

THE WHITE HOUSE

WASHINGTON

July 22, 1998

Set
Director

The Honorable Janice R. Lachance
Director, Office of Personnel Management
Theodore Roosevelt Federal Building
1900 E Street, N.W.
Washington, D.C. 20415

Dear Ms. Lachance:

On May 28, 1998, the President issued Executive Order 13087. It amends Executive Order 11478, which pertains to discrimination against federal civilian employees. Federal law has long prohibited discrimination for or against an employee or applicant based on "conduct which does not adversely affect the performance of the employee or applicant or the performance of others." 5 U.S.C. 2302(b)(10). In the case of civilian employees and applicants, OPM has interpreted this statute to prohibit discrimination based on sexual orientation, and that has been the policy of this Administration from the outset. Most federal agencies and departments have issued regulations or other directives to implement this bar on discrimination. The new executive order is intended to restate and make uniform across the executive branch the pre-existing policy prohibiting discrimination based on sexual orientation in federal civilian employment. I am writing to provide guidance on the intent behind this order.

Definition of Sexual Orientation

It is intended that the term "sexual orientation" have the common meaning stated in the Employment Non-Discrimination Act, "homosexuality, bisexuality, or heterosexuality."

Responsibilities of Agencies

The purpose of Executive Order 13087 is to confirm and make uniform the existing bar on discrimination based on sexual orientation by amending Section 1 of Executive Order 11478 to add sexual orientation to the categories for which discrimination has been expressly prohibited. Executive Order 13087 does not authorize affirmative action policies, such as recruitment, reporting, or goal-setting based on sexual orientation. As a result of this executive order, it is not intended that agencies take steps to determine the sexual orientation of current or prospective employees or to keep tallies regarding the sexual orientation of current or prospective employees.

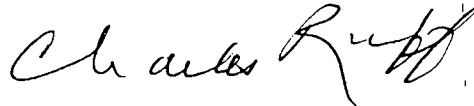
Hon. Janice R. Lachance
July 22, 1998
Page 2

Procedures for Enforcing Prohibition

The executive order does not create any rights to file a complaint alleging discrimination on the basis of sexual orientation with a court or with the EEOC. The order leaves intact the current procedures for dealing with such complaints. An employee who believes he or she has suffered adverse action may seek redress under procedures now available within each agency. The order does not authorize appeals of agency actions to the EEOC.

The President appreciates your assistance in furthering the policy of this important order. OPM can play a useful role in informing federal employees about applicable procedures, including the way in which claims may be raised by individual employees. Please let me know if you have any questions about the meaning or appropriate implementation of Executive Order 13087.

Sincerely,

A handwritten signature in cursive script, reading "Charles Ruff".

Charles F.C. Ruff
Counsel to the President



HUMAN
RIGHTS
CAMPAIGN

*Sex
Oriental*

1101 14th Street NW
Washington, DC 20005
phone 202 628 4160
fax 202 347 5323

FAX TRANSMISSION

DATE: July 21, 1998

TO: Rob Cogorno 225 - 0938
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Kirk Fordham 225 - 3132
Len Wolfson 225 - 9629
Richard Socarides 456 - 6218
Mary Smith 456 - 7431
Tom Freedman 456 - 7431
Martha Foley 456 - 6220
Karen Tramantano 456 - 1907

NUMBER OF PAGES: (including cover)

5

FROM: Chad Lord, Political Assistant

SUBJECT: Hefley amendment vote count and new Riggs Dear Colleague

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FRANK D. RIGGS
1714 Longworth
Washington, D.C. 20516

July 21, 1998

STOP EXTORTION OF PRIVATE ORGANIZATIONS WITH FEDERAL FUNDS

Vote For the MODIFIED Riggs Amendment to the VA-HUD Bill

Dear Colleague:

Chapter 12B of the San Francisco Administrative Code requires private organizations doing business with the City to provide benefits to unmarried domestic partners to the same extent as spouses of married employees. This applies to City grants and contracts, as well as grants and contracts using "moneys deposited" or "under the control" of the City—i.e., Federal funds.

This ordinance was used to force Catholic Charities to offer domestic partner benefits to its employees—contrary to Church principles—or risk losing \$5.6 million used help to homeless and destitute AIDS patients.

The Salvation Army used to provide beds and meals to AIDS patients in San Francisco. When the City attempted to force the Salvation Army to provide benefits to same-sex partners of employees, they refused. Even though the ordinance includes provisions for waivers, the City persisted in its efforts to extort the Salvation Army into betraying its deeply held beliefs. Its funding—\$3.5 million—has been lost.

I have modified my amendment to the VA-HUD Appropriations bill. It now states:

"None of the funds appropriated by this Act may be used to implement Chapter 12B of the Administrative Code of San Francisco, California."

- This is not a local autonomy issue. My amendment would not force San Francisco to change its law on use of City funds, no matter how misguided.
- This does not jeopardize local receipt of VA-HUD funds. My amendment merely prohibits San Francisco from attaching any domestic-partner conditions to any Federal funds it passes through to private organizations

Vote Yes on the MODIFIED Riggs Amendment.

Sincerely yours,

HEFLEY AMENDMENT TARGETS:**REPUBLICANS:**

Signed Non-
Discrimination
Policy

BALLENGER, T. CASS
BASS, CHARLES
BEREUTER, DOUG
NO BILBRAY, BRIAN
BILIRAKIS, MICHAEL
BLILEY, THOMAS J.
CAMP, DAVE
CASTLE, MICHAEL
CUNNINGHAM, DUKE
DAVIS, TOM
DIAZ-BALART, L.
DUNN, JENNIFER
ENSIGN, JOHN
LN ENGLISH, PHIL
LN EHRlich, ROBERT
LN FAWELL, HARRIS
NO FOLEY, MARK
NO FORBES, MICHAEL
LN FOWLER, TILLIE
FOX, JON
LN FRANKS, BOB
GILCHREST, WAYNE
GOODLING, WILLIAM
GOSS, PORTER
NO HOBSON, DAVID
LN HOUGHTON, AMO
KASICH, JOHN
NO KLUG, SCOTT
KNOLLENBERG, JOE
LaHOOD, RAY
LaTOURETTE, STEVEN
LY LATHAM, TOM
LN LAZIO, RICK
LEWIS, JERRY
LINDER, JOHN
LIVINGSTON, BOB
LoBIONDO, FRANK
McCRERY, JIM
McHUGH, JOHN
McINNIS, SCOTT
MICA, JOHN
LN MILLER, DAN
NUSSLE, JIM
PORTMAN, ROB
NO PRYCE, DEBORAH
QUINN, JACK
REGULA, RALPH
RIGGS, FRANK
ROGAN, JAMES
ROS-LEHTINEN, I.
SAXTON, JIM
SENSENBRENNER, J.
LN SHAW, E. CLAY
THOMAS, WILLIAM
LN UPTON, FRED
WALSH, JAMES
WELLER, JERRY
TOTAL: 57

Others

Bono, Mary
Brady, Kevin
Cooksey, John
Ehlers, Verne
Fossella, Vito
Ganske, Greg
Gillmor, Paul
Granger, Kay
Porter, John
Ramstad, Jim
Roukema, Marge
Royce, Ed
Sanford, Mark
Smith, Nick
Wilson, Heather
Young, Bill
TOTAL: 16

Tuesday Republican
Lunch Bunch

Vote Count

152 ENDA Cosp.
25 Committed NO's
177 Solid Votes

16 Leaning NO's

As of 7/21 5pm

DEMOCRATS

Signed Non-
Discrimination
Policy

BARCIA, JAMES
NO BENTSEN, KEN
LN BISHOP, SANFORD
BORSKI, ROBERT
NO BOSWELL, LEONARD
BROWN, CORRINE
CLEMENT, BOB
NO CONDIT, GARY
COSTELLO, JERRY
DINGELL, JOHN
NO DOGGETT, LLOYD
NO DOOLEY, CAL
DOYLE, MIKE
ETHERIDGE, BOB
GREEN, GENE
YES HALL, RALPH
HALL, TONY
JOHN, CHRIS
LN KAPTUR, MARCY
KLECZKA, GERALD
NO LaFALCE, JOHN
NO LAMPSON, NICK
LIPINSKI, WILLIAM
LN MINGE, DAVID
NO OBERSTAR, JAMES L.
OBEY, DAVID
PICKETT, OWEN
NO POMEROY, EARL
NO POSHARD, GLENN
PRICE, DAVID
ROEMER, TIM
SANDLIN, MAX
NO SCOTT, ROBERT
SISISKY, NORMAN
LN STRICKLAND, TED
NO STUPAK, BART
NO VISLOSKEY, PETE
TOTAL: 37

Others

Baessler, Scotty
LY Berry, Marion
Boucher, Rick
Boyd, Allen
Brady, Robert
Cramer, Bud
NO Danner, Pat
Davis, Jim
NO Edwards, Chet
Goode, Virgil
NO Gordon, Bart
Hamilton, Lee
NO Hefner, Bill
YES Holden, Tim
LN Kanjorski, Paul
Mascara, Frank
LY McIntyre, Mike
Molloy, Alan
NO Murtha, John
Ortiz, Solomon
LN Peterson, Collin
Rahall, Nick
Skeleton, Ike
NO Snyder, Vic
Spratt, John
Stenholm, Charles
YES Tanner, John
Talyor, Gene
Turner, Jim
LN Wise, Robert
TOTAL: 30

PLUS: ALL 152
ENDA
COSPONSORS

**TOTAL
NUMBER OF
TARGETS:
292**

Hefley Whip Count

Name	Party	NO	LN	LY	YES
Bentsen	D	1			
Berry	D			1	
Bishop	D		1		
Bilbray	R	1			
Bliley	R	1			
Boswell	D	1			
Condit	D	1			
Danner	D	1			
Doggett	D	1			
Dooley	D	1			
Edwards	D	1			
English	R		1		
Ehrlich	R		1		
Fawell	R		1		
Foley	R	1			
Forbes	R	1			
Fowler	R		1		
Franks	R		1		
Gordon	D	1			
Hall, R.	D				1
Hefner	D	1			
Hobson	R	1			
Holden	D				1
Houghton	R		1		
Kanjorski	D		1		
Kaptur	D		1		
Klug	R	1			
LaFalce	D	1			
Lampson	D	1			
Latham	R			1	
Lazio	R	1			
McIntyre	D			1	
Miller, Dan	R		1		
Minge	D		1		
Murtha	D	1			
Oberstar	D	1			
Peterson,	D		1		
Pomeroy	D	1			
Poshard	D	1			
Pryce, D	R		1		
Scott, R.	D	1			
Shaw	R		1		
Snyder	D	1			
Strickland	D		1		
Stupak	D	1			
Tanner	D				1
Upton	R		1		

Visclosky	D	1			
Wise	D	1			
		25	16	3	3



HUMAN
RIGHTS
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Martha Foley 456 - 6220
Karen Tramantano 456 - 1907

Set. O'neill
720 3231

NUMBER OF PAGES: (including cover) 6

FROM: Chad Lord, Political Assistant

SUBJECT: HRC's new Assertions and Reality

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HUMAN
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CAMPAIGN

THE TRUTH ABOUT EXECUTIVE ORDER 13087

BASIC FAIRNESS FOR FEDERAL EMPLOYEES

ASSERTIONS AND REALITY

ASSERTION

The President, in issuing Executive Order 13087, has exceeded his authority and bypassed Congress and the American people.

REALITY

As the federal government's chief executive, the President has the power to establish the personnel policies of his Administration. This authority emanates from Article II of the Constitution. As the President acknowledged, however, when he issued Executive Order 13087, this executive order "does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission or a direct judicial cause of action). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act."

Presidential authority to prescribe regulations for the conduct of federal civilian employees has long been established (under 5 U.S.C. 7301). Such uses of that authority allowed President Reagan to require drug testing in the federal civilian workforce (Executive Order 12564), and President Bush to set forth principles of ethical conduct for federal civilian employees (Executive Order 12674).

ASSERTION

Executive Order 13087 applies to federal contractors and subcontractors, and state and local governments.

REALITY

The scope of Executive Order 13087 is limited to that of the underlying executive order, Executive Order 11478, which does not apply to federal contractors or subcontractors, or state or

local governments. The prohibition against discrimination in the employment policies of federal government contractors and subcontractors is based on a completely different executive order, Executive Order 11246, issued by President Lyndon Johnson in 1965.

ASSERTION

Executive Order 13087 will result in affirmative action and quotas on the basis of sexual orientation for gay and lesbian federal civilian employees, and require the Equal Employment Opportunity Commission to assure that federal agencies adopt "affirmative programs" to promote employment of persons on the basis of their sexual orientation.

REALITY

Executive Order 13087 creates no "special privileges," "special preferences," "quotas," or "affirmative action" for lesbian and gay federal civilian employees. The Office of White House Counsel has explicitly stated "Executive Order 13087 does not authorize affirmative action policies, such as recruitment, reporting, or goal-setting based on sexual orientation." Similarly, "religion" is also covered by the underlying executive order, E.O. 11478, but has not been the subject of affirmative action, or statistics collection, programs in the federal workforce. Executive Order 13087 simply ensures equality and fairness by bringing uniformity to a multitude of already existing federal non-discrimination policies.

ASSERTION

Because the term "sexual orientation" is not explicitly defined, it could include homosexuality, bisexuality, transexuality, bestiality, incest and even pedophilia.

REALITY

It is well established that the term "sexual orientation" means homosexuality, bisexuality, and heterosexuality. The same definition is also included in the Employment Non-Discrimination Act (S. 869, H.R. 1858). In the Hate Crimes Statistics Act of 1990, the term "sexual orientation" is defined as "consensual homosexuality or heterosexuality." The Federal Bureau of Investigation also collects statistics on hate crimes perpetrated against individuals on the basis of bisexuality.

ASSERTION

President Clinton is out of step with the American public by prohibiting discrimination on the basis of sexual orientation in the federal civilian workforce.

REALITY

In issuing Executive Order 13087, President Clinton joins over half of the Fortune 500 companies, 245 House Members and 65 Senators who already have similar policies, prohibiting discrimination against their employees on the basis of sexual orientation. Poll after poll has shown overwhelming support (80% in a recent Tarrance Group/Lake Sosin Snell & Associates poll) in the American public for the basic premise that lesbian and gay workers should be treated fairly in the workplace.

ASSERTION

*"Sexual orientation" is **not** an immutable characteristic in the same way as race, color, ethnicity or sex...[it] is a demonstrably changeable behavioral characteristic.*

REALITY

A growing body of scientific evidence continues to indicate a biological basis to sexual orientation. The American Psychological Association has stated that "psychologists do not consider sexual orientation for most people to be a conscious choice that can be voluntarily changed."

In any event, however, whether or not someone can change their sexual orientation should not be the determining factor in supporting Executive Order 13087's prohibition on discrimination in the federal civilian workforce. While not a perfect analogy, one's religion is certainly a choice. Yet there is agreement that one should not discriminate based on an individual's chosen religion. What is clear is that sexual orientation has no effect on an employee's ability to do her or his job and as such, employment discrimination on the basis of sexual orientation should be prohibited.

ASSERTION

Executive Order 13087 will require the federal government to recruit, track and promote individuals on the basis of their sexual orientation.

REALITY

The Executive Order does not require federal agencies to determine the number of lesbian and gay employees in their workforce, nor promote individuals on the basis of their sexual orientation. As the Office of White House Counsel has explicitly stated, “[a]s a result of this executive order, it is not intended that agencies take steps to determine the sexual orientation of current or prospective employees or to keep tallies regarding the sexual orientation of current or prospective employees.”

ASSERTION

Executive Order 13087 could be used as a tool to discriminate against people who espouse traditional values, morals, and religious beliefs about sexual activity and sexual orientation.

REALITY

Executive Order 13087 in no way interferes with the personal moral or religious beliefs of federal civilian employees. The religious exercise and expression rights of federal civilian employees are clearly enunciated and protected by the *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*, issued by President Clinton in August 1997. The executive order merely prohibits discrimination on the basis of sexual orientation in the federal workplace.

ASSERTION

Executive Order 13087 conflicts with the Administration’s “don’t ask, don’t tell” policy with regard to homosexuals in the military.

REALITY

The scope of Executive Order 13087 is limited to that of the underlying executive order, Executive Order 11478, which applies *solely* to federal civilian employees. The executive order applies to “military departments” as defined in 5 U.S.C. 102, the same definition of military departments used by Title VII of the Civil Rights Act of 1964 (as amended). It is well established that while this definition *does* include *civilian* employees of the military departments, it *does not* include *uniformed members of the Armed Forces*. *Johnson v. Alexander*, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978).

The Administration’s “don’t ask, don’t tell” policy applies to *uniformed members of the Armed Forces*. **These two separate policies do not conflict at all.**

ASSERTION

Executive Order 13087 would apply to Congressional offices.

REALITY

While Executive Order 13087 establishes the same non-discrimination policy for federal civilian employees that *already* exists in the offices of 245 House Members and 65 Senators, it does not apply to Congress. Non-discrimination protection for congressional employees is governed by the Congressional Accountability Act of 1995 (which prohibits discrimination against congressional employees on the basis of race, color, religion, sex, national origin, age and disability by bringing Congress under the jurisdiction of the relevant existing federal statutes). The Congressional Accountability Act of 1995 does *not* prohibit discrimination on the basis of *sexual orientation*.

ASSERTION

Lesbians and gays, on average, have attained higher incomes and educational levels than others thus militating against any threshold presumption of disadvantage or discrimination in employment.

REALITY

The assertion that gays and lesbians are better off, on average, than other people is a *false statement* based on *inaccurate facts*. This claim is derived from a survey of a *non-random sample* of gay people -- readers of *selected national gay magazines*. This is comparable to surveying the readers of *New Yorker* magazine and suggesting that the data are representative of the entire American public. Gay men, lesbians, and bisexuals cross *all* lines *equally*: race, religion, ethnicity, disability, and *class*. In fact, recent studies show that sexual orientation does have a negative impact on earnings among individuals with similar education and background. In 1995, a study by M. V. Lee Badgett, Ph. D. found that gay men earn as much as 27% less than heterosexual men with the same education, experience, race, occupation, and geographic location. An analysis of 1990 Census data found very similar results: gay men in couples earned roughly 26% less than married men with the same education, geographic location, race, age, education, number of children, and disability status.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
LEGISLATIVE AFFAIRS

PHONE: 395-4790 / FAX: 395-3729

TO:

Mary Smith

DATE:

7-15

FROM:

___ CHUCK KIEFFER

___ CHUCK KONIGSBERG

___ ELIZABETH GORE

✓
___ KATE DONOVAN

___ NANCY BRANDEL

___ LISA ZWEIG

___ BRIAN MASON

Comments:

T/P House floor SRP

FAX #:

6-743

PHONE NUMBER:

PAGES:

(includes cover page)

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as well



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

June 24, 1998
(House Floor)

STATEMENT OF ADMINISTRATION POLICY

(THIS STATEMENT HAS BEEN COORDINATED BY OMB WITH THE CONCERNED AGENCIES.)

H.R. 4104 -- TREASURY AND GENERAL GOVERNMENT APPROPRIATIONS BILL, FY 1999

(Sponsors: Livingston (R), Louisiana; Kolbe (R), Arizona)

This Statement of Administration Policy provides the Administration's views on the Treasury and General Government Appropriations Bill, FY 1999, as reported by the House Appropriations Committee. Your consideration of the Administration's views would be appreciated.

The Administration appreciates efforts by the Committee to accommodate the President's priorities within the 302(b) allocation. The President's FY 1999 Budget proposes levels of discretionary spending for FY 1999 that conform to the Bipartisan Budget Agreement by making savings in mandatory and other programs available to help finance this spending. In the recently enacted Transportation Equity Act, Congress -- on a broad, bipartisan basis -- took similar action in approving funding for surface transportation programs paid for with mandatory offsets. We encourage the Congress to take advantage of such additional offsets, or to reduce appropriations for programs or projects not requested by the President in order to fund requested levels for items discussed below.

Below is a discussion of our specific concerns with the Committee-reported bill. We look forward to working with you to resolve these concerns as the bill moves forward.

Year 2000 Computer Conversion

The Administration appreciates the emphasis that the Committee has placed on year 2000 (Y2K) computer conversion activities. OMB will continue to assist all agencies in ensuring that adequate resources are available to address this critical issue. In the FY 1999 Budget, the President has requested more than \$1 billion for Y2K computer conversion. In addition, the budget anticipated that additional requirements would emerge over the course of the year and included an allowance for emergencies and other unanticipated needs.

As we learn more about how to address this problem, we expect that ensuring Government-wide compliance will require flexibility to respond to unanticipated requirements. To the extent such unanticipated requirements are identified, it will be essential to make that funding available quickly. It will truly be emergency funding. The emergency mechanism recently approved by the House Appropriations Committee provides such flexibility.

Yesterday, the Rules Committee approved a rule that would strip the emergency funding mechanism from the bill. This regrettable action will not help agencies move forward in addressing this problem. We note that the Committee bill allocates funds from the emergency reserve for Treasury and other agency Year 2000 (Y2K) needs. If the emergency reserve is not funded, the Congress will need to find other ways to fund Treasury's critical Y2K needs.

The value of the emergency mechanism approved by the House Appropriations Committee is the flexibility it provides in the event that we determine that additional resources are required. We have only 555 days until January 1, 2000. We want to solve this problem as soon as possible. Delaying approval of emergency funding and reopening the issue of the use of the emergency spending authority would create controversy and delay. We hope that the House will reconsider.

Exchange Stabilization Fund

The Administration has serious concerns that an amendment to restrict severely the use of the Exchange Stabilization Fund (ESF) may be considered as part of the bill. Such an amendment would constitute an unacceptable limitation on the executive branch's ability to protect critical U.S. economic interests. The Secretary of Treasury would recommend a veto if the provision is included in the bill.

Federal Election Commission

The Administration strongly objects to language included in the bill that would limit the term of the Federal Election Commission's staff director and general counsel to four years and require a vote of four commissioners to reappoint them. This procedure is a departure from current practice, established in statute, whereby the Commission appoints a staff director and general counsel for an unlimited term. As with all Commission decisions under current practice, removal of the staff director and general counsel requires a vote of four commissioners. The Administration strongly urges the House to eliminate this unacceptable provision from the bill. Furthermore, because the provision effectively could remove the current occupants of the positions, it would raise serious constitutional questions under the separation of powers.

Executive Office of the President

The Administration is strongly concerned with a number of provisions related to the Executive Office of the President. It is our hope that any differences that exist concerning these provisions will be resolved as the bill moves through the process.

Internal Revenue Service

The Administration appreciates the Committee's efforts to fund the President's budget request for the IRS. However, if resources for Y2K are struck from the bill, IRS would be

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significantly underfunded. We look forward to working closely with the House to identify ways in which full funding of the President's request can be achieved.

The Administration appreciates congressional support for IRS information technology investments. However, tying obligation of funds to GAO review of expenditure plans is objectionable since the Administration has no control over the nature or timing of any prospective GAO review.

U.S. Customs Service

The Administration is concerned about the funding level for Customs' Automated Commercial Environment (ACE). Without major revisions to the existing system, Customs cannot keep up with increasing trade volumes nor can it be responsive to the requirements stated in the 1993 Modernization Act and the needs articulated by industry. The Committee has funded only \$8 million of the requested \$56 million level, which would cause the modernization effort to come virtually to a halt. To accommodate the full amount requested, the Administration has proposed funding the majority of ACE requirements through a user fee paid by those who stand to benefit most from this system, the trade community.

Bureau of Alcohol, Tobacco and Firearms

The Administration appreciates the efforts of the Committee to fully fund the President's Youth Crime Gun Interdiction Initiative (YCGII). This initiative is an important part of the Administration's overall strategy to curb youth gun violence. The Administration welcomes an opportunity to report on the performance of the YCGII.

The Administration requests reconsideration of the Violent Crime Coordinator initiative, as the U.S. Attorneys have requested additional ATF support for bringing cases involving violent criminals to the Department of Justice for prosecution.

We are pleased that the Committee shares the Administration's view that relocation of the Bureau of Alcohol, Tobacco and Firearms headquarters staff remains a key concern due to inadequate security at the present headquarters site. We hope that the Congress will continue to consider funding for this priority when the review process is completed.

Federal Employees Health Benefits Program

The Administration strongly opposes sections 514 and 515 of the bill. These provisions would restrict Federal Employees Health Benefits Program (FEHBP) coverage for abortions except in situations where the life of the mother is endangered or the pregnancy is the result of rape or incest. While the President believes that abortion should be safe, legal, and rare, the Administration does not believe that Federal employees and their families should be precluded from choosing to purchase health insurance that includes broader coverage. The Administration believes that the decision to cover abortion should be left to each health plan participating in the

FEHBP. Thus, Federal employees who wish to purchase health coverage that does not include abortion services would have that choice. The provision in the Committee bill does not allow Federal employees and their families to make that choice.

The Administration supports the Committee reported provision which requires coverage of prescription contraceptives by health plans participating in the Federal Employees Health Benefits Program (FEHBP) and would oppose an amendment to strike it. We support improvements in basic health care coverage for women and the goal of the amendment -- to reduce unwanted pregnancies and the need for abortion. However, the Administration urges the Congress to give authority to the Office of Personnel and Management to waive the requirement for plans that are sponsored by organizations whose religious beliefs do not support artificial methods of contraception.

The rule under which the bill will be considered by the House makes in order an amendment that would restrict the definition of contraceptives to exclude any drug, device, or procedure "which has as one of its known effects the interference with the implantation of a fertilized human ovum or embryo." The Administration would strongly oppose such an amendment, which could result in the denial of safe and legal contraceptive options to Federal workers. Further, such an amendment would interfere with physician decision-making and communication with patients, as it may restrict the ability of physicians to discuss such treatment options with patients.

Pay Raises

The Administration shares the Committee's concern with the current system for setting and adjusting Federal pay. However, the potential costs and programmatic disruptions should section 644 of the Committee bill be enacted are significant. A Federal employee pay raise of about 15 percent would be automatically triggered in January 2000. Therefore, the Administration urges that this provision be dropped. Under the leadership of the Office of Personnel Management, the Administration is working expeditiously on a reform proposal and, as part of this process, will consult with appropriate stakeholders, including the Congress.

The Administration is disappointed that the bill includes a proposal to eliminate the 1999 pay raise for Federal judges and employees paid under the Executive Schedule. Failure to provide pay raises for senior executives is eroding the value of their pay, causing severe pay compression in the executive ranks. Pay adjustments have been made for such individuals only once in the last five years. If continued, this failure will affect the Government's ability to attract and retain the executive talent that it needs. We urge the House to restore the pay raise for Federal judges and the Executive Schedule.

Firefighter's Pay

The Administration commends the Committee for including a provision (section 639) in the bill to reform the overtime pay system for Federal firefighters. A more rational,

understandable, and uniform system for calculating the overtime pay of Federal firefighters is long overdue. The Committee provision would accomplish this important and much-needed legislative change and reflects a consensus agreement among the various stakeholders, such as affected executive branch agencies and employee organizations.

United States Trade Representative

The Administration opposes the provision that would make the U.S. Trade Representative the United States representative to the Universal Postal Union. The U.S. Trade Representative lacks the resources and expertise in postal administration to take on this responsibility. In addition, this provision would repeal the authority of the Postal Service to establish international postage rates. We urge that this provision be dropped.

United States Postal Service

The Administration is concerned that the Committee bill would prohibit the Postal Service from initiating new non-postal commercial activities or pack and send services. An appropriations bill should not be used to legislate such restrictions on Postal Service operations.

Office of National Drug Control Policy (ONDCP)

The Administration appreciates the support the Committee has provided for drug control efforts in general, and for ONDCP in particular. The Administration encourages the House to provide the full amount requested for the Special Forfeiture Fund as anything less would adversely impact our ability to continue moving towards our mutual goal of reducing drug use. Failing to fully fund this request would negatively impact the National Drug Control Strategy and our efforts to meet the targets established in the Performance Measures of Effectiveness system. The House could fund this spending, in part, by reducing amounts earmarked by the Committee for an unrequested technology transfer program.

Federal Buildings Fund

The Committee has not provided \$14 million requested for the design of a new Department of Transportation (DOT) Headquarters. Instead, the Committee urges GSA to enter into a lease transaction, as authorized by the House Transportation and Infrastructure Committee and the Senate Environment and Public Works Committee. The Administration requests that the House provide funding for the design of a new DOT Headquarters. Providing for a government-owned building would save taxpayers approximately \$190 million, in present value terms, compared to the cost of entering into a lease.

The Committee bill would delay the availability of funding until September 30, 1999, for the repair and alterations program (\$19 million) and building operations program (\$223 million). The Administration is concerned that a delay in obligations of this amount for buildings operations would impede GSA's ability to operate and maintain Federal facilities under its control.

SENT BY AUSA [unclear] 1010 1 7 10 00 12 10000000

The Administration is also concerned that the Committee bill has approved over \$500 million for 15 unrequested courthouse construction projects.

National Bioethics Advisory Commission

The Administration objects to section 628 of the Committee bill, which would prevent interagency funding of the National Bioethics Advisory Commission. The work of the Commission affects at least 15 Federal agencies. Access to interagency funding is essential for continued operations of this small, but important commission.

Bureau of Engraving and Printing

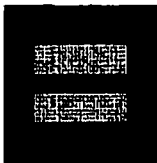
The Administration objects to section 116 of the Committee bill, which would prevent the Bureau of Engraving and Printing from awarding a contract for currency paper under an ongoing competitive procurement without prior congressional approval. The Administration will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in INS vs. Chadha.

Potential Amendment Related to Peer Review

The Administration strongly opposes an amendment that may be offered mandating peer review of "scientific data" supporting final regulations. The Administration is committed to using the best possible science and peer review for rule-making. However, this amendment is unnecessary, inappropriate and wasteful. Peer review is currently incorporated in the Government-wide rule-making process where it is needed through extensive outreach, public comment, and scientific advisory boards. This amendment as drafted mandates a one-size-fits-all requirement that would serve only to delay important government action, in particular, rules designed to protect health safety and the environment. It would impose a costly additional step in the regulatory process and would cover a large heterogeneous set of rules, as diverse as meat and poultry inspection rules, airplane and automobile safety standards, FDA drug and device approvals, and rules to ensure safe drinking water and clean air. This would impose an undue burden on numerous final rules by requiring substantial personnel and other resources and could result in significant delays on important public health and safety rules.

Potential Amendment Related to Presidential Executive Order

The Administration would oppose an amendment that may be offered that would prohibit the use of funds in the Act for implementing the May 28, 1998, Presidential Executive Order which provides a uniform policy for the Federal Government to prohibit employment discrimination based on sexual orientation in the federal civilian workforce.



HUMAN
RIGHTS
CAMPAIGN

1101 14th Street NW
Washington, DC 20005
phone 202 628 4160
fax 202 347 5323

FAX TRANSMISSION

DATE: July 14, 1998

TO: Rob Cogorno 225 - 0938
Robert Raben 225 - 7680
Marcia Kuntz 225 - 0182
Mark Agrast 225 - 5658
Kirk Fordham 225 - 3132
Len Wolfson 225 - 9629
Richard Socarides 456 - 6218
Mary Smith 456 - 7431
Tom Freedman 456 - 7431
Martha Foley 456 - 6220
Karen Tramantano 456 - 1907

Set.
Dierckx
HRC
Died

NUMBER OF PAGES: (including cover) 5

FROM: Chad Lord, Political Assistant

SUBJECT: *HRC Hefley amendment talking points, myth and fact; and
NRCC's non-discrimination statement*

If you have any problem with this transmission, please call (202) 628-4160.

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HUMAN
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VOTE NO ON THE HEFLEY AMENDMENT TO TREASURY-POSTAL APPROPRIATIONS

CLINTON EXECUTIVE ORDER CLARIFIES EXISTING POLICY. NO AFFIRMATIVE ACTION, NO QUOTAS.

- The Hefley Amendment to the Treasury-Postal Appropriations bill seeks to gut a recent presidential Executive Order (E.O. 13087) by "prohibit[ing] the expenditure of funds to implement, administer or enforce [it]."
- E.O. 13087 was issued by President Clinton on May 28, 1998, as an amendment to Executive Order 11478. This Executive Order breaks no new ground. It neither creates new law nor any new enforceable judicial protections for Federal employees. It merely amends the existing federal executive order governing equal employment opportunity by adding the term sexual orientation, bringing much needed uniformity and effectiveness to *existing* nondiscrimination policies of Federal agencies and office.
- Executive Order 13087 ensures equality and fairness, not "special privileges," "special preferences," quotas, or affirmative action of any kind.
- Over the years, many Federal civil employers have adopted individual policies prohibiting employment discrimination on the basis of sexual orientation. These policies lacked uniformity and consistency. This Executive Order merely remedies these inconsistencies by promoting uniformity in Federal sexual orientation nondiscrimination policies.
- This amended Executive Order does not create any new enforceable legal protections. A lesbian or gay Federal employee who is discriminated against by his/her employer on the basis of sexual orientation *cannot* sue her/his employer in court under the amended Executive Order.
- Nothing in the President's Executive Order applies to Federal grants, private contractors, or state and local governments.
- According to a poll performed by the Tarrance Group (R) and Lake Sosin Snell & Associates (D), 80 percent of the American public says that homosexual should have equal rights in terms of job opportunity.

THIS IS AN HRC KEY VOTE.



HUMAN
RIGHTS
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PRESIDENT CLINTON'S EXECUTIVE ORDER 13087

BASIC FAIRNESS FOR FEDERAL EMPLOYEES

MYTHS AND FACTS

MYTH

Executive Order 13087 will result in affirmative action and quotas on the basis of sexual orientation for gay and lesbian federal civilian employees.

FACT

Executive Order 13087 creates no "special privileges," "special preferences," "quotas," or "affirmative action" for lesbian and gay federal civilian employees. Instead, the executive order ensures equality and fairness by bringing uniformity to a multitude of already existing federal non-discrimination policies.

MYTH

The President, in issuing Executive Order 13087, has exceeded his authority and bypassed Congress and the American people.

FACT

As the federal government's chief executive, the President has the power to establish the personnel policies of his Administration. This authority emanates from Article II of the Constitution. As the President acknowledged, however, when he issued Executive Order 13087, this executive order "does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission or a direct judicial cause of action). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act."

Presidential authority to prescribe regulations for the conduct of federal civilian employees has long been established. Such uses of that authority allowed President Reagan to require drug testing in the federal civilian workforce (Executive Order 12564), and President Bush to set forth principles of ethical conduct for federal civilian employees (Executive Order 12674).

MYTH

Executive Order 13087 applies to federal contractors and subcontractors, and state and local governments.

FACT

The scope of Executive Order 13087 is limited to that of the underlying executive order, Executive Order 11478, which does not apply to federal contractors or subcontractors, or state or local governments. The prohibition against discrimination in the employment policies of federal government contractors and subcontractors is based on a completely different executive order, Executive Order 11246, issued by President Lyndon Johnson in 1965.

MYTH

Because the term "sexual orientation" is not explicitly defined, it could include homosexuality, bisexuality, transexuality, bestiality, incest and even pedophilia.

FACT

It is well established that the term "sexual orientation" means homosexuality, bisexuality, and heterosexuality. The same definition is also included in the Employment Non-Discrimination Act (S. 869, H.R. 1858). In the Hate Crimes Statistics Act of 1990, the term "sexual orientation" is defined as "consensual homosexuality or heterosexuality." The Federal Bureau of Investigation also collects statistics on hate crimes perpetrated against individuals on the basis of bisexuality.

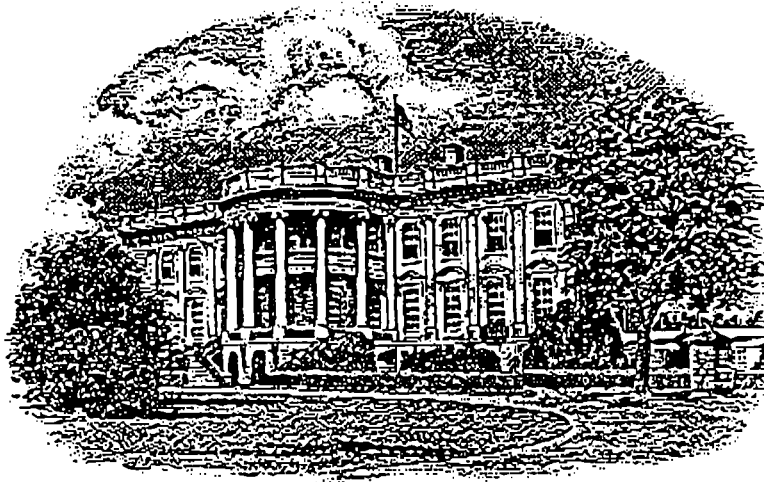
Sex Orientation

Part 3. EQUAL EMPLOYMENT OPPORTUNITY

The National Republican Congressional Committee is an equal opportunity employer. No person shall be discriminated against in employment because of such individual's race, marital status, religion, family responsibilities, color, sex, age, sexual orientation, handicap, personal appearance, national origin, matriculation or other status or condition that is protected by applicable law, including the District of Columbia Human Rights Act. The Committee's policy of maintaining a work environment free of unlawful discrimination also includes the right to freedom from sexual harassment.

The White House

Set as aribm
?



Office of Counsel to the President
Facsimile Transmission

Date: _____

To: MARY Smith

Facsimile Number: 67431 Total Pages: 6

From: Jim Kennedy
Phone: 202-456-7909
Return Fax: 202-456-7906

Note: Per my voice mail. Rob Warner suggested I show this to you! He, Chuck Ruff and Mark Reed have OK'd. The article has been sent, but I can probably make some changes by Thursday morning if necessary. Thank you, and I apologize for this late notice.

The documents accompanying this facsimile transmittal sheet are intended only for the use of the individual or entity to whom it is addressed. This message contains information which may be privileged, confidential or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any disclosure, dissemination, copying or distribution, or the taking of any action in reliance on the contents of this communication is strictly prohibited. If you have received the information in error, please immediately notify the sender at the telephone number above.

Jim

by James F. Kennedy

Article Two, Section Three of the United States Constitution says that the President "shall take care that the laws be faithfully executed." Every President since George Washington has fulfilled that constitutional obligation in part by issuing orders executing laws passed by the Congress.

Some executive orders are basic: ordering that flags be flown at half-staff in honor of a deceased notable, for example, or ordering that federal offices be closed the day after Christmas. Others are more sweeping: President Lincoln freed the slaves with the stroke of his pen in the Emancipation Proclamation. President Truman integrated the Armed Forces in 1948 with an Executive Order. President Kennedy issued an order establishing the Peace Corps in 1961.

In fact, since the government began keeping count earlier this century, presidents have issued nearly 13,100 executive orders. President Franklin Roosevelt, facing such dire issues as the Depression and World War II, issued orders at the rate of about one each day. President Clinton, like Presidents Reagan and Bush before him, has issued Executive Orders a little less than once a week, on average.

One such order came on July 9, when the President empowered the Office of Personnel Management to terminate health insurers from federal employee health plans if they are not in compliance with the Kennedy-Kassebaum health care legislation. That law enables more Americans to acquire and keep health insurance if they have pre-existing medical conditions and they change jobs. By making compliance with the law a condition of having access to thousands of federal employees, this order (which is technically in the form of an Executive Memorandum) encourages the 350 insurance companies who do business with the federal government to abide by the letter and spirit of the Kennedy-Kassebaum legislation in their provision of insurance to all citizens. As President Clinton said in announcing his decision, "If you say 'no' to people with pre-existing conditions, the federal government will say 'no' to you."

Earlier this year, on March 13, the President issued an Executive Order to increase employment of adults with disabilities. The order was supportive of the goals outlined in the Americans with Disabilities Act of 1990. It calls for the establishment of a National Task Force on Employment of Adults with Disabilities to create a coordinated and aggressive national policy to bring adults with disabilities into gainful employment at a rate that is as close as possible to that of the general adult population. "Since 1993, we have created 15 million new jobs," said President Clinton in announcing the Executive Order. "But the unemployment rate among people with disabilities is far too high." Through this exercise of presidential authority, there is hope that such a disparity may soon begin to narrow.

Not surprisingly, presidential critics throughout history have found fault with various Executive Orders. Members of Congress take to the floor of the House or the Senate to decry "overreaching" Executive Orders issued by a President (who is usually of the opposite party). Sometimes they engage in legislative efforts to undo the effect of an order. Attacks on presidential decisionmaking can also be found in court cases, as various aggrieved parties file suit against the federal government to overturn Executive Orders -- sometimes successfully. The President's health insurance order, for example, was quickly criticized by health insurers and their political allies.

Among Perhaps the *more* contentious *debates is the one* Executive Order 13087, issued by the President on May 28, 1998. The order bars discrimination based on sexual orientation in the federal civilian workforce. It does so by amending Executive Order 11478, issued by President Nixon, which banned discrimination by the federal government based on race, color, religion, sex, national origin, handicap or age.

Representative Joel Hefley (R-CO) has sought to undo the effect of Executive Order 13087 by proposing an amendment to an appropriations bill which would effectively legitimize discrimination by the federal government against its own citizens based solely on sexual orientation. It is our view that such unfairness is out of step with most Americans' sense of right and wrong.

Beyond the particulars of that debate, however, is the question of whether President Clinton's authority to issue such an Executive Order is clear. We believe the answer is a resounding "yes." Executive Order 13087 does not reflect any new policy and creates no new law. With regard to adding "sexual orientation" to the list of prohibited bases for discrimination, the President relied on his authority under the civil service law ^{which allows him to proscribe regulations for} of 1978, which prohibits ^{the conduct of} "discrimination for or against any employee or applicant for employment on the basis of conduct ^{of federal employees and} with does not adversely affect the performance of the employee or applicant or the performance of others." That most certainly would apply to the sexual orientation of employees or applicants. ~~Since 1978.~~ ^{or directives} Many federal agencies have issued regulations to implement the law in a way that includes sexual orientation. President Clinton's Executive Order simply makes the policy uniform for the entire civilian federal workforce.

Those who question the President's authority to issue such guidelines governing federal employees must also -- if they are consistent -- question President Reagan's authority to issue Executive Order 12564, which requires a drug-free federal workplace. They must also question President Bush's Executive Order 12674, setting forth principles of ethical conduct for government employees. ^{And they must even question President Nixon's order banning discrimination by the federal government based on race, gender, religion and other factors.} It would not make sense to contend that a President can regulate the ethical conduct of federal employees and ~~require~~ ^{and ban racial, gender and religious discrimination,} drug testing, but cannot instruct them to refrain from discriminatory conduct ^{based on sexual orientation.}

But consistency and common sense do not underlie the arguments of those who oppose this and other Executive Orders. That's because the heart of their criticism is not a concern about presidential abuse of authority. At the heart is a fundamental disagreement over policy and, in some cases, a politically-inspired desire to do damage to the President.

That is really what the recent flurry of attention over Executive Orders is all about. Republicans in Congress cannot quite decide whether they want to fashion a "do nothing" or a "kill everything" legacy this year. They have failed to set a policy agenda and they have failed to produce a meaningful legislative record. With so little to show for their own efforts, they do not like to see the President occupying center stage as he goes about the people's business and exercises leadership on issues that matter to the American public. Even the conservative Washington Times, in an editorial otherwise attacking the President's use of Executive Orders, argues that the best way for Republicans to counter President Clinton "is to get a legislative

agenda of their own together and push it all the way to the president's desk."

The Republican lack of an agenda going into the summer recess in an election year is a remarkable thing, deserving further coverage on its own. But at least it helps to explain why some Republicans are so anxious to criticize the decisive actions of a President who clearly does have an agenda and a willingness to use his power to make things happen.

After all, making things happen is what leadership is all about. Executive Orders are one way presidents of the United States can exercise leadership and "take care that the laws are faithfully executed," just as they swear to do every Inauguration Day.

(James E. Kennedy is Special Advisor To The White House Counsel. Prior to assuming this position in January, he worked as Issues Director for Standard & Poor's in New York, and before that he spent nearly 18 years with Senator Joe Lieberman)

Insight

ON THE NEWS

Douglas Burton
Associate Editor

9 July, 1998
burton@twfmail.com

Mr. James Kennedy
The White House Counsel's Office
1600 Pennsylvania Ave. N.W.
Washington, D.C. 20500

Dear Mr. Kennedy,

This is a request for an essay by James Kennedy.

As you may know, Insight has long been committed to airing both sides of contentious issues. Insight's "Symposium" section has been the venue for articles by several other Administration officials, including Education Secretary Richard Riley, Secretary of Transportation Rodney Slater, Secretary of Energy Federico Pena, EPA Administrator Carol Browner and Census Bureau Director Margaret Farnsworth Riche opposed by the essays of Republican lawmakers and conservative intellectuals (see enclosures).

The question we would like you to address is: "Has the President made appropriate use of executive orders? That is the general idea, and we can further refine the question. As you know, the executive order is a hot topic for many columnists of late (see enclosures). An opposing essay likely will be written by Rep. Joel Hefley of Colorado. No doubt your comment on this issue will frame one side of the national debate, and will be read by policy makers in Washington as well as Insight's national audience.

Your essay should be no more than 1,700 words in length, and we would need a color portrait of you. We are prepared to publish your essay as soon as it is available, but we hope to have it in our offices by the morning of July 15. Sample issues of Insight enclosed by separate cover; please see the "Symposium" section for examples of the point-counterpoint debate format. We look forward to working with you!

With Best Regards,



Douglas Burton

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN
FROM: TOM FREEDMAN, MARY L. SMITH
RE: EXECUTIVE ORDER ON SEXUAL ORIENTATION
DATE: JULY 15, 1997

SUMMARY

In response to your request to draft an executive order prohibiting discrimination regarding sexual orientation, enclosed is a draft executive order modifying Executive Order 11478 which concerns discrimination in the Federal Government.

There currently is no executive order concerning discrimination based on sexual orientation. As the result of an Office of Personnel Management recommendation, most of the agencies currently have explicit policies that prohibit discrimination based on sexual orientation, with the notable exceptions of the Department of Defense and NASA. Statutory authority seems to exist for prohibiting discrimination based on sexual orientation in the Civil Service Reform Act (CSRA), which covers certain federal employees.

Currently there are two bills on the Hill, one in the House and one in the Senate, that would prohibit discrimination based on sexual orientation.

STATE OF THE LAW

I. POLICY STATEMENTS

On March 10, 1997, OPM issued a recommendation to all agencies that they "issue a strong management statement which clearly defines the Federal Government's policy with regard to discrimination based on conduct which does not adversely affect the performance of employees or applicants for employment." The Federal Government's policy includes discrimination based on sexual orientation. The March 10, 1997 memo was a reiteration of two previous OPM memoranda that discussed the Federal Government's policy on discrimination in employment, one dated May 12, 1980, and one dated February 17, 1994. During President Clinton's first term, most of the agencies complied with OPM's recommendation by issuing a policy statement prohibiting discrimination, explicitly including discrimination based on sexual orientation, with two notable exceptions. The Department of Defense appears to have taken no action to issue a policy statement. In addition, NASA's General Counsel explicitly refused to issue a policy statement because he believed that a policy statement was not necessary because employees were already adequately protected and to issue a new policy would elevate discrimination based on sexual

orientation above other types of discrimination.

II. CIVIL SERVICE REFORM ACT

5 U.S.C. section 2302(b) states that "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority:

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining the suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, or the District of Columbia, or of the United States.

In a Civil Service Bulletin dated December 21, 1973, the Civil Service Commission stated:

You may not find a person unsuitable for Federal Employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness --excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.

In Ashton v. Civiletti, 613 F.2d 923, 927 (D.C. Cir. 1979), the court cited the above bulletin as the policy "applicable to the great bulk of employees in the federal service."

In the May 12, 1980 OPM memorandum cited above, the Director of OPM elaborated on the Civil Service Reform Act's prohibition of discrimination based on non-job-related conduct by stating: "Thus, applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as religious, community or social affiliations, or sexual orientation." In February 17, 1994, OPM reiterated that the "1980 memorandum continues to reflect the Federal Government's longstanding policy on the matter of discrimination based on non-job-related conduct."

THE HILL

1. **H.R. 1858 by Rep. Shays (R-CT) on 6-10-97 (150 cosponsors). EMPLOYMENT NON-DISCRIMINATION ACT OF 1997.** This Act prohibits employment discrimination based on sexual orientation. The Act provides the remedies provided in Title VII of the Civil Rights Act of 1964 for aggrieved individuals. However, the Act does not apply to the provision of employee benefits.

2. **S. 869 by Sen. Jeffords (R-VT) on 6-10-97(33 cosponsors). EMPLOYMENT NON-DISCRIMINATION ACT OF 1997.** This Act is essentially the same as H.R. 1858 above.

3. **S. 47 by Sen. Helms on 1-21-97.** This bill prohibits the executive branch of the federal government from establishing an additional class of individuals that is protected against discrimination in federal employment other than those classes identified in the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.

WHAT AGENCIES HAVE

- NASA refused to adopt a policy.
- The Department of Defense does not have a policy.
- Agencies that have adopted a policy of prohibiting discrimination based on sexual orientation: Department of Commerce, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of Treasury, Department of Veterans Affairs, Small Business Administration

OPTIONS

1. Modify Executive Order 11478 entitled "Equal employment opportunity in the federal government" to add sexual orientation as a category to Section 1.

PROS: This would be the most efficient method to include sexual orientation because E.O. 11478 already covers the topic of discrimination.

CONS: Sections 3 through 5 of E.O. 11478 discuss the EEOC. Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, prohibits discrimination only on the basis of race, color, religion, sex or national origin. The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age. The Rehabilitation Act of 1973 prohibits discrimination on the basis of physical or mental disability. By adding "sexual orientation" to Section 1 of E.O. 11478, Section 1 will no longer mirror the classes of prohibited discrimination in Sections 3-5. Some persons may perceive that the President is trying to legislate via executive order.

2. Create a new executive order with only sexual orientation as a category of prohibited discrimination.

CONS: This may single out sexual orientation too much. Some persons may perceive that sexual orientation is entitled to greater protection than other types of discrimination.

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Set on number

**FAX FROM THE OFFICE WASHINGTON OFFICE OF
CONGRESSMAN BARNEY FRANK**

TODAY'S DATE: 7/28

TO: Mary Smith

FROM: Marcia Kinsley

FAX NUMBER: 456 - 7431

NUMBER OF PAGES [INCLUDING THIS ONE]: 2

If this fax does not transmit properly, please call 202-225-5931.

COMMENTS:

FYI - Dear Colleague

Dear Colleague:

Because you may have seen a recent Dear Colleague concerning the Hefley Amendment to the CJS Appropriations bill entitled "JUST THE FACTS ON E.O. 13087," we thought it useful to provide two facts left out of that letter which are very relevant:

- The White House, which issued the Executive Order and is given by U.S. statute the authority to pass regulations concerning the conduct of federal employees, has stated conclusively that Executive Order 13087 does not authorize affirmative action, nor does it require or even permit statistical record-keeping. In a letter from the White House Counsel to the Director of the Office of Personnel Management (a copy of which is on the reverse of this letter) the White House states unequivocally:

The purpose of Executive Order 13087 is to confirm and make uniform the existing bar on discrimination based on sexual orientation by amending Section 1 of Executive Order 11478 to add sexual orientation to the categories for which discrimination has been expressly prohibited. Executive Order 13087 does not authorize affirmative action policies, such as recruitment, reporting, or goal-setting based on sexual orientation. As a result of this executive order, it is not intended that agencies take steps to determine the sexual orientation of current or prospective employees or to keep tallies regarding the sexual orientation of current or prospective employees.

There will simply be no affirmative action based on sexual orientation in the federal government as a result of the Executive Order which ensures uniform anti-discrimination policies.

- While the CRS Report raises the specter of affirmative action and recordkeeping based on sexual orientation, it fails to note that protections against discrimination based on religion and age, which were a part of the original Nixon executive order, **have not given rise to affirmative action or recordkeeping.** The Executive branch has undertaken no affirmative action or recordkeeping on these bases. Indeed, protection against sexual orientation discrimination has been in place in many Federal agencies, and no affirmative action nor recordkeeping on this basis has resulted.

The CRS Report is rife with speculation -- "it is *quite possible*," "*could* require," "*could conceivably* provide," "*appears*," "*could at least have some* policy implications," etc. But the President has made clear the intent and scope of E.O. 13087. The White House has the power to decide and has determined that protecting employees from discrimination based on sexual orientation does not authorize nor will it permit affirmative action based on that status.



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FAX TRANSMISSION

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Chief Counsel
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Kevin Layton
Staff Counsel
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DATE: July 29, 1998

TO: Mary Smith

FAX NUMBER: 202-456-7431

VOICE NUMBER: 202-456-5571

FROM: Kevin Layton

TOTAL No. OF PAGES
(incl. this coversheet): 6

MESSAGE:

Mary,

This is what we have...at this point it appears unlikely that we will be mounting any major opposition to this -- unless there are significant weakness and/or problems that can be identified on your end. Let me know what you find out. Thanks again.

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United States Senate

WASHINGTON, DC 20510-2203
July 27, 1998

Family Impact Statement Act

Dear Colleague:

This week, we will be offering the Family Impact Statement Act (S. 1002) as an amendment to the Treasury Postal Appropriations bill. As you may be aware, last year President Clinton repealed an executive order that required agencies to review proposed policies and regulations for their impact on the family.

We believe that protecting America's families should be a priority for any government agency when considering new regulations. That is why we introduced legislation last year to reinstate this policy. We can think of no better requirement--for any regulation--or policy proposal than a review of how it could impact the American family.

This legislation would simply require agencies to issue a statement on how the policies and regulations it implements effects families in the following ways:

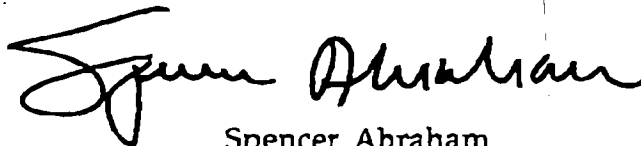
- Does this action strengthen or erode the authority and rights of parents in education, nurturing, and supervising their children?
- Does it strengthen or erode the stability of the family, particularly the marital commitment? !
- Does it help the family perform its function, or does it substitute government activity for that function?
- Does it increase or decrease family earnings, and do the proposed benefits justify the impact on the family budget?
- Can the activity be carried out by a lower level of government or by the family itself?
- What message, intended or otherwise, does this program send concerning the status of the family?
- What message does it send to young people concerning the relationship between their behavior, their personal responsibility, and the norms of our society?

Please contact Brandi Laperriere (4-3807) with Senator Abraham's office if you need any additional information.

Sincerely,



Lauch Faircloth



Spencer Abraham



Tim Hutchinson



Jeff Sessions

II

105TH CONGRESS
1ST SESSION**S. 1002**

To require Federal agencies to assess the impact of policies and regulations on families, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 10, 1997

Mr. ABRAHAM (for himself, Mr. FAIRCLOTH, Mr. SESSIONS, Mr. HUTCHINSON, Mr. DEWINE, Mr. COATS, Mr. ASHCROFT, Mr. COVERDELL, Mr. SMITH of New Hampshire, Mr. NICKLES, and Mr. HELMS) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To require Federal agencies to assess the impact of policies and regulations on families, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PURPOSES.**

4 The purposes of this Act are to—

5 (1) require agencies to assess the impact of pro-
6 posed agency actions on family well-being; and

7 (2) improve the management of executive
8 branch agencies.

1 **SEC. 2. DEFINITIONS.**

2 In this Act—

3 (1) the term “agency” has the meaning given
4 the term “Executive agency” by section 105 of title
5 5, United States Code, except such term does not in-
6 clude the General Accounting Office; and

7 (2) the term “family” means—

8 (A) a group of individuals related by blood,
9 marriage, or adoption who live together as a
10 single household; and

11 (B) any individual who is not a member of
12 such group, but who is related by blood, mar-
13 riage, or adoption to a member of such group,
14 and over half of whose support in a calendar
15 year is received from such group.

16 **SEC. 3. FAMILY POLICYMAKING ASSESSMENT.**

17 Before implementing policies and regulations that
18 may affect family well-being, each agency shall assess such
19 actions with respect to whether—

20 (1) the action strengthens or erodes the stabil-
21 ity of the family and, particularly, the marital com-
22 mitment;

23 (2) the action strengthens or erodes the author-
24 ity and rights of parents in the education, nurture,
25 and supervision of their children;

1 (3) the action helps the family perform its func-
2 tions, or substitutes governmental activity for the
3 function;

4 (4) the action increases or decreases disposable
5 family income;

6 (5) the proposed benefits of the action justify
7 the financial impact on the family;

8 (6) the action may be carried out by State or
9 local government or by the family; and

10 (7) the action establishes an implicit or explicit
11 policy—

12 (A) concerning the status of the family;

13 and

14 (B) concerning the relationship between
15 the behavior and personal responsibility of
16 youth, and the norms of society.

17 **SEC. 4. GOVERNMENTWIDE FAMILY POLICY COORDINA-**
18 **TION AND REVIEW.**

19 (a) **CERTIFICATION AND RATIONALE.**—With respect
20 to each proposed policy or regulation that may affect fam-
21 ily well-being, the head of each agency shall—

22 (1) submit a written certification to the Direc-
23 tor of the Office of Management and Budget and to
24 Congress that such policy or regulation has been as-
25 sessed in accordance with this Act; and

1 (2) provide an adequate rationale for implemen-
2 tation of each policy or regulation that may nega-
3 tively affect family well-being.

4 (b) OFFICE OF MANAGEMENT AND BUDGET.—The
5 Director of the Office of Management and Budget shall—

6 (1) ensure that policies and regulations pro-
7 posed by agencies are implemented consistent with
8 this Act; and

9 (2) compile, index, and submit annually to the
10 Congress the written certifications received pursuant
11 to subsection (a)(1).

12 (c) OFFICE OF POLICY DEVELOPMENT.—The Office
13 of Policy Development shall—

14 (1) assess proposed policies and regulations in
15 accordance with this Act;

16 (2) provide evaluations of policies and regula-
17 tions that may affect family well-being to the Direc-
18 tor of the Office of Management and Budget; and

19 (3) advise the President on policy and regu-
20 latory actions that may be taken to strengthen the
21 institutions of marriage and family in the United
22 States.

1 SEC. 5. ASSESSMENTS UPON REQUEST BY MEMBERS OF
2 CONGRESS.

3 Upon request by a Member of Congress relating to
4 a proposed policy or regulation, an agency shall conduct
5 an assessment in accordance with section 3, and shall pro-
6 vide a certification and rationale in accordance with sec-
7 tion 4.

O

FYI —

See # 30 C

Richard
Socarides

HART - TEELE

NBC/WSJ
Study #4091
July 25-27, 1998

Q.30c. (FORM A) As you may know, President Clinton issued an executive order that prohibits federal agencies from discriminating against homosexuals. Do you favor or oppose President Clinton's effort to prohibit discrimination against homosexuals working in federal agencies? *

Table 257

	Sex			Region				Race		Age				Income				Area Type		
	All Adults	Men	Women	Northeast	Midwest	South	West	Whites	Blacks	18-34	35-49	50-64	65 and over	Under \$20,000	\$20,000-\$30,000	\$30,000-\$50,000	Over \$50,000	Urban	Suburbs/towns	Rural
Total	502	236	266	90	122	177	113	402	48	144	146	116	90	73	73	128	171	168	216	117
Favor	360 72%	160 68%	199 75%	71 79%	84 69%	113 64%	91 81%	285 71%	38 78%	111 77%	107 74%	84 72%	57 63%	46 63%	50 69%	93 73%	134 78%	132 78%	161 74%	67 57%
Oppose	101 20%	57 24%	44 17%	13 14%	26 21%	46 26%	17 15%	87 21%	6 13%	24 16%	33 22%	26 23%	18 20%	19 26%	16 21%	27 21%	29 17%	21 13%	46 21%	34 29%
Not sure	41 8%	18 8%	23 8%	6 7%	12 10%	18 10%	5 4%	31 8%	4 9%	9 7%	6 4%	6 5%	15 17%	8 11%	8 10%	8 6%	8 5%	15 9%	10 5%	16 14%

Sex, Over

* Asked of one-half the respondents.

HART - FEETER

NBC/WSJ
Study #4091
July 25-27, 1998

Q.30c. (FORM A) As you may know, President Clinton issued an executive order that prohibits federal agencies from discriminating against homosexuals. Do you favor or oppose President Clinton's effort to prohibit discrimination against homosexuals working in federal agencies? *

Table 237

Banner 2

	Voting		Party Identification			Ideology				Occupation				Education			Union		Protestants	
	All Adults	Regis-tered voters	Nonregis-tered adults	Demo-crats	Inde-pend-ents	Repub-licans	Lib-erals	Mod-erates	Conser-vatives	Profes-sionals/managers	White collar workers	Blue collar workers	Reti-rees	High school or less	Some col-lege	College gradu-ates	Union house-holds	Nonunion house-holds	Funda-mental-ists	Non-funda-mental-ists
Total	502	440	54	210	112	166	112	178	146	125	94	93	121	172	154	172	80	413	100	153
Favor	360	312	44	166	85	100	98	143	79	96	72	62	78	109	118	132	62	294	53	121
	72%	71%	81%	79%	76%	61%	87%	81%	54%	77%	77%	67%	65%	63%	77%	77%	77%	71%	53%	79%
Oppose	101	92	8	29	20	50	9	24	52	25	17	22	26	43	25	33	15	84	33	27
	20%	21%	15%	14%	17%	30%	8%	13%	35%	20%	18%	23%	22%	25%	16%	19%	18%	21%	34%	18%
Not sure	41	36	2	15	8	15	5	11	16	4	5	9	16	21	10	7	4	35	13	5
	8%	8%	4%	7%	7%	9%	5%	6%	11%	3%	5%	10%	13%	12%	7%	4%	5%	8%	13%	3%

* Asked of one-half the respondents.

Copy to Burt R, Allen A,
McCurry, Robert,
+ Tom [unclear]
PVE - R GUL
See # 30C

HART - TEETER

NBC/WSJ
Study #4091
July 25-27, 1998

Table 236

Q.30b. (Form A) Do you think that being homosexual is something people choose to be, or do you think that people are born homosexual and it is something they cannot change? *

Banner 1	Sex			Region				Race		Age				Income				Area Type		
	All Adults																			
	Men	Women		Northeast	Midwest	South	West	Whites	Blacks	18-34	35-49	50-64	65 and over	Under \$20,000	\$20,000-\$30,000	\$30,000-\$50,000	Over \$50,000	Urban	Suburbs/towns	Rural
Total	502	236	266	90	122	177	113	402	48	144	146	116	90	73	73	128	171	168	216	117
Choose to be homosexual	191 38%	103 43%	88 33%	26 29%	51 41%	78 44%	37 32%	148 37%	18 38%	61 42%	54 37%	40 35%	35 39%	31 43%	32 44%	55 43%	58 34%	52 31%	88 41%	51 44%
Born homosexual	207 41%	82 35%	125 47%	49 54%	51 41%	63 36%	45 40%	170 42%	20 41%	62 43%	63 43%	47 40%	34 38%	20 27%	30 41%	54 43%	80 47%	75 45%	91 42%	41 35%
Neither/other (VOL)	6 1%	4 2%	3 1%	4 4%	1 1%	1 1%	1 1%	5 1%	- -	2 1%	1 1%	3 2%	1 1%	1 1%	- 1%	1 1%	2 1%	3 1%	4 2%	- -
Some of both (VOL)	39 8%	18 7%	21 8%	4 4%	9 8%	13 7%	12 11%	32 8%	4 7%	11 8%	9 7%	14 12%	5 5%	10 14%	3 4%	8 6%	12 7%	14 8%	18 8%	7 6%
Not sure	59 12%	30 13%	29 11%	8 9%	10 9%	23 13%	18 16%	49 12%	7 14%	8 6%	18 12%	13 11%	16 17%	11 15%	8 11%	9 7%	19 11%	25 15%	16 7%	18 15%

* Asked of one-half the respondents.

HART - TEEER

NBC/WSJ
Study #4091
July 25-27, 1998

Table 2:

Q.30b. (FORM A) Do you think that being homosexual is something people choose to be, or do you think that people are born homosexual and it is something they cannot change? *

	Banner 2																			
	Voting		Party Identification				Ideology			Occupation				Education			Union		Protestants	
	Regis- All	Nonregis- tered	Inde- pend- ents	Repub- licans	Lib- erals	Mod- erates	Conser- vatives	Profes- sionals/ managers	White collar workers	Blue collar workers	Reti- rees	High school or less	Some col- lege	College gradu- ates	Union house- holds	Nonunion house- holds	Funda- menta- lists	Non-funda- menta- lists		
	Adults voters	adults	crats																	
Total	502	440	54	210	112	166	112	178	146	125	94	93	121	172	154	172	80	413	100	153
Choose to be homosexual	191 38%	168 38%	20 36%	58 27%	43 38%	85 51%	29 25%	50 28%	83 56%	40 32%	33 35%	47 51%	63 36%	76 44%	63 41%	51 29%	26 33%	160 39%	49 49%	55 36%
Born homosexual	207 41%	183 42%	22 41%	105 50%	49 44%	50 30%	60 53%	91 51%	37 25%	60 48%	44 47%	31 34%	45 37%	66 38%	59 38%	83 48%	34 42%	174 42%	30 31%	68 44%
Neither/other (VOL)	6 1%	6 1%	-	2 1%	2 2%	3 2%	2 2%	1 1%	3 2%	2 2%	1 1%	1 1%	2 1%	1 1%	2 1%	3 2%	2 2%	5 1%	1 1%	1
Some of both (VOL)	39 8%	35 8%	4 7%	18 9%	9 8%	9 6%	12 11%	16 9%	6 4%	9 7%	7 7%	8 8%	9 7%	10 6%	15 10%	14 8%	9 11%	28 7%	7 7%	15 10%
Not sure	59 12%	48 11%	9 16%	27 13%	10 8%	19 11%	10 9%	20 11%	19 13%	14 11%	10 10%	6 6%	22 19%	19 11%	15 10%	22 13%	10 12%	45 11%	13 12%	15 10%

* Asked of one-half the respondents.



HUMAN
RIGHTS
CAMPAIGN

1101 14th Street NW
Washington, DC 20005
phone 202 628 4160
fax 202 347 5323

FAX TRANSMISSION

DATE: August 4, 1998

TO: Richard Socarides 456 - 6218
Mary Smith 456 - 7431
Tom Freedman 456 - 7431
Martha Foley 456 - 6220
Karen Tramantano 456 - 1907

NUMBER OF PAGES: (including cover) 2

FROM: Chad Lord, Political Assistant

SUBJECT: McGovern Dear Colleague

If you have any problem with this transmission, please call (202) 628-4160.

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08/01/98 MON 00:01 FAX

JAMES P. MCGOVERN
The District, MassachusettsCOMMITTEE ON
TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEE

SURFACE TRANSPORTATION
WATER RESOURCES AND ENVIRONMENTCongress of the United States
House of Representatives
Washington, DC 20515-2103HEFLEY AMENDMENT
TO CJS APPROPRIATIONS BILL

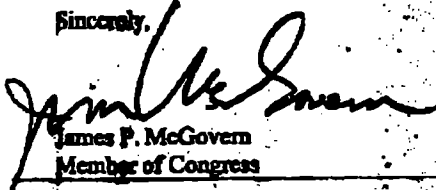
MANY RELIGIOUS GROUPS OPPOSE

Dear Colleague:

I would like to make you aware of the letter I received from several groups who wrote regarding the upcoming Hefley Amendment to the Commerce, Justice, State Appropriations bill which will likely reach the floor today.

I hope you will join me in voting against this misconceived measure.

Sincerely,



James P. McGovern
Member of Congress

July 23, 1998

Dear Representative:

On behalf of the undersigned religious denominations and organizations, we urge you to oppose the Hefley amendment which will be offered to the Commerce, State, and Judiciary Appropriations bill (H.R. 4276). Representative Joel Hefley (R-CO) is expected to offer an amendment to gut the recent Clinton Executive Order which added sexual orientation to the nondiscrimination policy of the federal government.

Executive Order 13087 was issued by President Clinton on May 28, 1998. This Executive Order breaks no new ground and creates no new law. It merely amends the existing federal executive order (E.O. 11478) governing equal employment opportunity by adding the term sexual orientation, bringing much needed uniformity and effectiveness to existing nondiscrimination policies of Federal agencies and offices.

We recognize that there are theological differences of belief on the issue of homosexuality among people of faith. Such differences exist between and even within our many denominations. Yet we also recognize the God-given worth and dignity of every individual. Like the majority of Americans, most people of faith still believe that, notwithstanding differences in our theological views, discrimination in the workplace based on sexual orientation is wrong.

We are clearly of one voice in opposing discrimination on the basis of sexual orientation in federal civilian employment. The Hefley amendment, plain and simple, attempts to make that discrimination legal. It is our belief employees should be judged on their job performance, not their sexual orientation.

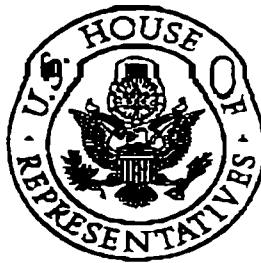
We believe in fairness. Indeed our faith calls us to fairness. All of us are diminished when individuals are prevented from contributing the full measure of their talent and ability to society. We urge you to vote NO on the Hefley amendment as a matter of basic fairness.

Sincerely,

American Friends Service Committee
American Jewish Congress
Central Conference of American Rabbis
Church Women United
Equal Partners in Faith
Jewish Reconstructionist Federation
Mennonite Central Committee, Washington Office
National Council of Jewish Women
The Interfaith Alliance
Unitarian Universalist Association of Congregations

American Jewish Committee
Anti-Defamation League
Church of the Brethren, Washington Office
Episcopal Church
Friends Committee on National Legislation (Quakers)
Lutheran Office of Governmental Affairs,
Evangelical Lutheran Church in America
Presbyterian Church (USA), Washington Office
Union of American Hebrew Congregations
United Church of Christ, Office for Church in Society

512 Cannon Building
Washington, DC 20515-2103
(202) 225-0101DISTRICT OFFICE:
30 MICHIGAN STREET
FIRST FLOOR
Worcester, MA 01608
(508) 851-73861 PINE STREET
ATTLEBORO, MA 01703
(508) 431-8025218 South Main Street
Suite 204
Fall River, MA 02721
(508) 677-8142<http://www.house.gov/mcgobern/>



Set
Dietrich

CONGRESSMAN WILLIAM D. DELAHUNT

1517 LONGWORTH HOUSE OFFICE BUILDING

WASHINGTON, D.C. 20515

202.225-3111

FAX: 202/225-5658

Date: July 27, 1998
To: Richard Socarides 456-6682
From: Mark D. Agrast, Counsel - Legislative Director
Pages: 12, including this cover sheet.
Comments: Attached, as promised, are our latest Dear Colleague letters on Hefley; our handbill to be distributed on the floor; and the CRS report on the President's Executive Order.

I think we would be well advised to have a ready response to the speculations of the CRS analyst with regard to the affirmative action implications. Please let me know what your legal folks recommend.

TO: ROSS WEEHNER
MARY SMITH
TOM FREEDMAN
MANITA FEELEY
AK NOTE
EC

Congress of the United States

Washington, DC 20515

July 21, 1998

DEFEND EQUAL OPPORTUNITY FOR FEDERAL WORKERS: OPPOSE THE HEFLEY AMENDMENT TO THE COMMERCE-STATE-JUSTICE APPROPRIATIONS BILL

Dear Colleague:

On May 28, 1998, President Clinton signed an executive order prohibiting discrimination based on sexual orientation in the federal civilian workforce. The order extends to gay and lesbian employees the same equal opportunity long afforded to women, seniors, persons with disabilities, and members of racial, ethnic and religious minorities.

We understand that Congressman Hefley will seek to attach a floor amendment to the Commerce-State Justice Appropriations bill to prohibit the government from implementing this executive order. **We strongly urge you to OPPOSE this amendment.**

You will no doubt hear that the executive order grants "special rights" or "special status" to homosexuals. This is not true. An executive order issued by President Nixon in 1969 granted the same "special status" to federal workers who are subject to discrimination because of "race, color, religion, sex, national origin, handicap, or age." President Clinton's order merely adds the words "or sexual orientation" to the list. No quotas. No affirmative action. No "special rights."

In so doing, it recognizes, as a majority of Americans have, that a person's sexual orientation -- like these other characteristics -- is irrelevant to work performance, and should not be the basis for the denial of a job or promotion. There is nothing "special" about that. As Supreme Court Justice Anthony Kennedy has written, "These are protections taken for granted by most people either because they already have them or do not need them."

Over 300 members of the House and Senate have acknowledged this, by stating in writing that sexual orientation is not a consideration in the hiring, promoting, or terminating of an employee in their congressional office. All the President's executive order says is that federal agencies should operate the same way. **Please vote NO on the Hefley Amendment.**

For further information, call Mark Agrast (Delahunt 5-3111) or Kirk Fordham (Foley 5-5792).

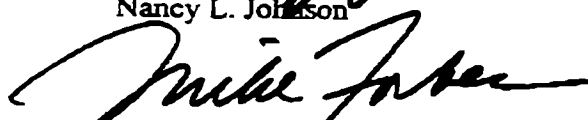
Sincerely,



Nancy L. Johnson



William D. Delahunt



Michael P. Forbes



Richard A. Gephardt

Stephen Horn

Stephen Horn

Constance A. Morella

Constance A. Morella

Christopher Shays

Christopher Shays

Mark Foley

Mark Foley

James A. Leach

James A. Leach

Brian P. Bilbray

Brian P. Bilbray

Tom Campbell

Tom Campbell

Benjamin A. Gilman

Benjamin A. Gilman

Ellen O. Tauscher

Ellen O. Tauscher

Lloyd Doggett

Lloyd Doggett

Martin T. Meehan

Martin T. Meehan

Xavier Becerra

Xavier Becerra

Cynthia A. McKinney

Cynthia A. McKinney

Jane Harman

Jane Harman

James P. McGovern

James P. McGovern

Dale E. Kildee

Dale E. Kildee

Congress of the United States

Washington, DC 20515

July 22, 1998

MYTHS AND FACTS ABOUT THE HEFLEY AMENDMENT TO HR 4276, THE COMMERCE-JUSTICE-STATE APPROPRIATIONS BILL

Dear Colleague:

Supporters of the Hefley Amendment make a series of spurious claims in support of their efforts. We wanted to set the record straight:

Myth No. 1: "The executive order grants "special rights" or "special status" to homosexuals.

THE FACTS: The executive order extends to gay and lesbian employees the same equal opportunity long afforded to women, seniors, persons with disabilities, and members of racial, ethnic and religious minorities under an executive order issued by President Nixon in 1969. President Clinton's order merely adds the words "sexual orientation" to the list of factors that are irrelevant to work performance, and should not be the basis for the denial of a job or promotion. There is nothing "special" about that.

Myth No. 2: "The executive order mandates 'affirmative action' for gays and lesbians."

THE FACTS: The executive order no more requires affirmative action based on sexual orientation than President Nixon's executive order required affirmative action based on age or religion. In fact, the President could not mandate affirmative action for gay and lesbian employees even if this were his intention. Only Congress has the authority to extend Title VII remedies such as affirmative action to new classes of individuals.

Myth No. 3: "The executive order would protect sexual misconduct on the job."

THE FACTS: The executive order says only that people should not be fired because of who they are. It does not immunize misbehavior in the workplace. Inappropriate dress, language, demeanor or behavior remains inappropriate — regardless of who is engaging it.

Myth No. 4: "'Sexual orientation' could mean anything, including incest or pedophilia."

THE FACTS: "Sexual orientation" means heterosexuality, homosexuality, or bisexuality. Period. This is the universal understanding of the term and — to the extent that it is defined in case law or statute — the legal understanding as well.

Myth No. 5: "The executive order binds private companies that have federal contracts."

THE FACTS: The executive order covers only federal civilian employees. It does not apply to grantees, private contractors, or state and local governments.

Myth No. 6: *"The President has no constitutional authority to amend a statute."*

THE FACTS: The President has amended a previous executive order, not a statute. In so doing, he has exercised his clear authority (under 5 U.S.C. 7301) to regulate the conduct of federal employees. The executive order is a statement of administration policy which creates no new law, but serves to clarify existing legal rights and provides a uniform policy for federal agencies, most of which already have internal policies that are working well.

We just thought you should know the facts. Please vote NO on the Hefley Amendment.

For further information, contact Mark Agrast (Rep. Delahunt) at 5-3111 or Kirk Fordham (Rep. Foley) at 5-5792.

Sincerely,


Nancy L. Johnson

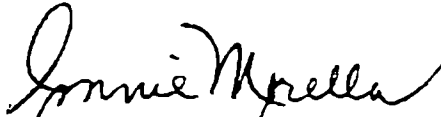

William D. Delahunt

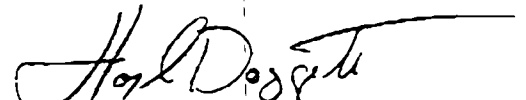

Michael P. Forbes

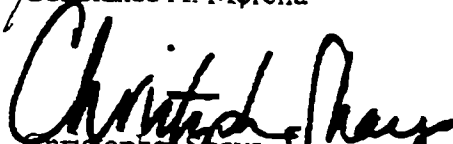

Richard A. Gephardt

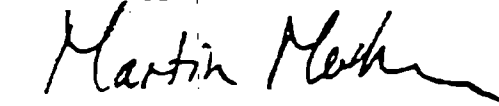

Stephen Horn


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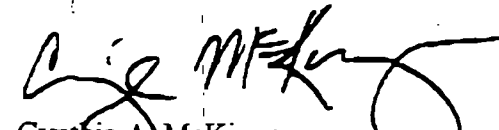

Christopher Shays


Martin T. Meehan


Mark Foley


Xavier Becerra


James A. Leach


Cynthia A. McKinney


Brian P. Bilbray


Jane Harman


Tom Campbell


James P. McGovern





~~Benjamin A. Gilman~~
Benjamin A. Gilman

Dale E. Kildee

**DEFEND EQUAL OPPORTUNITY
FOR FEDERAL WORKERS**

VOTE NO

ON THE HEFLEY AMENDMENT
**TO H.R. 4276, THE COMMERCE-JUSTICE-STATE
APPROPRIATIONS BILL**

The Hefley amendment would prohibit implementation of a recent Executive Order that says that federal civilian workers should not be fired or denied a promotion because of their sexual orientation. This is the same protection granted by previous executive orders to women, seniors, people with disabilities, and members of racial, ethnic and religious minorities.

The Executive Order does **NOT** authorize hiring quotas, affirmative action, or "special rights" based on sexual orientation. It says only that sexual orientation should not be a consideration in the hiring, promotion, or termination of federal employees who are doing their jobs — the very policy adopted by over 300 members of the House and Senate for their personal offices.

Please be advised that the Hefley amendment was revised at the Rules Committee in an effort to gain more support. It now also prohibits the use of funds to implement a second, unrelated executive order dealing with federalism. Mr. Kolbe will offer a separate amendment following the vote on the Hefley amendment to give Members a clean vote on the federalism issue alone.

Don't be fooled. The vote on the Hefley amendment is about one thing and one thing only: fairness in the workplace.

STAND UP FOR FAIRNESS AND EQUALITY.
☒ VOTE NO ON HEFLEY.

CRS Report for Congress

Congressional Research Service • The Library of Congress

Legal Analysis of E.O. 13087 to Prohibit Discrimination Based on Sexual Orientation in Federal Employment

Charles V. Dale
Legislative Attorney
American Law Division

Summary

E.O. 13087 amends a nearly 30 year-old executive order, E.O. 11478, to prohibit sexual orientation discrimination in most federal civilian employment along with the other forms of bias covered by the earlier order. The nondiscrimination and affirmative action mandate of the executive order extends to "every aspect of personnel policy and practice in employment, development, advancement, and treatment of civilian employees of the federal government." It applies to civilian employment by the executive branch, including the military departments, and sundry other agencies but does not cover the uniformed military. In addition, although it purports to apply to legislative and judicial branch entities "having positions in the competitive service," relatively few such positions exist outside the executive branch, and E.O. 11478 has been judicially held not to apply to noncompetitive and excepted service personnel. This report will be updated as events warrant.

On May 28, 1998, President Clinton issued an amendment to E.O. 11478 which states a basic policy of equal employment opportunity in federal executive branch departments and agencies. The original order, as earlier amended, prohibits discrimination because of "race, color, religion, sex, national origin, handicap, and age" in covered employment and requires each executive department and agency to promote equal opportunity through a "continuing affirmative action program." The scope of the equal opportunity mandate in E.O. 11478 encompasses "every aspect of personnel policy and practice in employment, development, advancement, and treatment of civilian employees of the federal government." The Clinton order, E.O. 13087, adds "sexual orientation" after "age" as a protected category in Section 1 of the underlying document along with qualifying language, in effect, authorizing the expansion of coverage only "to the extent permitted by law."

CRS-2

The nature of the nondiscrimination and affirmative action obligations imposed on federal departments and agencies by E.O. 11478 are spelled out in some greater detail in Section 2. Thus, each agency head must establish and maintain an "affirmative program of equal employment opportunity" for all civilian employees and applicants emphasizing active outreach and recruitment efforts; employee development and training designed to fully utilize and "enhance" employee skills and advancement opportunities to "their highest potential;" training for managers and supervisors to promote "understanding and implementation" of the policy; and a system for oversight and periodic evaluation of program effectiveness. Beyond these more or less inward-looking aspects of the program, federal managers are also directed to "assure participation at the local level with other employers, schools, and public or private groups in cooperative efforts to improve community conditions which affect employability . . ." The Equal Employment Opportunity Commission has overall responsibility for implementing the executive order program through the issuance of rules and regulations which are binding on federal departments and agencies.

When Title VII of the Civil Rights Act of 1964 was enacted, federal employees were not protected since the federal government was specifically excluded from the definition of an "employer" covered by the Act. Section 701 did, however, provide that federal sector employment decisions were to be free from discrimination. The President was authorized to issue executive orders enforcing this policy. "*Provided further*, That it shall be the policy of the United States to insure equal employment opportunities for federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy."¹ To carry out this mandate, President Nixon issued E.O. 11478 in 1969, replacing portions of an earlier Johnson Administration directive on the subject.² Pursuant to the order, the former Civil Service Commission established comprehensive administrative procedures for the investigation and resolution of discrimination complaints by federal employees. However, the courts from an early date denied a right to judicial review of discrimination claims brought pursuant to the executive order.³

The lack of a judicial remedy for federal employees was rectified in 1972 when Congress extended Title VII coverage to the federal workplace and provided for *de novo* review in federal court of federal employee discrimination claims following completion of the administrative process. Explicit congressional ratification of the E.O. 11478, as then written, was included in § 717(c) of the 1972 amendments which authorized private civil actions for federal employees complaining of "discrimination based on race, color, religion, sex, or national origin." In addition, the amendments state:

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure non-discrimination in employment as required

¹ P.L. 88-352, § 701(b), 78 Stat.241, 252 (1964).

² E.O. 11246

³ See e.g. *Gnota v. United States*, 451 F.2d 1271 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); *Brown v. G.S.A.*, 425 U.S. 820 (1976).

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by the Constitution and statutes or of its responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.⁴

The Civil Service Commission's responsibility for enforcing Title VII and the Executive Order was transferred to the EEOC pursuant to Reorganization Plan No. 1 of 1978 and the Civil Service Reform Act of 1978. The EEOC carried forward the Commission's regulatory enforcement scheme which was incorporated into the EEOC's overlapping statutory jurisdiction.

The EEOC regulations elaborate upon the responsibility of federal departments and agencies for maintaining an "affirmative program" of equal employment opportunity as required by § 717 and the Executive Order. Aside from procedures for processing complaints of discrimination, those rules focus on two major aspects of a federal employer's compliance with nondiscrimination requirements. First, they make clear that the equal opportunity mandate extends to all of a department or agency's "personnel policies, practices, and working conditions"—including job advertising, recruitment, training activities, promotion, discipline and discharge, etc. Secondly, the regulations emphasize the need for measures to inform and educate other employees, supervisors and managers in particular, concerning their role in program implementation. Thus, the governmental employer is to "enlist th[e] cooperation" of the agency's general workforce and labor organizations and must take "appropriate disciplinary action" against discriminating employees. Similarly, managers and supervisors are to be provided "orientation, training, and advice" on the program with their participation a factor in the evaluation of their job performance.

The meaning of the affirmative action for administrative implementation of the executive order as applied to sexual orientation is a matter of speculation. As generally enforced by courts and administrative agencies with respect to race, ethnicity, or gender, however, affirmative action may encompass a broad range of minority hiring preferences or other race- or gender-conscious efforts to increase workplace participation of previously excluded groups. For example, § 717 of the 1972 Title VII amendments was reinforced by the 1978 Civil Service Reform Act which included a mandate for a federal "minority recruitment program" designed to eliminate "underrepresentation" of minority groups in specific job categories. The EEOC and the Office of Personnel Management have issued rules to guide monitoring and compliance of minority recruitment programs adopted by individual federal agencies. Among various other specified requirements, each agency plan "must include annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured."⁵ Although not directly applicable to enforcement of equal opportunity based on sexual orientation, it is quite possible that similar statistically-based techniques would be developed for this purpose as well, particularly given the current state of consolidated administration of EEO compliance under the executive order and these other federal laws. If so, it could require recordkeeping by agencies of workforce composition based on sexual orientation.

⁴ 42 U.S.C. 2000e-16(e).

⁵ 5 U.S.C. § 720.205(b)(1998).

CRS-4

The effect of the Clinton Administration order on federal health insurance, family leave, and other employment benefits for federal employees that include marital status distinctions would probably be marginal. Definitional aspects of family relationship, i.e. husband, wife, spouse etc. required for participation in most such programs are set by statute.⁶ Thus, any claim of sexual orientation discrimination resulting from the denial of benefits to any person not the spouse or child of an employee—or an agency's voluntary adoption of domestic partnership policies—would for many federal purposes be contrary to law and outside the scope of E.O. 13087. But in light of the U.S. Supreme Court ruling last term in *Oncale v. Sundowner Offshore Services Inc.*⁷—finding that Title VII prohibits same-sex harassment—the new order could require agencies to take actions to prevent and remedy harassment of employees based on their sexual orientation. Such anti-harassment policies could include agency-sponsored training programs to foster awareness and appreciation of diversity in matters of sexual orientation. Employees objecting to compulsory attendance at such programs on moral or religious grounds may enjoy uncertain constitutional protection.⁸ However, objectors might in some circumstances find relief in the EEOC regulations which require agencies to “reasonabl[y] accommodate” the religious needs of employees when this can be done without “undue hardship” to agency business.⁹ Nor would the amended order necessarily preclude even-handed application to all employees, regardless of sexual orientation, of agency rules governing employee conduct in relation to displays of affection or other workplace behavior that could “reasonably be expected to interfere with, or prevent, effective accomplishment by the employing agency of its duties and responsibilities.”¹⁰

The executive order has its most obvious and direct implication on federal employers and for the rights of employees and applicants for employment in the Executive Branch. It would not immediately impact the employment practices of federal contractors—who are subject to nondiscrimination and affirmative action requirements on the basis of race, ethnicity, and gender imposed by E.O. 11246—or recipients of federal financial assistance governed by a host of other nondiscrimination statutes which do not include sexual orientation protections. Nonetheless, it is possible that E.O. 11478, as amended, could have ramifications for the private sector. In addition to internal measures to avoid discrimination and affirmatively enhance employment opportunities within the agency, federal employers are directed to engage in “cooperative efforts” with employers, schools, and public or private groups “at the local level” in aid of these objectives. The authority to cooperate with local entities could conceivably provide a basis for requiring or encouraging the adoption of sexual orientation policies by such entities as a condition to federal cooperation. Some parallel may be found in federal regulations unrelated to E.O.

⁶ E.g. the Federal Employee Health Benefits Plan defines “member of the family” to include the “spouse” of an employee and an “unmarried dependent child.” 5 U.S.C. § 8901; “Spouse” for purposes of the Family and Medical Leave Act, 29 U.S.C. § 2611(13) means “husband or wife, as the case may be.”

⁷ 118 S.Ct. 998 (1998).

⁸ Cf. *Roberts v. United States Jaycees*, 468 U.S. 509 (1984) (rejecting First Amendment challenge to state law forcing a nominally “members-only” association to admit women to its all-male ranks).

⁹ 29 C.F.R. § 1614.102(a)(7).

¹⁰ 5 C.F.R. § 731.202(a)(2).

CRS-5

11478 which have either mandated nondiscrimination or required the affirmative consideration of sexual orientation as a criterion by participants in other federal programs.¹¹ It therefore appears, that the sexual orientation amendment to the executive order program could have at least some policy implications outside the federal workplace.

Procedures for enforcing equal employment opportunity in the federal sector are prescribed by EEOC regulations which will govern the administrative process in sexual orientation cases under E.O. 13087.¹² Briefly, a federal employee aggrieved by discrimination must first consult with an agency EEO counselor for advise and informal resolution of the matter which, if unsuccessful, may be followed by a formal complaint with the employing agency, an investigation, and ultimately a hearing before an EEOC administrative law judge. Any final agency determination may be appealed to the EEOC and from there to the federal courts in racial, ethnic, religious, or gender discrimination cases. A right to judicial review in sexual orientation cases would not be independently available under the executive order without congressional authorization. Another enforcement avenue may exist, however. The Office of Special Counsel (OSC) was created by the Civil Service Reform Act to investigate allegations of "prohibited personnel practices" within the executive branch and, when appropriate, to seek corrective and disciplinary action through auspices of the Merit System Protection Board (MSPB).¹³ Falling within the independent investigatory jurisdiction of the OSC is any allegation of "activities prohibited by any civil service law, rule, or regulation" and "involvement by an employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action."¹⁴ Allegations of sexual orientation discrimination prohibited by E.O. 13087 may come within this definition. OSC has no independent enforcement authority, however, but where it find "reasonable grounds," may seek stays and corrective action from the MSPB against the employing agencies and disciplinary sanctions against alleged discriminators.

Questions have arisen as to whether any statutory basis exists for the most recent amendment to E.O. 11478 regarding sexual orientation discrimination. While Congress has authorized and approved of the executive order program as applied to racial minorities and women, both before and after its implementation, the legislative history of the Title VII and the 1972 amendments provides no support for the post-enactment revisions

¹¹ E.g. 61 Fed. Reg. 40380, 40388 (8-2-96)(private participants in Groundfish Observer Program "must assign observers without regard to any preference by representatives of vessels and shoreside facilities based on observer race, gender, age, religion, or sexual origin"); 60 Fed. Reg. 20684, 20692 (4-27-95)(applicants for Runaway and Homeless Youth Program must identify strategies "for encouraging awareness of and sensitivity to the diverse needs of runaway and homeless youth who represent particular ethnic and racial backgrounds, sexual orientations, or are street youth"); 46 Fed. Reg. 18055, 18056 (legal services programs supported by Legal Services Corporation may not discriminate on the basis of sexual orientation in delivery of legal services and "must take affirmative action to end the underutilization of certain protected groups in their workforces"); 59 Fed. Reg. 96599 (3-28-94) (Americorps technical training and assistance to state commission or alternative entities to include "developing strategies which encourage mutual respect and cooperation among citizens of different . . . sexual orientations").

¹² 29 C.F.R. §§ 1614.103 et seq. (1998).

¹³ 5 U.S.C. § 1212.

¹⁴ Id., § 1216(a)(4),(5).

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effected by E.O. 13087. The President does, however, possess executive authority under the federal civil service laws to make such rules "as will best promote the efficiency of [the] service." Thus, 5 U.S.C. § 3301 provides:

The President may—

- (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service;
- (2) ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought;
- (3) appoint and prescribe the duties of individuals to make inquiries for the purpose of this section.

In addition, while the Civil Service Reform Act of 1978 does not mention "sexual orientation," it incorporates a job-based performance standard which has been administratively interpreted since the Carter Administration as barring disqualification of persons from the federal service based on sexual orientation alone.¹⁵ By 1996, at least thirteen cabinet level agencies and 33 independent establishments of the U.S. government had reportedly issued policy statements forbidding sexual orientation discrimination. These included the Departments of Justice (including the FBI), Agriculture, Transportation (including the Coast Guard), Health and Human Services, Interior, Housing and Urban Development, Labor, Energy and the General Accounting Office, General Services Administration, Internal Revenue Service, Office of Personnel Management, the White House, and the Federal Reserve System.¹⁶ E.O. 13087 essentially makes such policy universal in the Federal Executive Branch and with respect to civilian employees of the military departments and sundry other governmental entities,¹⁷ but would not create judicial enforceable rights in the absence of congressional action.

An amendment will reportedly be offered by Representative Hefley to an appropriations measure scheduled for House action prior to the August recess to deny funding for E.O. 13087 implementation.

¹⁵ 5 U.S.C. § 4302(b)(1) ("performance standards" to be based on "objective criteria . . . related to the job in question for each employee or position . . ."). See also "Federal Employees Gain Better Protection Against Sexual Orientation Discrimination," 24 DLR (BNA) A-9 (Feb. 7, 1994) (citing 1980 Office of Personnel Management memorandum explaining that sexual orientation discrimination is illegal.)

¹⁶ See Serra, "Sexual Orientation and Michigan Law," 76 Mich. B.J. 948, 949 (1997).

¹⁷ See Washington Post, A-8 (July 22, 1998).

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PENN. SCHÖENBERG

PAGE 03

#5228 HRC

TABLE 1: Are you 18 years of age or older and registered to vote in the U.S.?

yes	100%
no	0
don't know	0

TABLE 2: Regardless of how you feel personally about homosexuality, do you think job discrimination against gays and lesbians should be legal or should it be illegal?

Legal	17%
Illegal	75
Don't know	8

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PENN. SCHOLARSHIP FUND

PAGE 04

TABLE 3: Recently, President Clinton issued an executive order barring discrimination against gays and lesbians in federal jobs. Do you support or oppose President Clinton's decision to end discrimination against gays and lesbians in federal jobs?

Support

70%

Oppose

21

Don't know

9

TABLE 4: Some Republicans in Congress have said they want to reverse President Clinton's decision to end discrimination against gays and lesbians in federal jobs. Do you support or oppose reversing Clinton's decision to end discrimination against gays and lesbians in federal jobs?

Support

28%

Oppose

64

Don't know

8

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FENI .SCHODENBEFLAND

PAGE 05

TABLE 5: . Suppose your Congressperson voted to overturn the decision to end discrimination against gays and lesbians in federal jobs, meaning that the federal government could once again discriminate against gays and lesbians in federal jobs. Would this make you much more likely to vote for your Congressperson, somewhat more likely, somewhat less likely, or much less likely to vote for them, or would it have no effect on your opinion?

Much more likely	11%
Somewhat more likely	6
Somewhat less likely	15
Much less likely	33
Has no effect	31
Don't know	4

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PENNY SCHODENSEEFLAND

PAGE 06

TABLE 6: Recently, Senate Majority Leader Trent Lott, Representative Dick Armey, and other Republicans have spoken out against gays and lesbians, calling homosexuality a sin, as well as comparing it to alcoholism, kleptomania, and sex addiction. Does this make you much more favorable to the Republican Party, somewhat more favorable, somewhat less favorable, or much less favorable to the Republican Party, or does it have no effect on your opinion?

Much more favorable 12%

Somewhat more favorable 6

Somewhat less favorable 11

Much less favorable 29

Has no effect 39

Don't know 4

TABLE 7: Suppose your Congressperson spoke out against gays and lesbians. Would this make you much more likely to vote for your Congressperson, somewhat more likely, somewhat less likely, or much less likely to vote for them, or would it have no effect on your opinion?

Much more likely 12%

Somewhat more likely 7

Somewhat less likely 16

Much less likely 30

Has no effect 31

Don't know 4

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FELIX SCHDENSEBERLAND

PAGE 07

TABLE 8: Some people say that homosexual activists are pushing a Homosexual Agenda and that we need to combat this threat to our children. Others say that gays and lesbians pose no real threat, and that instead we should be concentrating on other issues, such as improving education and health care, fighting crime and drugs, and protecting the environment. Which is closer to your own view?

We need to combat this threat
to our children 33%

Gays and lesbians pose no real
threat 60

Don't know 7

TABLE 9: Which of the following categories best describes your age? READ LIST

18-24 9%

25-34 17

35-49 29

50-64 22

65+ 18

don't know/refused (DO NOT
READ) 3

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PENNY SCHONBERGER

PAGE 08

TABLE 10: What is the last grade in school you completed?

grade school	21
some high school	6
high school graduate	30
some college	23
college graduate	26
graduate school	10
technical school	1
don't know/refused	2

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PENNY SCHOEENBERG

PAGE 09

TABLE 11: What is your current marital status - are you married, single, widowed, or divorced?

married	58%
single	23
widowed	7
divorced	8
living with someone	1
don't know	3

TABLE 12: Do you have any children ages 18 or younger living at home?

Yes	33%
No	64
Don't know	3

TABLE 13: Are you or is anyone in your household a member of a labor union?

yes	17%
no	80
don't know	3

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PENNY SCHOEENBERG

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TABLE 14: Do you live in a city, suburb just outside a city, or a less developed or rural area not near a city?

city	41%
suburb	29
more rural, less developed	30

TABLE 15: Do you consider yourself a Democrat, Republican, or an Independent?

Democrat	33%
Republican	26
Independent	38
Don't know	4

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FETH SCHÖENSEEPLAND

PAGE 11

TABLE 16: Regardless of what party you associate yourself with, are you registered as a Democrat, Republican or as an Independent?

Democrat	36%
Republican	29
Independent	19
Not registered by party	11
Don't know	4

TABLE 17: Do you generally consider yourself liberal, moderate, or conservative?

liberal	21%
moderate	34
conservative	36
don't know	9

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PENN. SCHÖENBERG/AND

PAGE 12

TABLE 18: What is your religion? IF CHRISTIAN, ASK FOR THEIR DENOMINATION.

PROTESTANT - Episcopal	74
PROTESTANT -Baptist	16
PROTESTANT -Lutheran	7
PROTESTANT -Methodist	7
PROTESTANT -Presbyterian	4
Unitarian	0
Anglican	0
Congregationalist	1
Mormon	2
Catholic	27
Jewish	1
Moslem	0
Hindu	0
Buddhist	0
other	10
none/Atheist	10
don't know/refused	5

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PENH .SCHÖENBERG

PAGE 13

TABLE 19: IF PROTESTANT (USE CODES) Do you consider yourself a born-again Christian?

Yes	59%
No	39
don't know	2

TABLE 20: How often do you go to religious services - frequently or at least once a week, often or several times a month, occasionally or several times a year, or virtually never?

frequent	39%
often	11
occasionally	27
virtually never	18
don't know	5

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FENH .SCHGENSEEPLAND

PAGE 14

TABLE 21: For statistical purposes only, we need to know your family income for 1997. Will you please tell me which of the following categories best represents your family income? (READ CHOICES)

less than \$20,000	14%
\$20,000-\$34,999	24
\$35,000-\$59,999	26
\$60,000-\$99,999	15
\$100,000+	6
don't know/refused (DO NOT READ)	17

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FENH .SCHODENBERLAND

PAGE 15

TABLE 22: What is your race?

white	79%
black/African-American/Caribbean-American	9
Hispanic/Latino	5
Asian	1
Arabic	0
other	2
don't know	4

TABLE 23: IF NOT HISPANIC: Do you consider yourself to be of Hispanic descent?

yes	5%
no	92
don't know	4

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PENN , SCHENGBERLAND

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TABLE 24: CODE SEX

male	488
female	52

TABLE 25: Recently you may have heard a lot about gays and lesbians in the news. Religious political groups have taken full page ads in several national newspapers claiming that gays and lesbians can change their sexual orientation. Senate Majority Leader Trent Lott has spoken out against gays and lesbians, calling homosexuality a sin. And several Republicans have sponsored anti-gay legislation in Congress. Do you think that this discussion helps the country by moving it forward or hurts the country by creating an environment of intolerance and hostility?

helps the country	243
hurts the country	62
don't know	15

TABLE 26: REGION

NE	229
MW	20
S	30
Farm	6
W	22

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PENN. SCHOENBERLAND

PAGE 01

Methodology

- **A total of 845 telephone interviews were conducted nationwide from July 27 to July 28, 1998.**
- **To qualify, respondents had to:**
 - **Be 18 years of age or older**
 - **Be registered to vote in the United States**
- **At the 95% confidence level, the margin of error is +/- 8.4% but is higher for subgroups.**

MEMORANDUM

TO: BRUCE REED, ELENA KAGAN
FROM: TOM FREEDMAN, MARY L. SMITH
RE: EXECUTIVE ORDER ON SEXUAL ORIENTATION
DATE: JULY 15, 1997

SUMMARY

In response to your request to draft an executive order prohibiting discrimination regarding sexual orientation, enclosed is a draft executive order modifying Executive Order 11478 which concerns discrimination in the Federal Government.

There currently is no executive order concerning discrimination based on sexual orientation. As the result of an Office of Personnel Management recommendation, most of the agencies currently have explicit policies that prohibit discrimination based on sexual orientation, with the notable exceptions of the Department of Defense and NASA. Statutory authority seems to exist for prohibiting discrimination based on sexual orientation in the Civil Service Reform Act (CSRA), which covers certain federal employees.

Currently there are two bills on the Hill, one in the House and one in the Senate, that would prohibit discrimination based on sexual orientation.

STATE OF THE LAW

I. POLICY STATEMENTS

On March 10, 1997, OPM issued a recommendation to all agencies that they "issue a strong management statement which clearly defines the Federal Government's policy with regard to discrimination based on conduct which does not adversely affect the performance of employees or applicants for employment." The Federal Government's policy includes discrimination based on sexual orientation. The March 10, 1997 memo was a reiteration of two previous OPM memoranda that discussed the Federal Government's policy on discrimination in employment, one dated May 12, 1980, and one dated February 17, 1994. During President Clinton's first term, most of the agencies complied with OPM's recommendation by issuing a policy statement prohibiting discrimination, explicitly including discrimination based on sexual orientation, with two notable exceptions. The Department of Defense appears to have taken no action to issue a policy statement. In addition, NASA's General Counsel explicitly refused to issue a policy because he believed that a policy statement was not necessary because employees were already adequately protected and to issue a new policy would elevate discrimination based on sexual

orientation above other types of discrimination.

II. CIVIL SERVICE REFORM ACT

5 U.S.C. section 2302(b) states that "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority:

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining the suitability or fitness any conviction of the employee or applicant for any crime under the laws of any State, or the District of Columbia, or of the United States.

In a Civil Service Bulletin dated December 21, 1973, the Civil Service Commission stated:

You may not find a person unsuitable for Federal Employment merely because that person is a homosexual or has engaged in homosexual acts, nor may such exclusion be based on a conclusion that a homosexual person might bring the public service into contempt. You are, however, permitted to dismiss a person or find him or her unsuitable for Federal employment where the evidence establishes that such person's homosexual conduct affects job fitness --excluding from such consideration, however, unsubstantiated conclusions concerning possible embarrassment to the Federal service.

In Ashton v. Civiletti, 613 F.2d 923, 927 (D.C. Cir. 1979), the court cited the above bulletin as the policy "applicable to the great bulk of employees in the federal service."

In the May 12, 1980 OPM memorandum cited above, the Director of OPM elaborated on the Civil Service Reform Act's prohibition of discrimination based on non-job-related conduct by stating: "Thus, applicants and employees are to be protected against inquiries into, or actions based upon, non-job-related conduct, such as religious, community or social affiliations, or sexual orientation." In February 17, 1994, OPM reiterated that the "1980 memorandum continues to reflect the Federal Government's longstanding policy on the matter of discrimination based on non-job-related conduct."

THE HILL

1. **H.R. 1858 by Rep. Shays (R-CT) on 6-10-97 (150 cosponsors). EMPLOYMENT NON-DISCRIMINATION ACT OF 1997.** This Act prohibits employment discrimination based on sexual orientation. The Act provides the remedies provided in Title VII of the Civil Rights Act of 1964 for aggrieved individuals. However, the Act does not apply to the provision of employee benefits.

2. **S. 869 by Sen. Jeffords (R-VT) on 6-10-97(33 cosponsors). EMPLOYMENT NON-DISCRIMINATION ACT OF 1997.** This Act is essentially the same as H.R. 1858 above.

3. **S. 47 by Sen. Helms on 1-21-97.** This bill prohibits the executive branch of the federal government from establishing an additional class of individuals that is protected against discrimination in federal employment other than those classes identified in the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Rehabilitation Act of 1973.

WHAT AGENCIES HAVE

- NASA refused to adopt a policy.
- The Department of Defense does not have a policy.
- Agencies that have adopted a policy of prohibiting discrimination based on sexual orientation: Department of Commerce, Department of Health and Human Services, Department of Housing and Urban Development, Department of the Interior, Department of Justice, Department of Labor, Department of State, Department of Transportation, Department of Treasury, Department of Veterans Affairs, Small Business Administration

OPTIONS

1. Modify Executive Order 11478 entitled "Equal employment opportunity in the federal government" to add sexual orientation as a category to Section 1.

PROS: This would be the most efficient method to include sexual orientation because E.O. 11478 already covers the topic of discrimination.

CONS: Sections 3 through 5 of E.O. 11478 discuss the EEOC. Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, prohibits discrimination only on the basis of race, color, religion, sex or national origin. The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age. The Rehabilitation Act of 1973 prohibits discrimination on the basis of physical or mental disability. By adding "sexual orientation" to Section 1 of E.O. 11478, Section 1 will no longer mirror the classes of prohibited discrimination in Sections 3-5. Some persons may perceive that the President is trying to legislate via executive order.

2. Create a new executive order with only sexual orientation as a category of prohibited discrimination.

CONS: This may single out sexual orientation too much. Some persons may perceive that sexual orientation is entitled to greater protection than other types of discrimination.

Gay/Les: Anti-discrimination Exec Order

Sexual Orientation

Tam, Mary —
 Make changes
 and check with
 Bruce.
 Elena

July 25, 1997

MEMORANDUM FOR FRANKLIN D. RAINES

THROUGH: MAC REED

 FROM: BRUCE REED
 ELENA KAGAN

 SUBJECT: EXECUTIVE ORDER TO PROHIBIT DISCRIMINATION BASED ON
 SEXUAL ORIENTATION

~~The attached~~ ^{the} ~~This is a highly request~~ ^{that} ~~We request that you process this executive order pursuant to Executive~~ ~~Order No. 11030, as amended. For the reasons described below, we request that~~ ~~you complete this process by Friday, August 15, 1997.~~ ✓

~~The Administration would like to enact an executive order to prohibit~~ ^{The} ~~discrimination based on sexual orientation in federal civilian employment. Although~~ ~~most agencies currently have some sort of policy prohibiting discrimination on the~~ ~~basis of sexual orientation, this executive order is needed to provide a uniform~~ ~~policy to replace the patchwork of policies in the agencies.~~ ~~In addition, this~~ ~~executive order should be enacted in August before the Employment~~ ~~Non-Discrimination Act of 1997, which the Administration supports, is scheduled~~ ~~for a hearing this fall. The Employment Non-Discrimination Act would prohibit~~ ~~discrimination based on sexual orientation, in both the public and private sectors,~~ ~~with certain exemptions for small businesses, charitable organizations, and the~~ ~~military.~~ ✓

~~Attached is a draft of the executive order which would amend Executive~~ ^{1/} ~~Order No. 11478 entitled "Equal Employment Opportunity in the Federal~~ ~~Government."~~ ✓

(Add to 1st paragraph)

~~the attached~~

DRAFT

EXECUTIVE ORDER #

Equal Employment Opportunity in the Federal Government

By the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

SEC 1. Executive Order No. 11478, as amended, is further amended by substituting "age, or sexual orientation" for "or age" in the first sentence of Sec 1.

Set on track

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possibility of Clinton's
ationship, acting contrite;
he strategy remains fluid;
ntor walks him through
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o matter what. "We won't
tify," one aide says.

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POLL

about sex as serious

"The level of nervousness about this has exceeded the real damage by a factor of 100 to one," counters Democratic consultant Mellman. By 34% to 32%, Americans say they will back Democrats for the House. But Democrats worry the scandal may drown out health-care and Social Security messages as they try to recapture control.

People like this Congress, even though 83% say its accomplishments are average or worse.

TOLERANCE WINS: Only 38% agree with Lott's contention that gays choose to be homosexual; 41% say it dates from birth. And 72% support Clinton's order against antigay bias in federal agencies, while only 20% oppose it.

BETTER ABROAD: Clinton gets 58% approval on foreign policy following the China trip, up five points since June. Few see East Asia's economic crisis as a major threat, but 53% cite chemical, biological and nuclear weapons in Iraq or South Asia as top foreign concerns.

THOUGH NATIONAL CRIME rates fall, 52% say they are more worried about personal safety than a year ago; only 16% feel safer. The really worried are more often rural than urban, women rather than men. Blacks feel less safe than whites.

CLEAR LOSER: Linda Tripp finishes popularity among scandal figures. Clinton and Starr about the least of