Recommendations to the Executive Branch to Benefit Lesbian, Gay, Bisexual, and Transgender Americans and Families: A Blueprint for Positive Change

Executive Summary:

The 2008 presidential election paves the way for unprecedented changes in U.S. policy, creating opportunities to create a safer, healthier America, safeguard every person's right to work, expand protections for all families, maintain a fair-minded judiciary, lead the fight for civil rights legislation, and fundamentally re-think the government's ways of serving every American.

For the lesbian, gay, bisexual, and transgender ("LGBT") community, electing a fair-minded president has profound effects and provides vast opportunities. This results not only from new leadership, and new vision, in the White House, but also from new management of the entire executive branch, including the agencies that perform functions—such as protection from violence, provision of health education and research funding, and benefits for families—crucial to the wellbeing of LGBT people.

The Obama administration, through the power that our Constitution provides the President and executive branch, can institute much-needed changes in federal policy without Congressional action. The president has the power to appoint officials who are receptive to civil rights and judges who respect fundamental constitutional principles and enforce legal protections for all Americans. President Obama will also be empowered to direct administrative actions that will improve the lives of millions of LGBT people.

For example:

- As leader of our nation's largest civilian workforce, the president may institute workplace protections including non-discrimination policies, improved access to health care, and improved services for employees' families.
- The administration can promote the public health by allocating funds to much-needed HIV/AIDS prevention and treatment programs, and funding scientifically-based education programs that are proven to fight disease and address the circumstances faced by LGBT people.
- Directing our nation's largest law-enforcement organization and civil rights enforcement body, President Obama can appoint an Attorney General who recognizes the importance of fighting bias-motivated violence and is committed to rigorous enforcement of all civil rights protections. In addition, the Administration can make clear that civil rights enforcement is a priority.
- The president can insure that the federal government does not fund social service programs without a guarantee that the funds will not be used to discriminate against the most vulnerable clients. And although the LGBT community recognizes and celebrates our tradition of religious liberty, the President can and should safeguard against religious liberty being used—whether in federally-funded programs or in the federal workforce—as a proxy for discrimination.

- A fair-minded judiciary is critical to the civil rights of all Americans. LGBT Americans — who currently face discrimination under state and federal law but who have recently seen crucial gains before the Supreme Court— rely upon this President to appoint judges with a robust understanding of fundamental rights and Equal Protection, and who respect Congress' power to enact civil rights legislation.

The executive branch's authority to implement federal statutes also provides broad latitude to maximize the government's ability to protect every American under existing law. As set forth more fully below, the last administration exercised this power to weaken or undermine protections for the LGBT community.

The Human Rights Campaign has conducted exhaustive research into federal policies that this Administration can achieve through executive orders, department and agency rulings and policies, administrative rule-making, statements of administration policy, and other non-legislative actions.

I. The Federal Government as Employer

a. Non-discrimination in the federal workplace

According to seasonally-adjusted numbers from the Bureau of Labor Statistics, the federal government employed approximately 2,745,000 individuals in June 2008.[1] As the employer of two percent of the nation's non-farm labor force, the Federal government has the power to set an example for public and private employers in determining how best to provide equal opportunity.[2] When President Clinton signed Executive Order 13087, which sent a clear message that discrimination based on sexual orientation would not be tolerated in federal employment, the action resonated through the private sector as well. In fact, as of 2008, 86.6% of Fortune 500 Companies ban workplace discrimination based upon sexual orientation. Twenty-six state and 281 local governments also ban discrimination in public employment based upon sexual orientation. Similarly, gender identity workplace protections are now provided by 30.6% of Fortune 500 companies and 12 state and 93 local governments.[3]

In spite of the executive order, over the past eight years the federal government has fallen behind in enforcing workplace protections. In February 2004, almost immediately after his appointment to lead the Office of Special Counsel ("OSC"), Scott Bloch ordered that sexual orientation non-discrimination provisions be removed from OSC's website and stated that his office did not have the authority to pursue claims of discrimination based on sexual orientation by federal employees.[4]

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[1] *See* U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, *Data Retrieval: Employment, Hours, and Earnings (CES)*, tbl. B-1, http://www.bls.gov/webapps/legacy/cesbtab1.htm ("Employees on nonfarm payrolls by industry sector and selected industry detail (in thousands)").

[2] *See id.*

[3] *See* HUMAN RIGHTS CAMPAIGN, *Search Our Employer Database*, http://www.hrc.org/issues/workplace/search_employers.htm (follow "Provide Domestic Partner Health Benefits" hyperlink; then follow "State Governments" hyperlink).

[4] *See* Ari Shapiro, *Federal Agents Investigate Whistle-Blower Agency*, NAT'L PUBLIC RADIO, May 7, 2008, http://www.npr.org/templates/story/story.php?storyId=90245837.

Despite complaints from Congress[5] and a public correction from the Bush Administration,[6] Bloch has continued to argue that, in at least some cases, that OSC lacks the authority to protect federal employees from discrimination based on sexual orientation. Most recently, in July 2008, as part of a high-profile investigation of the hiring and firing of non-political career attorneys at the Department of Justice, it was revealed that a highly qualified career attorney was dismissed over rumors about her sexual orientation.[7]

Although the 1998 executive order was a step forward, the federal workforce currently lags behind America's leading employers by lacking any protection from discrimination based upon gender identity [and expression]. The President should act with expedience to restore full enforcement of civil service law with regard to discrimination based on and to enact an anti-discrimination policy covering gender identity and expression. Fully including transgender workers in the federal workforce also means lifting the discriminatory exclusion of gender transition-related health services from the Federal Employee Health Benefit Program ("FEHBP") and providing equal access to gender-appropriate facilities.

b. Best practices in hiring and recruitment

As noted, while the federal government has established some protections for LGBT employees, it is simply not competitive with the private sector in recruiting and retaining these workers, and in providing diversity training related to LGBT equality. To maintain a workplace where all employees are valued and treated equally, the federal government should adopt a set of "best practices" specifically geared toward the LGBT community.

Aside from the strengthening and expansion of nondiscrimination policies described above, and the expansion of benefits discussed below, these best practices should include: instituting formal diversity programs on LGBT issues throughout departments and agencies, advertising positions in LGBT media, recruiting through LGBT organizations and job fairs, and including nondiscrimination policies clearly in all recruitment materials and job announcements.

c. Benefits and protections for families

The majority of Fortune 500 companies provide domestic partner benefits to their employees. Many of America's leading companies, including the "Big Three" automakers, defense giant Raytheon, IBM, Microsoft, Shell Oil, Walt Disney, Fannie Mae, Citigroup, Xerox, Time Warner and United and American Airlines offer these benefits. In addition, 13 states and 201 local governments offer their public employees domestic partnership benefits.

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[5] *See* Stefen Styrsky, *Federal Gay Employees Have No Job Protection*, SAN FRANCISCO BAY TIMES, May 26, 2005, http://www.sfbaytimes.com/index.php?sec=article&article_id=3702.

[6] *See* Christopher Lee, *Official Says Law Doesn't Cover Gays*, WASH. POST, May 25, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/05/24/AR2005052401496.html.

[7] *See* Ari Shapiro, *Justice Probes Lawyer's Dismissal Amid Gay Rumor*, NAT'L PUBLIC RADIO, July 29, 2008, http://www.npr.org/templates/story/story.php?storyId=89288713.

The practices adopted by these companies have shown a commitment to provide a fair workplace to LGBT employees. In addition to strong and effective discrimination policies, many private employers have developed innovative business practices as part of their model for equal opportunity. Eighty-nine percent of businesses rated by the Human Rights Campaign's Workplace Project now provide domestic partner health coverage to employees—a benefit that has become the new norm for equal opportunity employers.[8] Seventy-eight percent provide equal dental, vision, dependent medical and COBRA-lie continuation coverage.[9] Seventy-eight percent have also created LGBT employee resource groups and diversity councils.[10] These organizations can serve a number of functions, such as improving communication between employees and management, developing new marketing and workplace policies, serving as a base for employee recruitment, developing new leadership, and providing cultural representation at outside events.[11]

In contrast, the federal civilian workforce not only lacks health benefits for same-sex partners, but gay and lesbian Americans serving our government abroad are denied even such basic family services as language training and evacuation assistance. Recently Michael Guest, former ambassador to Romania, cited the lack of family benefits as his reason for retiring from the Foreign Service. Although including same-sex partners in the FEHBP would require legislation,[12] the Administration can extend protections to gay and lesbian partners and the children they are raising.

Much more than a mere administrative inconvenience, the denial of these basic family services causes gay and lesbian Foreign Service officers not only to fear for the health and safety of their families, but to experience much greater financial hardships. Yet as important as these protections are to gay and lesbian Foreign Service officers serving abroad, what is remarkable is the ease with which the Administration can provide these protections. In fact, all the Administration needs to do to provide these basic services is to acknowledge that the gay and lesbian partners of Foreign Service officers are, in fact, members of their family. To continue to deny these benefits to the gay and lesbian partners of Foreign Service officers—especially when relatively simple actions could remedy the problem—shows disrespect for the integrity of their families.

d. Non-discrimination by employers and service providers who use federal dollars

When the federal government hires private companies to perform government functions with public funds, it can and should expect the contractors to adhere to the same civil rights standards as the government would if it were doing the work. Executive Order 11,246 already ensures strict conformity to these standards in providing itself recourse to act when a federal contractor or subcontractor discriminates on the basis of race, color, religion, sex, or national origin. Extending these non-discrimination provisions to cover sexual orientation and gender identity would encourage

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[8] *See* HUMAN RIGHTS CAMPAIGN FOUND., CORPORATE EQUALITY INDEX: A REPORT CARD ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER EQUALITY IN CORPORATE AMERICA 16 (2008), http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2008.pdf. Also notable as the country's twentieth largest contractor is Honeywell International Inc., which also received a perfect score from HRC.

[9] *See id.* at 17.

[10] *See id.* at 18.

[11] *See id.*

[12] *See* Domestic Partnership Benefits and Obligations Act, S. 2521, H.R. 4838, 110th Cong. (2007). Senator Obama was one of only twenty original cosponsors of the Senate legislation.

contractors to act in the federal government's interests of having an "economical" and "efficient" system of procurement.[13]

Notably, several prominent federal prime contractors have already made significant strides in providing comprehensive sexual orientation and gender identity non-discrimination protections to their employees. Traditionally considered a conservative industry, aerospace and defense corporations have transformed into an industry filled with several of America's best workplaces for LGBT employees. In fact, the five largest federal contractors in 2007—all of them aerospace and defense corporations representing over $98 billion in contracts—prohibited workplace discrimination based on sexual orientation.[14] Moreover, Boeing Co., Northrop Grumman Corp., and Raytheon Co. each went well beyond these minimal protections in receiving perfect scores in HRC's *Corporate Equality Index*,[15] Encouraging corporations to adopt LGBT workplace protections is simply a wise "business decision," which in the case of Lockheed Martin, served the corporation's and the federal government's interests in ensuring that prime contractors can "hire and retain tens of thousands of employees over a short period of time."[16]

The President should issue an executive order that would amend Executive Order 11,246 to prohibit discrimination on the basis of sexual orientation and gender identity by federal contractors and subcontractors as a term of contract. No longer should a corporation be allowed to reap the rewards of receiving federal contracts while ignoring basic workplace protections for its employees.

Also, in recent years, the federal government has turned increasingly to religious organizations to provide vital services to vulnerable populations. These services include substance abuse treatment, early childhood education, food and nutrition assistance, job training and homeless shelters. Faith-based groups often have expertise in direct services, and strong ties to the communities that they serve. Making use of their skills and commitment can have remarkable benefits.

Federal funding should never be provided to organizations that discriminate. Because the intended recipients of faith-based services are among the most vulnerable people—whether those seeking counseling, searching for housing or food, or developing skills to support themselves in the workforce—the administration has a heightened duty to protect them from discrimination.

Faith-based organizations have significant opportunities to obtain federal funds for the provisions of a range of services. As a result, without proper safeguards, those are also opportunities for taxpayer dollars to support discrimination against lesbian, gay, bisexual and transgender people. The Bush Administration has attempted, through program guidance, executive order, support of legislative changes, to loosen the reins on religious organizations. While the ability of faith-based groups to provide these critical services should be preserved, safeguards must be restored to protect all recipients and prevent misuse of taxpayer dollars.

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[13] Federal Property and Administrative Services Act, 40 U.S.C. § 101 (1949).
[14] *See* Top 200 Contractors, http://www.govexec.com/features/0807-15/0807-15s2s1.htm.
[15] *See* CORPORATE EQUALITY INDEX, *supra* note 8, at 41.
[16] Diane Cadrain, *Equality's Latest Frontier*, HR MAGAZINE (Mar. 2003), http://findarticles.com/p/articles/mi_m3495/is_3_48/ai_98830404 (quoting Lockheed Martin spokesperson Tom Jurkowsky).

Through executive order, President Bush created the Office of Faith Based and Community Initiatives and directed cabinet departments to create internal offices which identify opportunities for faith-based groups to receive federal grants. In order to ensure that federal dollars do not finance discrimination, the Administration must issue clarifying regulations that ensure that the government does not discriminate on the basis of religion, religious affiliation, or lack of religious affiliation in making government grants or contacts and that grants and contracts continue to be issued based solely on merit.

A series of statutes enacted during the Clinton Administration included provisions collectively referred to as "charitable choice," designed to improve access to federal grants to faith-based organizations under the Temporary Assistance for Needy Families, Substance Abuse and Mental Health Services Administration, Community Services Block Grant and Community Development Block Grant. Again, in order to protect all recipients of services under these programs, the Administration should affirmatively clarify that the statutes containing charitable choice provisions have in no way preempted federal, state, or local laws preventing discrimination on the basis of sexual orientation or gender identity.

Aside from the risk of discrimination against recipients of services provided by faith-based groups, the Bush Administration has also increased the risk of a faith-based grantee using federal funds to discriminate in its own employment practices. In 2007, the Department of Justice issued a memoranda concluding that prohibiting faith-based recipients of federal grants from discriminating in their employment practices based on religion conflicts with the Religious Freedom Restoration Act, a law adopted to prevent the federal government from substantially burdening individuals' constitutionally-protected religious freedom. This novel and disturbing take on conditioning federal grants opens the door to discrimination with federal dollars against LGBT people in the name of religious freedom. While faith-based groups should be free to provide critical services, they should not be free to use taxpayer money to discriminate.

This year, Congress amended the Higher Education Act to require accrediting agencies to take into account the "religious mission" of a college or university when evaluating it. While the religious heritage of an institution of higher learning must be respected to the extent the First Amendment requires, the Administration must make clear that this provision cannot be used to undermine voluntary policies preventing discrimination on the basis of sexual orientation or gender identity as a precondition for accreditation.

II. The Executive Branch's Role in Promoting Public Health

Public health is a national priority, and the administration plays a key role in providing funding for research, educating the public, addressing the needs of minority communities, and raising awareness of our most critical public-health concerns. The LGBT community faces heightened challenges. Because not all employers offer health benefits to same-sex partners of their employees (and such coverage is subject to unfair taxation), health insurance is less accessible to LGBT people. Most insurers fail to cover procedures and treatments related to gender transition, and due to a recent IRS ruling, such costs are not reimbursable under flexible spending accounts. Aside from facing a lack of

access to health coverage and potential discrimination by health care providers, LGBT people also face increased risks of HIV/AIDS and certain cancers.[17] Recent focus on scientifically-inaccurate, ideologically-focused "abstinence only" sexuality education has disadvantaged LGBT youth even more greatly than other communities, because the message of waiting until marriage is not relevant to people who are still legally denied the right to marry. On behalf of the LGBT community, the Human Rights Campaign has studied the following areas of public health and crafted recommendations.

a. Improved Response to HIV/AIDS

While HIV/AIDS affects people from all walks of life, the epidemic continues to disproportionately impact the LGBT community, especially young gay and bisexual men of color. Our government has made tremendous strides toward effective prevention and treatment, but there is much more to be done. While the era of Senator Jesse Helms, and his hateful efforts to undermine HIV/AIDS programs aimed at our community, is behind us, our government maintains policies that are driven by ideology and create stigma rather than fight the epidemic.

One such stigmatizing policy is the lifetime ban on blood and organ donation by gay and bisexual men. While the Food and Drug Administration evaluates the eligibility of all other donors based on risk factors, its blanket policy toward "men who have sex with men" presumes that all sexual activity among gay and bisexual men carries a high risk of HIV infection. With the extensive screening and other safety measures in place for all donors, there is no justification for maintaining an antiquated and discriminatory policy that turns away life-saving blood and organs.

b. Addressing the specific needs of LGBT people as a community

Federal legislation and administrative policies allocate funding in the form of minority health initiatives to improve health care for disadvantaged populations, particularly those who suffer disparities in health and in access to health care. Current designated groups include women, persons with disabilities, rural populations, and others. LGBT people face significant challenges in gaining access to quality health care, both due to discrimination by health care providers and insurers and to a lack of understanding of the health issues that disproportionately impact them. Designation as a health disparity group would expand research on the needs of the LGBT community and increase access to treatment.

c. Educating the Public About Disease Prevention

Preventing the spread of HIV/AIDS and other communicable diseases is a critical priority for the LGBT community. Scientifically-accurate, effective education on HIV prevention can save lives. Unfortunately, the Bush Administration's policy of funding inadequate "abstinence-only" programs leaves LGBT youth and adults with inadequate information. Information about our community is

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[17] GAY AND LESBIAN MED. ASSOC., HEALTHY PEOPLE 2010: COMPANION DOCUMENT FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) HEALTH 1 (Apr. 2001), http://www.glma.org/_data/n_0001/resources/live/HealthyCompanionDoc3.pdf.

been sorely lacking in other Administration materials about youth and sexual activity – for example, an HHS web-based resource for parents only briefly notes that some youth may identify as gay or lesbian in a section about discussing abstinence, but gives no guidance as to how to actually speak to a LGBT young person about sexual activity other than to "address this issue in an age-appropriate manner."[18] By failing to provide, if not actively opposing, any frank discussion of the realities of sexual activity for LGBT youth, the Administration increases their risk of contracting HIV or other sexually-transmitted diseases.

d. Expanding Medicare Coverage of Medically Necessary Treatments

Medicare is one of the largest health insurance programs in the country, providing for millions of Americans, especially seniors. Yet transgender people can face significant difficulty obtaining critical coverage. Despite consensus in the medical community that sex reassignment surgery is medically necessary for some transgender people, Medicare guidance explicitly excludes any coverage for those procedures. In addition, transgender people who undergo medical transition, and succeed in having the gender marker changed in their Social Security records, are subsequently barred from coverage for medical screenings and treatments for conditions related to their pre-transition sex. As a result, transgender men may be left without insurance coverage for mammograms or cervical cancer screenings, and transgender women may be unable to obtain prostate testing under Medicare. Allowing ignorance of and bias against transgender people to dictate Medicare policy, and endanger the health and well being of member of our community, is unacceptable.

e. Allowing FSA Reimbursement for Medically-Necessary Treatments

Transgender people incur significant expenses in the gender-transition process. Currently, the majority of insurance plans exclude the procedures and treatments from coverage. A recent IRS ruling increases this financial burden by disallowing reimbursement for these expenses through tax-preferred flexible spending accounts. Denying transgender individuals access to necessary care by erroneously identifying such treatment as "cosmetic" is unnecessary under the Tax Code and unfair to a community already burdened by discrimination.

III. Protecting Families

As of Census 2000, gay and lesbian couples live in over 99.3% of U.S. counties and in over 96% of counties gay and lesbian couples are raising children.[19] Of the over 780,000 same-sex couples as estimated in 2006, approximately twenty-seven percent are raising children under 18 in the home.[20] As of 2000, 22.3% of gay couples and 34.3% of lesbian couples are raising children. Although

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[18] http://www.4parents.gov/talkingtoteen/ifgay/ifgay.html.

[19] *See* DAVID M. SMITH & GARY J. GATES, GAY AND LESBIAN FAMILIES IN THE UNITED STATES 1 (The Human Rights Campaign ed. 2000); U.S. CENSUS BUREAU, CENSUS 2000, *Married Couple and Unmarried-Partner Households* (Feb. 2003).

[20] *See* CENSUS 2000, *supra* note 21, at 9. *See also* Gary J. Gates, *Geographic Trends Among Same-Sex Couples in the U.S. Census and the American Community Survey*, Nov. 2007, http://www.law.ucla.edu/williamsinstitute/publications/ACSBriefFinal.pdf. It is believed that Census-based estimates of same-sex couples may be undercounted by as much as 62%. *See* SMITH & GATES, *supra* note 21, at 3.

different-sex couples have access to hundreds of protections for themselves and their children in every state, and over 1100 protections and benefits at the federal level, families headed by gay and lesbian couples suffer legal disadvantages in inheritance rights, taxation, retirement planning, family and medical leave, access to health care, and often even the opportunity to visit one another in the hospital.

In forty-eight states, gay and lesbian couples are denied the right to marry.[21] In addition to full marriage equality in Massachusetts and California, an additional eight states and the District of Columbia provide legal protections to gay and lesbian couples through domestic partnerships or civil unions.[22] Because of the so-called "Defense of Marriage Act" ("DOMA"),[23] even couples whose states recognized them as married or parties to a civil union are denied over 1100 benefits and protections that other families take for granted. For example, gay and lesbian workers pay equally into the Social Security system, but same-sex partners and their children are denied most of the family benefits that Social Security provides.[24]

Although gay and lesbian couples are explicitly excluded by statute from most of the protections that other families receive under federal law, the Administration has the power to implement some changes that will benefit both couples and their children.

a. Clarifying Family and Medical Leave Act ("FMLA") to Protect LGBT Couples and their Children

Sixty percent of children raised by same-sex couples live in jurisdictions that do not permit second-parent adoption. That means that for these children, it is impossible to secure a permanent, legal relationship to both parents, and the guarantee of legal protections that such a relationship provides. Although the definition of "spouse" under federal law explicitly excludes same-sex couples, no definition of "child" under the FMLA precludes the administration from ensuring that all children of same-sex couples are covered.

b. Protecting gay and lesbian couples and families in the event of disaster

Discrimination against LGBT families is often the most pervasive and damaging in times of crisis. Because various federal agencies erroneously interpret the Defense of Marriage to bar any assistance

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[21] California and Massachusetts provide equal marriage rights for gay and lesbian couples. In addition, the State of New York recognizes out-of-state marriages celebrated by same-sex couples through an executive order even though New York does not presently permit these couples to be married in-state.

[22] Civil unions providing the same rights as marriage are now provided in Vermont, New Hampshire, Connecticut, and New Jersey. Oregon, Washington, Maine, Hawaii (reciprocal beneficiaries), and the District of Columbia recognize domestic partnerships that have provided some benefits to couples.

[23] 1 U.S.C. § 7.

24 Although children with a legal relationship to the worker may receive surviving child benefits, many children of same-sex couples cannot secure a legal relationship to both parents. In fact, 60% of children raised by gay and lesbian couples live in jurisdictions where second-parent adoption is unavailable. These children are denied surviving child benefits if the non-biological, non-adoptive parent dies. Because surviving parent benefits are only offered to a person raising the deceased "spouse's' child, and DOMA defines spouse to exclude gay and lesbian partners, *all* children raised by gay and lesbian couples are denied access to these valuable benefits, even if they are the legal children of the deceased worker and their parents are married under state law.

to gay and lesbian couples, these families encounter several administrative hurdles in navigating the disaster relief process and rebuilding their lives. Relief monies are often distributed to LGBT families as if they were individuals, and not as a couple, or as a family. A person caring for his or her same-sex partner's children finds it more difficult to procure housing or financial support to provide for the child, simply because the system does not recognize their relationship. At these times of crisis, when families need the Federal Emergency Management Agency ("FEMA") most desperately, discriminating against these families is simply unacceptable. Congress provided the President with sweeping authority to ensure that the provision of aid is fair and equitable by letting the President determine what constitutes a "household"[25] for the purposes of FEMA disaster relief. The Administration can and should clarify this definition of "household" to explicitly include LGBT families equally.

c. Providing access to affordable housing

The Affordable Housing Program is administered by the Office of Community Planning and Development ("CPD") of HUD.[26] Under the Program, federal money is provided to state and local agencies to develop affordable housing and subsidize rents and to approved lending institutions to provide down payments and below-market mortgages to eligible families.[27] How HUD defines "family" for this program has significant implications for determining eligibility for financial assistance. Family income is determined by aggregating the incomes of the homebuyer and members of the family residing with the homebuyer, which is then adjusted by the number of members in that family.[28] Because relative income level determines a family's eligibility,[29] whether the administrating agency regards a partner or his dependents as members of a prospective homebuyer's or renter's family can have a material impact on whether a family headed by a same-sex couple receives aid.

IV. Assessing the failed policy of discharging essential service members due to their sexual orientation

There is growing consensus among the American public, veterans, and active service members that the military's "Don't Ask, Don't Tell" ("DADT") policy must be eliminated. Since DADT was implemented in 1993, over ten thousand qualified members of the U.S. Armed Services have been discharged under the law.[30] A Government Accountability Office report found that by 2005, discharges of service members with mission-critical skills was nearing 800.[31] DADT also deters many qualified lesbian, gay, and bisexual ("LGB") people from enlisting in the military. Studies have

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[25] 42 U.S.C. § 5174(a)(1) (2006).
[26] DEP'T OF HOUS. AND URBAN DEV., OFFICE OF CMTY. PLANNING AND DEV., *Affordable Housing Programs*, http://www.hud.gov/offices/cpd/affordablehousing/programs/index.cfm.
[27] FEDERAL HOUSING FINANCE BOARD, *Housing Programs*, http://www.fhfb.gov/default.aspx?page=47.
[28] *See* 42 U.S.C. §12852(b)(2).
[29] *See id.*
[30] John Files, *Rules on Gays Exact a Cost in Recruiting, a Study Finds*, N.Y. TIMES, Feb. 24, 2005, *available at* http://www.nytimes.com/2005/02/24/politics/24gays.html?_r=1&oref=slogin.
[31] GOVERNMENT ACCOUNTABILITY OFFICE, MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD'S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED, 4-5. (Feb. 2005).

estimated the U.S. military loses over 4,000 LGB military personnel each year whom it otherwise would have retained had they been able to be open about their sexual orientation.[32]

Since the law's inception, public opposition to DADT has remained high or increased with virtually every poll. In the year DADT was enacted, 1993, an NBC/Wall Street Journal Poll showed 40 percent of Americans favored allowing openly gay men and lesbians to serve in the military.[33] Current polling stands at 79 percent, according to a 2007 CNN Poll.[34] This demonstrates a consistently increasing level of support for allowing gays and lesbians to serve openly in the military.

There have also been significant increases in the number of people within the military that denounce DADT. Former supporters have agreed that it is time to reexamine this failed policy and have called for its repeal. In January 2007, John M. Shalikashvili, former Chairman of the Joint Chiefs of Staff, recanted his support for the "Don't Ask, Don't Tell" policy in a NY Times Op-Ed column. He now believes that "if gay men and lesbians served openly in the United States military, they would not undermine the efficacy of the armed forces."[35] A December 2006 Zogby poll of soldiers returning from Iraq and Afghanistan found that 73 percent of soldiers reported being "comfortable … in the presence of gays," and only 37 percent oppose repealing the policy.[36]

These numbers demonstrate that DADT is a divisive and ineffective policy that serves to weaken our military by rejecting qualified lesbian, gay, and bisexual individuals who are ready and willing to serve our country. Although this discriminatory policy is statutory, and requires congressional action to eliminate, the next administration should establish a plan for eliminating DADT to guide Congress in repealing the policy in its entirety. The next administration should establish such a plan.

V. Community Safety

a. Improving Response to Hate Crimes

According to Federal Bureau of Investigation ("FBI") data, a bias-motivated violent crime occurs every hour.[37] Although the FBI stated that 7,722 instances of hate crimes occurred in 2006, the Bureau of Justice Statistics—the research arm of the Department of Justice ("DOJ")—estimates that approximately 191,000 incidents, affecting 210,000 victims, of bias-motivated incidents occur

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[32] GARY GATES, EFFECTS OF "DON'T ASK, DON'T TELL" ON RETENTION AMONG LESBIAN, GAY, AND BISEXUAL MILITARY PERSONNEL, THE WILLIAMS INSTITUTE (Mar. 2007) *available at* http://www.law.ucla.edu/williamsinstitute/publications/EffectsOfDontAskDontTellOnRetention.pdf.

[33] Heather Mason Kiefer, *Gays in Military: Public Says Go Ahead and Tell,* GALLUP, Dec. 21, 2004, http://www.gallup.com/poll/14419/Gays-Military-Public-Says-Ahead-Tell.aspx.

[34] *Polling Data on Gays and Lesbians in the U.S. Military*, SERVICEMEMBERS LEGAL DEFENSE NETWORK, http://www.sldn.org/templates/dadt/record.html?section=143&record=1900.

[35] John M. Shalikashvili, *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007 *available at* http://www.nytimes.com/2007/01/02/opinion/02shalikashvili.html?_r=1&scp=1&sq=second+thoughts+on+gays+in+the+military&st=nyt&oref=slogin.

[36] Brad Knickerbocker, *U.S. Military More Open to Gays Serving Openly*, THE CHRISTIAN SCIENCE MONITOR, Dec. 4, 2007, http://www.csmonitor.com/2007/1204/p03s01-usmi.html?page=1.

[37] *See* FED. BUREAU OF INVESTIGATION, *FBI Releases 2006 Hate Crime Statistics* (Nov. 2007), http://www.fbi.gov/ucr/hc2006/pressrelease.html

annually.[38] Although there may be any number of reasons for this disparity, it is undisputable that hate crimes are vastly underreported in this country.

Although LGBT people constitute a small percentage of the population, anti-LGBT attacks are among the most common hate crimes.[39] Although current federal hate crimes law does not cover crimes motivated by anti-LGBT bias, there is a federal sentence enhancing statute that applies to anti-gay crimes, and the Hate Crimes Statistics Act ("HCSA") authorizes the collection of data on anti-gay violent crimes.[40] The Department of Justice should prioritize investigating and prosecuting all types of hate crimes. Additionally, the Administration should review the Hate Crimes Statistics Act, a valuable tool for state and federal law enforcement and make recommendations for legislative or regulatory changes to increase understanding of HCSA and encourage reporting by agencies in underreported or zero reporting jurisdictions.

b. Protecting LGBT People from Domestic Violence

Like all communities, the LGBT community faces the problem of domestic violence. Although the DOJ has recognized both heterosexual and same-sex domestic violence as a national problem,[41] prosecutions under the Violence Against Women Act[42] have been historically non-existent in cases where both the victim and the offender are members of the same gender. In 2006, Congress passed legislation that expanded the breadth of the criminal provisions of VAWA to protect "intimate partners" and "dating partners."[43] The plain language of VAWA could not be any clearer in its gender neutrality by broadly extending federal protection to individuals in any "social relationship of a romantic or intimate nature." Yet with such an expansive definition that clearly protects LGBT victims, DOJ has not sufficiently informed prosecutors that VAWA can apply when both the victim and offender are members of the same gender. To solve this problem, DOJ should issue a ruling in which it would clarify that the interstate domestic violence and stalking provisions of VAWA apply in situations where the offender and the victim are of the same gender.

c. Ease Unfair Burdens on Transgender People in Securing Identity Documents

The current federal method for determining whether a transgender person may change his or her gender marker on identity documents depends upon an unreasonable requirement that a transgender person have "completed" surgery. The current approach fails to consider the realities of gender

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[38] *See* BUREAU OF JUSTICE STATISTICS, HATE CRIME REPORTED BY VICTIMS AND POLICE 1 (Nov. 2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/hcrvp.pdf.

[39] *See* FED. BUREAU OF INVESTIGATION, *supra* note 1 (finding that 15.5% of the 7,722 criminal incidents involving 9,080 offenses were triggered by a bias on the basis of sexual orientation).

[40] 28 U.S.C. §§ 534, 594 n. sec. 280003.

[41] As stated by the DOJ, "[d]omestic violence can happen to anyone regardless of race, age, sexual orientation, religion, or gender…Domestic violence occurs in both opposite-sex and same-sex relationships and can happen to intimate partners who are married, living together, or dating." U.S. DEP'T OF JUSTICE, OFFICE ON VIOLENCE AGAINST WOMEN, *About Domestic Violence*, http://www.ovw.usdoj.gov/ domviolence.htm.

[42] 18 U.S.C. § 2261 *et seq*.

[43] The definition of "intimate partners" includes a person who "is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship." Pub. L. No. 109-162, Title I, § 106(d) (2006).

transition. The medical aspects of gender transition can involve multiple surgeries, as well as mental health counseling, hormone therapy and other treatments. Furthermore, many transgender people choose not to undergo some—or any—medical intervention, some are medically unable to do so because of other health considerations, others may not be financially able to do so, and still others may be in a place in the treatment of gender identity disorder that precedes any surgery. In such circumstances, to insist that an individual has failed to "complete" an undefined "gender reassignment surgery" in order to correct a key identity document is ethically objectionable and factually inaccurate.

Transgender individuals experience higher levels of discrimination, harassment, and emotional trauma as a consequence of being denied the right to have the gender markers on their identity documents match their gender presentation. Given that the current policy causes such harm, the Administration should permit an individual to change his or her gender marker on their federal documents and records if that individual provides proof that he or she has started medical treatment related to gender transition, has been advised by his or her physician against pursuing gender reassignment surgery or other medical treatment, or has made decisive steps to live his or her life fully and permanently as the gender other than that currently listed on their documents or records.

a. Social Security Administration policy regarding gender marker changes on SSA records

To change one's gender information in that SSA record,[44] one must complete an SS-5 form, provide proof of identity showing current legal name, and provide a letter from a surgeon or attending physician verifying that gender reassignment surgery has been completed.[45] SSA has provided no definition of what either "gender reassignment surgery" or "completed" mean. According to SSA internal policies, sex and gender data is collected and "used for identification purposes only."[46] Whether SSA truly "requires" gender data for identification purposes is unclear because the Administration does not require employers to input gender information when verifying employee Social Security numbers.[47] Notably, prior to October 2002, SSA permitted an individual to change his or her gender marker upon being provided with documentation stating that gender reassignment surgery had *started*. This prior policy indicates that a currently "accurate" identification of an individual's gender is not necessary. Given this fact, the Administration should adopt this new policy that would reflect the medical realities of gender transition.

The failure to allow transgender individuals to change their gender markers leads to other problems. SSA encourages employers to verify Social Security numbers when processing W-2 forms as part of SSA's duty to maintain wage reports under the Social Security Act. Under current practice, SSA sends employers a "no-match" letter when an employee's reported gender does not match the gender marker in his or her Social Security record. Employers receiving a "gender no-match" letter will

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[44] 20 C.F.R. §§ 422.110, 422.107(c) (July 31, 2006).
[45] *See* SOCIAL SECURITY ADMIN., SSA PROGRAM OPERATING MANUAL SYSTEM § RM 00203.215, *Changing Numident Data – Other than Name Change* (Dec. 2005), https://secure.ssa.gov/apps10/poms.nsf/lnx/0100203215!opendocument.
[46] *Id.*
[47] *See infra*, memorandum on "gender no-match" letters.

likely confront the employee about the discrepancy and require that the discrepancy be resolved before continuing with employment. Because SSA presently requires proof of sex reassignment surgery in order to change a person's gender marker, many transgender job applicants and employees will not be able to remedy that discrepancy. As a result, a "gender no-match" letter may not only lead to invasive questions regarding medical information, but when the discrepancy is not resolved, an employer may also terminate the employment of a transgender employee.[48] Given that gender information is only requested, but not required, in several SSN verification services, gender information is clearly not necessary to identify a particular individual for wage report submission purposes.[49] Given these facts, the Administration should also cease requiring or requesting gender information in the Social Security number verification process.

b. Department of State policy regarding gender marker changes on passports

Current passport policy limits transgender individuals by permitting either a permanent gender marker change upon providing a detailed statement from a surgeon or hospital that gender reassignment surgery was completed, or a temporary one-year passport with a gender marker change if provided with a detailed statement from a physician regarding the individual's plans to complete surgery within one year.[50] Again, the Department has provided no definition of what either "gender reassignment surgery" or "completed" mean. Furthermore, by permitting individuals, under current policy, to receive a temporary one-year passport in order to arrange for gender transition surgery, the Department has acknowledged that it can maintain security while issuing passports to people who have not undergone surgery. Given this fact, the Administration should adopt this new passport policy that would reflect the medical realities of gender transition.

VI. Travel and Immigration

In the age of heightened security concerns, the executive branch has a strong interest in ensuring the safety of citizens traveling to and from the United States and foreign nationals visiting or seeking asylum. For LGBT people, new security regulations and immigration policies have created extra burdens, including invasions of privacy. The Administration should revisit travel and immigration policies in order to remove unfair barriers to LGBT people traveling or visiting.

a. Giving transgender individuals the freedom to travel more freely

As the government has instituted new screening measures to ensure the security of airline travel, the effects of these measures are not felt equally by all groups. Current standard operating procedures and regulations adopted by the Transportation Security Administration ("TSA") require that transgender passengers sacrifice a certain level of privacy in order to travel freely. Although TSA has

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[48] Under a proposed additional regulation published on March 26, 2008 by the Bureau of Immigrations and Customs Enforcement (ICE) and the Department of Homeland Security (DHS), DHS would consider the receipt of a no-match letter as constructive knowledge that an employee may be an alien not authorized to work in the United States. Nothing in the proposed rule prohibits employers from using a gender no-match letter to discriminate against an employee.

[49] In addition, SSNVS states that including a date of birth and/or middle name of the employee is optional as well.

[50] This requirement is not explicitly outlined in the Foreign Affairs Manual, but it is consistent with the provisions outlined for time-limited passports. *See* U.S. DEPT. OF STATE, 7 FAM 1340(a) App. F, *Time-Limited Passports That May Be Replaced* (Nov. 9, 2007), http://www.state.gov/documents/organization/ 86784.pdf.

sought to avoid time-consuming and privacy-invasive security measures through the adoption of new technologies, these efforts have failed to address the privacy concerns of the transgender community.

i. TSA standard operating procedures for screening

TSA has adopted as a standard operating procedure that its employees only screen passengers of the same sex regardless of an individual's preference.[51] A transgender individual whose identity documents do not match his or her current gender presentation might encounter uncomfortable situations when he or she is searched by a screener who TSA believes to be of the "same sex." The Administration should allow a transgender individual to have a choice as to the gender of the screener in order to alleviate some of the anxiety of travel. In addition, the Administration should also issue explicit guidance to its employees on the proper screening procedures for transgender passengers and require all TSA security personnel to undergo training with respect to the needs of transgender travelers.

ii. Reject the proposed Secure Flight Program rules that would discriminate against transgender travelers

TSA has issued proposed regulations requiring that all passengers making flight reservations provide their gender as part of the Secure Flight Program.[52] Requesting all passengers to include gender information substantially burdens transgender travelers without improving "watch list" matches. The proposed regulations discriminate against transgender passengers in security screening for failure to conform to the gender stated in their identity documents.[53] If the transgender individual does input his or her gender data at the time of reservation, and it does not conform to either his or her appearance or identity documents, then the transgender person would have a "profile of suspicious character," subjecting the individual to enhanced scrutiny as well. Furthermore, TSA provides no guidance either in defining "gender" or by stating how a transgender individual should enter his or her gender when making a reservation.[54] The Administration should decline to require that airline operators request gender data from passengers making reservations.

b. Eliminating discrimination in providing visas to LGBT and HIV-positive travelers

Foreign LGBT and HIV-positive travelers to the United States experience other difficulties impeding their freedom to travel. Although the Department of State provides B-2 visas to the gay and lesbian spouses and partners of non-immigrant visa holders, the B-2 class is a temporary visa that only allows the spouse or partner to enter the United States for purposes of "pleasure."[55] The

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[51] *See id.* TSA states that enhanced screening must be performed by a member of the same sex except in "extraordinary circumstances" but does not define what types of extraordinary circumstances qualify.

[52] *See* Secure Flight Program Notice of Proposed Rulemaking, 72 Fed. Reg. 48356, 48371, 48388 (Aug. 23, 2007) (proposed regulation 49 C.F.R. § 1560.101(a)).

[53] *See* DEPT. OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE SECURE FLIGHT PROGRAM 12 (Aug. 9, 2007), http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_tsa_secureflight.pdf; 72 Fed. Reg. at 48366.

[54] For example, an individual might have a male gender marker on a passport, due to the State Department's requirement that an individual have completed gender reassignment surgery to change gender, but might have a female gender marker on a driver's license or other identification with a more permissive gender change policy.

[55] *See* Cohabitating Partners, Extended Family Members, and Other Household Members not Eligible for Derivative

maximum initial admission period for a B-2 visa is one year, and six-month extensions may be granted after the initial period expires.[56] Even though these extension requests are likely to be granted, the visa holder's stay must still be temporary, and the holder must maintain a residence abroad.[57] Thus, gay and lesbian spouses and partners of non-immigrant visa holders can only apply for a visa that is of a shorter guaranteed duration and that provides them with fewer rights, including the right to seek employment, during their stay in the United States. Given that the Administration possesses the power to remedy this inequity, it should grant the same opportunities to gay and lesbian spouses and partners of non-immigrant visa holders as their different-sex counterparts.

The Immigration and Nationality Act ("INA") renders any individual with a "communicable disease of public health significance" inadmissible to the United States and directs the Secretary of HHS to create and maintain the list of those diseases.58 Although Congress lifted the statutory HIV travel ban in July 2008, as long as HIV remains on the Secretary's list of communicable diseases, HIV-positive individuals are precluded from entering the United States either on a permanent or temporary basis, unless they qualify for one of a handful of narrowly- defined waivers. The current regulatory bar to entry for HIV-positive foreign nationals divides families, deprives American businesses and universities of talented workers and students, and keeps away researchers and scientists working against the HIV/AIDS epidemic. For these reasons, the Administration should remove HIV from the list of "communicable disease[s] of public health significance" in federal regulations.

c. Treating HIV-positive and LGBT detainees and asylees properly

As the federal government has adopted stricter security measures for entry in the United States, the number of LGBT and HIV-positive detainees has grown rapidly. Unfortunately, the Department of Homeland Security ("DHS") and Immigration and Customs Enforcement ("ICE") have failed to adopt sufficient protections to ensure the health and safety of HIV-positive and transgender detainees.

iii. Providing proper medical care to HIV-positive detainees

In December 2007, Human Rights Watch published a detailed report documenting the experiences of HIV-positive detainees in light of the inadequate policies regarding HIV diagnosis and

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Status, 9 FAM 41.31 N14.4. The term "pleasure" includes "legitimate activities of a recreational character, including tourism, amusement, visits with friends or relatives, rest, medical treatment, and activities of a fraternal, social, or service nature." 22 C.F.R. § 41.31(b)(2).

[56] *See* Cable from Colin Powell, Sec'y of State, to All Diplomatic and Consular Posts (July 2001), http://travel.state.gov/visa/laws/telegrams/telegrams_1414.html.

[57] *Id.*

[58] 8 U.S.C. § 1182. Prior to the enactment of the Tom Lantos and Henry J. Hyde United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008 on July 30, 2008, the INA mandated that HIV remain on the list of diseases. For all other conditions, the Secretary retained authority to determine whether or not a condition should be listed. Presently, HHS identifies the following as communicable diseases of public health significance: tuberculosis, HIV, syphilis, chancroid, gonorrhea, granuloma inguineale, lymphogranuloma venerum, and Hansen's disease (leprosy). DEP'T OF HEALTH AND HUMAN SERVS., CTRS. FOR DISEASE CONTROL AND PREVENTION, *Communicable Diseases of Public Health Significance*, http://www.cdc. gov/ncidod/dq/diseases.htm.

treatment.[59] The testimony of a number of HIV-positive detainees indicates that they do not receive medication on a regular basis, are tested sporadically or not at all for T cell counts, and are exposed to both discrimination and harassment from other detainees and prison staff members.[60] The Administration should revise existing detention and residential health care standards as they pertain to HIV-positive detainees to conform to the accepted correctional health care standards and to the accepted clinical protocols for the treatment of HIV set by the Centers for Disease Control and Prevention.[61] Revisions to the DHS standards should also address HIV prevention education, availability and promotion of voluntary testing, and counseling; consultation and/or supervision of HIV-related care by clinicians with the appropriate expertise; and procedures to ensure maintenance of confidentiality.

iv. Providing proper treatment and medical care to transgender detainees

ICE manages the detention of people who have violated any of a wide spectrum of immigration laws. A classification officer evaluates whether a detainee might require special protective custody if, for example, he or she is a "witness, known informant, homosexual, ha[s] known enemies in the facility, or ha[s] a thin/frail appearance."[62] Although special protective custody may apply to a transgender detainee, ICE fails to specifically address transgender individuals, and an officer might overlook that a detainee is transgender when considering him or her for special protective custody. Ultimately, transgender detainees will be housed at the discretion of detention officials, but usually this decision is based on designated sex at birth or genitalia. Such misassignment can lead to verbal harassment, physical violence, and sexual assault against transgender detainees.

The Administration should address the issues faced by transgender detainees by creating guidelines for placing transgender detainees in the appropriate facility based on gender, ensuring that transgender detainees are safe from harassment and violence, and ensuring that transgender detainees receive appropriate medical treatment, if necessary.

v. Providing asylum to individuals persecuted because of their HIV status or gender identity

When deciding whether to grant asylum, the Board of Immigration Appeals ("BIA") considers whether a foreign national can demonstrate a "well-founded fear" of persecution in his or her home country on account of his or her "membership in a particular social group." BIA has defined social group membership as "that [which] the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[63] In general, what constitutes "membership in a particular social group" is determined by precedent established by the BIA and reviewed by the Attorney General.

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[59] HUMAN RIGHTS WATCH, CHRONIC INDIFFERENCE: HIV/AIDS SERVICES FOR IMMIGRANTS DETAINED BY THE UNITED STATES (Dec. 2007), http://www.hrw.org/reports/2007/us1207/.
[60] *See id.* at 21-45 (chronicling statements of detainees living with HIV).
[61] *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, *Recommendations & Guidelines*, http://www.cdc.gov/hiv/resources/guidelines/index.htm.
[62] *Id.*
[63] *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (BIA 1985).

BIA should recognize HIV-positive petitioners as members of a "particular social group" because they meet the BIA definition of being unable to change their HIV status. In 1996, the Office of the General Counsel for the Immigration and Naturalization Service ("INS") issued a policy memorandum recommending that INS and the Executive Office of Immigration Review approve asylum petitions premised on membership in the social group of HIV-positive individuals.64 Since then, immigration courts have sporadically granted asylum cases involving persecution based on HIV status. Although there are instances where HIV-positive individuals have been granted asylum because of their status, none of these cases has been adopted as precedent. Similarly, despite some decisions indicating that at least some transgender people can gain asylum based on "membership in a particular social group,"[65] no binding precedent exists to clarify for all immigration officials and courts that a person with a "well-founded fear" of persecution based on gender identity should be granted asylum .

As of this writing, no published case has granted an individual asylum based clearly and solely on either HIV status or transgender status, so it is necessary that the Administration identify and declare a precedent establishing that these two groups are members in a "particular social group" for asylum proceedings. Subsequently, the Administration should distribute information and increase awareness of the availability of asylum to individuals persecuted on the basis of their sexual orientation, gender identity, or HIV status.

VII. Judicial and Executive Appointments

A president's power to appoint judges and officials has far-reaching consequences. Judges' decisions can affect our lives for generations. Executive-branch officials shape the policies that have been discussed elsewhere in this paper, ranging from civil rights enforcement to public health to protections for families. The Administration should ensure that only fair-minded individuals, committed to impartial judgments and to policies based upon fact rather than ideology, serve our nation in these key posts.

a. Appointing fair-minded justices and Judges

Appointments to the federal judiciary are a president's most enduring legacy. Because Supreme Court justices and lower-court judges serve life terms, and because the courts seldom reverse their own precedents, each new justice can take part in decisions for decades to come, the impact of which will be felt for generations.

In recent years, we have seen important legal victories in cases such as *Romer v. Evans,* which held that a state could not make it more difficult for LGBT people to secure protections through the

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[64] See Memorandum from David A. Martin, General Counsel for the Immigration and Naturalization Service, to Regional Counsel and District Counsel, *Seropositivity for HIV and relief from deportation* (Feb. 16, 1996) (hereinafter, "Memorandum from David A. Martin"). In the memorandum, the date was incorrectly stated by Martin as being Feb. 16, 1995. This memorandum can be found at 73 Interpreter Releases 909 app. I (July 8, 1996).

[65] See, e.g. Hernandez-Montiel v. INS , 225 F.3d 1084 (9th Cir. 1999)(granting asylum to an individual characterized as a "gay man with a female sexual identity") and Morales v. Gonzales, 478 F.3d 972 (9th Cir. 2007)(acknowledging that a male-to-female transsexual would have been eligible for asylum under *Hernandez-Montiel*, but was denied on other grounds).

legislative process, *and Lawrence v. Texas,* in which the Court concluded that a state could not impose criminal penalties for private, adult, non-commercial, consensual sexual relations. These cases signal that the federal courts are increasingly willing to enforce the constitutional rights of lesbian, gay, bisexual and transgender Americans.

The LGBT community is making great strides in securing legal protections through the legislative process, especially in the states, but protections for LGBT people are still sparse, and increasingly, are challenged by anti-LGBT litigation groups. In order to ensure that legal protections survive these challenges, that the courts do not erode civil rights laws that will pass in the future (as has recently happened with other civil rights laws such as Title VII),[66] and to guarantee that the courts recognize LGBT people's fundamental rights and basic equality, the president should nominate only justices and judges who possess exceptional intellectual ability, distinguished experience in law, and a temperament that would enable them to make decisions fairly and with an open mind should they be confirmed for lifetime appointments to the bench. HRC believes that an assessment of temperament worthy of lifetime appointments should include the following:

- demonstrated commitment to full equality under law for lesbian, gay, bisexual and transgender Americans; individuals living with HIV and AIDS; women; people with disabilities and racial, ethnic, and religious minorities;
- demonstrated commitment to the constitutional right to privacy and individual liberty, including the right of two consenting adults to enter into consensual intimate relationships;
- respect for the constitutional authority of Congress to promote equality and civil rights and provide statutory remedies for discrimination and violence;
- sophisticated understanding of and commitment to the separation of church and state and the protection of those citizens with minority religious views;
- respect for state legislatures' attempts to address discrimination and violence based on sexual orientation, disability, race, ethnicity and other factors through carefully crafted legislation that meets the requirements of the Constitution.

b. Executive-branch appointments

Although executive-branch officials serve only during the president's term and at the president's pleasure, their decisions and priorities will drive the administration's policies in many areas, including those of particular interest to LGBT Americans. As the breadth of topics covered in this summary indicates, the president's appointments to every branch of government can have a material impact on the wellbeing of LGBT people. Two positions in the recent administration—Attorney General and Surgeon General—provide case studies in the way that an appointment can influence policy, and the way that an administration's oversight can hamper progress.

1. The Attorney General: Priorities and Ideology

The Attorney General ("AG") is America's lawyer, appointed to serve all people, and not solely the president or administration. As the chief enforcer of our civil rights, the AG must have a

[66] *See* Ledbetter v. Goodyear, 127 S. Ct. 2162 (2007) (concluding that plaintiff could not pursue a Title VII claim).

comprehensive vision of the government's authority to preserve equality for every person. The AG must also set an example of non-discrimination, impartiality, and meritocracy in the Department of Justice ("DOJ").

As the DOJ's chief executive, the Attorney General determines the Department's litigation priorities. Under the Bush Administration, the Department of Justice has pursued cases of religious discrimination while undercutting the Department's traditional role in litigating cases based on racial, ethnic, and sex discrimination. Although the suppression of religious expression is a valid concern and is justly prohibited, this dramatic change in the government's civil rights priorities has resulted in the Justice Department litigating fewer cases involving hate crimes, voter dilution, and civil rights violations by law enforcement officers.[67]

The hiring practices at DOJ have also fallen short of the example that our nation's civil rights enforcement agency should set. Over the past year, there has been significant press regarding the loss of experienced civil rights litigators in favor of recent "graduates of religious-affiliated law schools and some people vocal about their faith."[68] Further investigations have revealed that candidates were also vetted for support of President Bush. The next Attorney General must return to a meritocratic, apolitical the hiring of individuals for positions in government, and not base any hiring decisions upon applicants' personal beliefs.

The president should appoint an attorney general who will prioritize civil rights enforcement and pursue hiring practices that embrace diversity and meritocracy.

2. The Surgeon General: Fair-mindedness and freedom from undue political interference

The Surgeon General disseminates important public health information, including critical disease prevention education. A highly visible spokesperson, the Surgeon General has the power to influence public opinion. Because promoting the public requires faithfulness to sound scientific and medical research, a surgeon general who rejects mainstream science in favor of ideology cannot serve effectively, and Administration attempts to insert ideology over science do a disservice to the public. It is imperative that the Administration nominate an individual who is firm in scientific conviction and to refrain from hampering the Surgeon General's efforts to produce and disseminate sound public health information.

Unfortunately, the most recent administration has both asserted inappropriate ideological influence on the surgeon general, and attempted to appoint an individual whose bias rendered him unqualified to serve.

Former Surgeon General Richard Carmona stated, during a hearing with the House Committee on Oversight and Government Reform, that the Bush administration routinely blocked him from speaking about issues, including human embryonic stem cell research, abstinence-only sex education,

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[67] Neil A. Lewis, *Justice Department Reshapes its Civil Rights Mission*, N.Y. TIMES, June 13, 2007, http://www.nytimes.com/2007/06/14/washington/14discrim.html.
[68] *Id.*

emergency contraception and other sensitive public health topics. The Administration must avoid such ideological interference with the Surgeon General's work.

President Bush Nominated James Holsinger to replace Carmona. The nomination drew immediate opposition from HIV/AIDS organizations, the American Public Health Association, LGBT civil rights organizations including the Human Rights Campaign, at least thirty-five members of the House of Representatives, and many Democratic senators. The outcry was directed at his 1991 document, entitled the "Pathophysiology of Male Homosexuality," that was written for a United Methodist Church panel discussing homosexuality. In part due to Sen. Harry Reid convening the Senate pro forma over the winter holidays to avoid a recess appointment, the Holsinger nomination has failed to progress any further. This nomination exemplifies the problems of executive nominations in the most recent administration: the president nominated an individual with scientifically inaccurate, ideology-driven views of subject matter directly related to the position for which he was nominated. This administration must vet nominees for scientific rigor and fair-mindedness.

3. Maintaining diversity in appointments

Like any workforce, the federal government benefits from diversity. As America's leading employers have demonstrated, including LGBT people in diversity efforts is good for an organization. Diversity in leadership is equally important, but cannot happen without an affirmative effort by the administration to reach out to the LGBT community and ensure that LGBT candidates are among those considered for leadership roles. The president should include LGBT people and allies in his transition team, and solicit community input on qualified candidates for administration positions at all levels.

VIII. Conclusion

The Obama administration has an opportunity to implement policies that improve access to medical care, workplace equality, family protections, public health, and community safety for the LGBT community. By appointing fair-minded judges and LGBT-friendly executive-branch officials, the administration can insure that the next eight years not only reverse the damage of the most recent eight, but that the government serves this community as it never has before. The president, through executive orders and through his designees throughout the executive branch, can and should act to alleviate the challenges that LGBT people face. Such action is consistent with his longstanding commitment to pro-LGBT legislation in the Senate and the Illinois legislature. We encourage President Obama to continue this work his role as the head of the executive branch.