manual, 1900-16C, paragraph 6207; Air Force Regulation 36-2, Chapter 3, paragraph 4; U.S. Coast Guard Personnel Manual, Articles 12-B-16, 12-B18, 12-B-33; Director of Central Intelligence Directive No. 1/14.

²See American Civil Liberties Union Lesbian and Gay Rights Project, *Campus Update*, July 1991 (reporting that approximately 23 universities have either banned ROTC or have set deadlines before which the military must change its discriminatory policies or be denied access to university facilities; among the universities that have taken a strong stance against military recruiters are Alfred University, Amherst College, University of Cincinnati, University of Connecticut, Harvard University, John Jay College of Criminal Justice, Massachusetts Institute of Technology, University of Nebraska, University of Pennsylvania, Pitzer College, University of Rhode Island, Rutgers University, University of Wisconsin at Madison, and Yale University).

BE IT RESOLVED, that the American Bar Association urges the Federal government, the states and the local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public accommodations.

As resolved in August 1990, Canon 3B(5) of the Model Code of Judicial Conduct states, "A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon ... sexual orientation..." In August of 1991, the ABA passed a resolution supporting the enactment of federal legislation requiring a study of bias in the federal judicial system, including bias based on sexual orientation.

Across the nation, educational institutions have engaged in similar efforts to make their communities discrimination-free. Like the ABA, universities have amended their non-discrimination policies to include sexual orientation. All organizations that use university services and facilities are thereby required to abide by the non-discrimination policy.

Educational institutions have adopted these policies for a number of reasons. Some are required to do so by local law. Law schools are required to do so in order to maintain their accreditation with the Association of American Law Schools. Some universities have done so simply because it is the only means by which they can assure gay and lesbian community members

³In the District of Columbia, for example, it is unlawful for an educational institution to, "deny, restrict, or to abridge or condition the use of, or access to, any of its facilities and services to any person ... based upon the ... sexual orientation ... of any individual. D.C. Code 1981, § 1-2520.

⁴The AAIS has passed a regulation which states that, in order to maintain accreditation, schools, "shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b)." Bylaw 6-4(b) states that, "A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation."

that they will have equal access to all university facilities and services.

Notwithstanding the policy statements of the ABA and of our nation's leading educational institutions, some employers still discriminate on the basis of sexual orientation. Of these, the Department of Defense is most prominent. Because of its express nature, the policy of the Department of Defense can be used as a paradigm for understanding the debate that has gone on over inclusion and exclusion of gays and lesbians.

The Department of Defense explains the basis for its policy in Directive 1332.14, which states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers, and to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Service; to maintain the public acceptability of military service; and to prevent breaches of security.

While this policy remains in effect and continues to be enforced, there have been numerous reports commissioned by the Department of Defense itself which provide thorough critiques of the policy's underlying assumptions. In 1957, the Crittenden Report noted, "The concept that homosexuals pose a security risk is unsupported by any factual data." In 1988, the PERSEREC Report found that, "Although not well-publicized, the available data all point to the conclusion that preserve background characterization and subsequent job performance of homosexuals in

⁴Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals, 1957.

the military is satisfactory.⁵ The Report concluded by comparing the present-day attitudes toward homosexuals with the attitudes in the 1950's toward Blacks. It noted that despite the resistance toward integration, "the military services are leaders in providing equal opportunity for black men and women. It would be wise to consider applying the experience of the past 40 years to the integration of homosexuals."⁶ A more recent study conducted by the Defense Department also concluded that, "sexual orientation is unrelated to moral character. Both patriots and traitors are drawn from the class American citizen and not specifically from the class heterosexual or homosexual."⁷

Whether the military's policy is right or wrong, educational institutions have done what they perceive to be required to protect their community members from discrimination on campus.

Attempts to take away federal funds from schools that deny access to employers who discriminate would chill the debate on college campuses over how to eradicate discrimination. Because America's educational institutions are dependent on the Federal Government, the specter of losing federal funds would frighten schools out of exploring all the options.

This resolution does not ask that the ABA encourage schools to ban military recruiters. The resolution merely states that a school should not be forced to forego federal funds because of its desire to respect members of its community, because of its desire to discourage discrimination, because of its desire to maintain its accreditation, or because of its desire to abide by local law. Universities should have the freedom to pursue non-discrimination policies without the fear of a punitive response

⁵ Defense Personnel Security Research and Education Center, Nonconforming Sexual Orientations and Military Suitability, page 25, 1988.

⁶ *Id.*

⁷ John Lancaster, Defense Study: Gays Pose No Greater Security Risk: Military's Ban on Homosexuals Unaffected, Washington Post, October 10, 1991, at A20.

⁸ Institutions of higher education receive 12.6% of their total revenues from the Federal Government. U.S. Department of Education, National Center for Education Statistics, Financial Statistics of Institutions of Higher Education, April, 1991.

from the government. To this end, the American Bar Association should strongly oppose any efforts to withhold federal funds from, or otherwise penalize, educational institutions for denying access to services or facilities to employers who violate university policies by discriminating on the basis of sexual orientation.

Respectfully submitted,

Tracy Giles
Chair, Law Student Division

Philip A. Iacovara
Chair, Section of Individual
Rights and Responsibilities

Date: January 1992

GENERAL INFORMATION FORM

No. _____

Submitting Entity: Law Student Division
Section of Individual Rights and
Responsibilities

Submitted by: Tracy Giles, Chair, LSD
Philip Lacovara, Chair, Section of IR & R

1. Summary of Recommendation.

The purpose of the recommendation is to ensure that universities will not be forced to choose between their policies of non-discrimination on the basis of sexual orientation and their federal funding.

2. Approval by Submitting Entity.

Approved by the Law Student Division Assembly at its 1991 Annual Meeting. Also approved by the Section of Individual Rights and Responsibilities at its November Council meeting.

3. Previous Submission to the House of relevant Association position.

In February, 1989, the ABA approved a recommendation urging the federal government to enact legislation prohibiting discrimination on the basis of sexual orientation in employment, housing, and accommodations.

4. Need for Action at this Meeting.

Currently, there are two bills being considered by Congress. These bills deny funds to universities that do not allow the Secretary of Defense access to students on campuses.

5. Status of Legislation.

There are two bills (H.R. 1214 and H.R. 1651) currently pending in the House which deny federal funding to universities that prevent the Secretary of Defense from entering campus for military recruiting purposes.

6. Cost to the Association. (Both direct and indirect costs.)

None.

7. Disclosure of Interest. (If applicable.)

None.

8. Referrals.

A copy of the Report with Recommendation was circulated to the Young Lawyers Division, Section of Legal Education, Standing Committee on Military Law, and Standing Committee on Lawyers in the Armed Forces on November 26, 1991.

During the week of December 9, 1991, additional referrals were made to the Government and Public Sector Lawyers Division, the Section of General Practice, and the Section of Public Contract Law.

9. Contact Person. (prior to meeting.)

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10. Contact Person. (who will present the report to the House.)

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AMERICAN BAR ASSOCIATION
Section of International Law and Practice
Report to the House of Delegates

RECOMMENDATION

BE IT RESOLVED That the American Bar Association urges Congress to continue the exemption for capital gains derived by foreign investors on sales of stock of U. S. corporations (other than U.S. real property holding corporations), so as not to burden foreign direct investment in the United States with a second level tax not imposed on U. S. individual investors similarly situated.