

WORKING FOR LESBIAN, GAY, BISEXUAL AND TRANSGENDER CAMPAIGNS & ELECTIONS ➤ A Blueprint for Positive Change

EQUAL RIGHTS



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A Blueprint for Positive Change

"There's a lot that the president can do using his executive authority without waiting for congressional action, and I think we'll see the president do that ... He feels like he has a real mandate for change. We need to get off the course that the Bush administration has set."

-John Podesta, transition chief, President-elect Barack Obama

For the lesbian, gay, bisexual and transgender (LGBT) community, the election of a fair-minded president provides vast opportunities to advance equality in material ways on an accelerated timetable. This results not only from new leadership and vision in the White House itself, but from new management of the entire executive branch as well. These agencies recommend and implement policies related to violence, health education and research funding, family benefits and other areas that are critical to the well-being of LGBT people.

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

For example:

Federal Workplace Non-Discrimination: As leader of our nation's largest civilian work force, the president may institute non-discrimination, healthcare access and other policies to establish the equal rights of federal LGBT employees.

HIV and Health: The administration, and its secretary of Health and Human Services can promote honest, accurate information about LGBT people in its public information on HIV/AIDS and other health issues and support a national, comprehensive strategy to fight HIV/AIDS in the United States.

Hate Crimes and Civil Rights: As head of the nation's largest law- and civil rights-enforcement entities, the president can appoint an attorney general committed to fighting bias-motivated violence against LGBT Americans, as well as to rigorously enforcing all civil rights protections.

Federal Fundee Non-Discrimination: The president can ensure that no social service program uses federal funding to discriminate against LGBT Americans. And although the LGBT community celebrates America's tradition of religious liberty, the

civil rights of all Americans. LGBT Americans rely upon the president to appoint judges with a robust understanding of fundamental rights and equal protection, and who respect Congress' power to enact civil rights legislation.

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The Federal Government as Employer

Non-Discrimination in the Federal Workplace

According to seasonally adjusted numbers from the Bureau of Labor Statistics, the federal government employed some 2,745,000 individuals in June 2008 — 2 percent of the nation's non-farm labor force. It has the duty and power to set an example for all public and private employers by providing equal opportunity for its LGBT employees.

President Clinton's 1998 Executive Order 13,087 sent a clear message that discrimination based on sexual orientation would not be tolerated in federal employment. It clearly resonated throughout the private sector. Such discrimination was banned by 86.6 percent of Fortune 500 companies, 26 state governments and 281 local governments as of January 2008.

Although Clinton's executive order was a step forward, today's federal work force lags well behind other leading employers in banning workplace discrimination based on gender identity. Gender identity protections are provided by 30.6 percent of Fortune 500 companies, 12 state and 93 local governments. The president should issue a new executive order protecting transgender workers and act quickly to restore full enforcement of civil service law with regard to discrimination based on sexual orientation.

Benefits and Protections for Families

The majority of Fortune 500 companies provide domestic partner benefits to their employees. These include the "Big Three" automakers, most major airlines, IBM, Microsoft, Shell Oil, Walt Disney, Fannie Mae, Citigroup and Time Warner. In addition, 16 states and 201 local governments offer domestic partnership benefits to their public employees.

In contrast, the federal civilian work force not only lacks health benefits for same-sex partners, but gay and lesbian Americans serving our government abroad are denied such basic family services as language training, evacuation assistance and access to State Department medical facilities (Recently, former Ambassador to Romania Michael Guest cited the lack of family benefits as his reason for retiring from the Foreign Service.)

families and experience much greater financial hardship. **The administration can provide these protections by acknowledging that the gay and lesbian partners of Foreign Service officers are, in fact, members of their family.**

Although including same-sex partners in the Federal Employee Health Benefit Plan (FEHBP) would require legislation, the administration can extend benefits to the children that federal employees and their same-sex partners are raising.

Non-Discrimination by Employers and Service Providers Who Use Federal Dollars

When the federal government hires private companies to perform government functions with public funds, it can and should expect the contractors to adhere to the same civil rights standards as the government would if it were doing the work itself.

Executive Order 11,246 already ensures strict conformity to these standards by providing recourse to act when a federal contractor or subcontractor discriminates on the basis of race, color, religion, sex or national origin. **The president should amend Executive Order 11,246 to prohibit discrimination on the basis of sexual orientation and gender identity by federal contractors and subcontractors as a term of contract.** No longer should a corporation be allowed to reap the rewards of receiving federal contracts while ignoring basic workplace protections for its employees.

Non-Discrimination in Faith-Based Initiatives

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

Yet in order to ensure that federal dollars do not finance discrimination, the administration must issue clarifying regulations that ensure that the government does not discriminate on the basis of religion, religious affiliation, or lack of religious affiliation in making government grants or contracts and that grants and contracts continue to be issued based solely on merit. **The administration should also affirmatively clarify that the statutes containing charitable choice provisions in no way preempt federal, state or local laws preventing discrimination on the basis of sexual orientation or gender identity.**

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The Executive Branch's Role in Promoting Public Health

Public health is a national priority, and the administration plays a key role in providing funding for research, education and programs to address the special needs of minority communities. Yet while the LGBT community faces urgent and particular challenges, not all employers offer health benefits to their employees' same-sex

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Health insurance is also less accessible to LGBT people. Most insurers fail to cover procedures and treatments related to gender transition, and due to a recent IRS ruling, such costs are not reimbursable under flexible spending accounts.

Aside from facing a lack of access to health coverage and potential discrimination by health care providers, LGBT people also face increased risks of HIV/AIDS and certain cancers. Recent focus on scientifically-inaccurate, ideologically-focused "abstinence-only" sexuality education has disadvantaged LGBT youth even more greatly than other communities, because the message of waiting until marriage is not relevant to people who are still legally denied the right to marry.

The Human Rights Campaign has studied the following areas of public health and crafted recommendations to address inequities in federal policy.

Improved Response to HIV/AIDS

Although HIV/AIDS affects people from all walks of life, the epidemic continues to disproportionately impact the LGBT community — especially young gay and bisexual men of color. Our government has made tremendous strides toward effective prevention and treatment, but there is much more to be done. **The administration should promote a national plan to reduce AIDS infections, provide treatment and fund research for a cure.**

Addressing the Specific Needs of LGBT People as a Community

Federal legislation and administrative policies allocate funding for health initiatives aimed at minority and disadvantaged populations. Current designated groups include women, persons with disabilities and rural populations. LGBT people also face significant challenges in gaining access to quality healthcare, due to discrimination by providers and insurers and/or a lack of understanding of the health issues that disproportionately impact them.

The administration should designate LGBT Americans as a health disparity group as a means of expanding research on LGBT healthcare needs and increasing access to treatment.

Educating the Public About Disease Prevention

Preventing the spread of HIV/AIDS and other communicable diseases is a critical priority for the LGBT community. Effective, scientifically-accurate prevention education can save lives. Unfortunately, the Bush administration's policy of funding "abstinence-only" programs has left LGBT youth and adults without adequate information.

Realistic information about our community is also sorely lacking in other administration materials addressing youth and sexual activity; for example, in a section about discussing abstinence with offspring, an HHS web-based resource for parents only briefly notes that some youth may identify as gay or lesbian and gives no guidance as to how to actually speak to an LGBT young person about sexual activity other than to "address this issue in an age-appropriate manner."

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Protecting Families

According to the 2000 Census, gay and lesbian couples live in 99.3 percent of U.S. counties, and in 96 percent of those counties gay and lesbian couples are raising children. Of the more than 780,000 same-sex couples estimated in 2006, approximately 27 percent are raising children under 18 in the home. As of 2000, 22.3 percent of gay couples and 34.3 percent of lesbian couples are raising children.

Although different-sex couples have access to hundreds of protections for themselves and their children in every state, and more than 1,100 protections and benefits at the federal level, families headed by gay and lesbian couples suffer legal disadvantages in inheritance rights, taxation, retirement planning, family and medical leave, access to healthcare, and often even the opportunity to visit one another in the hospital .

In 48 states, gay and lesbian couples are denied the right to marry. In addition to full marriage equality in Massachusetts and Connecticut, an additional nine states and the District of Columbia provide legal protections to gay and lesbian couples through domestic partnerships or civil unions.

Yet because of the so-called Defense of Marriage Act (DOMA), even couples whose states recognize them as married or parties to a civil union are denied more than 1,100 federal benefits and protections that other families take for granted. For example, gay and lesbian workers pay equally into the Social Security system, but same-sex partners and their children are denied most of the family benefits that Social Security provides.

Although gay and lesbian couples are explicitly excluded by statute from most of the protections that other families receive under federal law, the administration has the power to implement some changes that will benefit same-sex couples themselves as well as their children.

Clarifying the Family and Medical Leave Act (FMLA) to Protect LGBT Couples and their Children

Sixty percent of children raised by same-sex couples live in jurisdictions that do not permit second-parent adoption. Consequently, for these children, it is impossible to secure a permanent, legal relationship to both parents and the guarantee of legal protections that such a relationship provides. Although the definition of "spouse" under federal law explicitly excludes same-sex couples, **the administration can and must clarify the FMLA definition of "child" to ensure that all children of same-sex couples are covered.**

Assessing the Failed Policy of Discharging Essential Service Members Due to Sexual Orientation

There is growing consensus among the American public as well as veterans and active duty service members that the military's "Don't

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members of the U.S. Armed Forces have been discharged under the law. A Government Accountability Office report found that by 2005, discharges of service members with mission-critical skills were nearing 800.

DADT also deters many qualified lesbian, gay and bisexual (LGB) people from enlisting in the military. Studies have estimated the military loses more than 4,000 LGB military personnel each year whom it would otherwise have retained had they been able to be open about their sexual orientation.

Although this discriminatory policy is statutory and requires congressional action to eliminate, **the administration should establish a plan for eliminating DADT** to guide Congress in repealing the policy in its entirety.

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Community Safety

Improving Response to Hate Crimes

According to FBI data, a bias-motivated violent crime occurs every hour. Although the FBI stated that 7,722 hate crimes occurred in 2006, the Bureau of Justice Statistics — the research arm of the Department of Justice — estimates that approximately 191,000 bias-motivated incidents, affecting 210,000 victims, occur annually.

Although there may be any number of reasons for this disparity, it is indisputable that hate crimes are vastly under-reported in this country.

While LGBT people constitute a small percentage of the population, anti-LGBT attacks are among the most common hate crimes. Federal hate crimes law does not cover crimes motivated by anti-LGBT bias, even though a federal sentence-enhancing statute does apply to anti-gay crimes, and the Hate Crimes Statistics Act (HCSA) authorizes the collection of data on anti-gay violent crimes.

The Department of Justice should prioritize investigating and prosecuting all types of hate crimes. Additionally, the administration should review the Hate Crimes Statistics Act and make recommendations for legislative or regulatory changes to encourage reporting by law enforcement agencies in under- or non-reporting jurisdictions .

Protecting LGBT People from Domestic Violence

Like all communities, the LGBT community faces the problem of domestic violence. Although the Department of Justice (DOJ) has recognized both heterosexual and same-sex domestic violence as a national problem, prosecutions under the Violence Against Women Act (VAWA) have historically been nonexistent in cases where both the victim and the offender are members of the same gender.

In 2006, Congress passed legislation that expanded the breadth of the criminal provisions of VAWA to protect "intimate partners" and "dating partners." The language could not be any clearer in its gender neutrality in broadly extending protection to individuals in any "social relationship of a romantic or intimate nature." Yet even with such an

To solve this problem, **DOJ should issue a ruling in which it clarifies that the interstate domestic violence and stalking provisions of VAWA apply in situations where the offender and the victim are of the same gender .**

Ease Unfair Burdens on Transgender People in Securing Identity Documents

The current federal method for determining whether a transgender person may change his or her gender marker on identity documents does not accurately reflect the decisions that such people make in their transition process, nor the financial burdens that inhibit access to medical treatments.

Transgender individuals experience higher levels of discrimination, harassment and emotional trauma as a consequence of being denied the right to have the gender markers on identity documents match their gender presentation. Given that the current policy causes such harm, **the administration should revisit the current standards regarding gender marker changes in Social Security records, passports and other federal identity documents in order to reduce the burdens on transgender people.**

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Travel and Immigration

In an age of heightened security concerns, the executive branch has a strong interest in ensuring the safety of citizens traveling to and from the United States, as well as foreign nationals visiting or seeking asylum. For LGBT people, new security regulations and immigration policies have created extra burdens, including invasions of privacy.

The administration should revisit travel and immigration policies in order to remove unfair barriers to LGBT people traveling or visiting.

Alleviate Burdens on Transgender Travelers

New screening measures instituted by the government to ensure the security of airline travel are not equally experienced by all groups. Current Transportation Security Administration (TSA) regulations require transgender passengers to sacrifice a certain level of privacy in order to travel freely. Although TSA has sought to avoid time-consuming and privacy-invasive security measures through the adoption of new technologies, these efforts have failed to address the privacy concerns of the transgender community. **The administration should make sure that security procedures accommodate the privacy of transgender travelers and treat them in a respectful and non-discriminatory way.**

Eliminating Discrimination in Providing Visas to LGBT and HIV-Positive Travelers

The Immigration and Nationality Act (INA) renders any individual with a "communicable disease of public health significance" inadmissible to the United States and directs the secretary of Health and Human Services to create and maintain the list of those diseases.

HIV-positive individuals are precluded from entering the United States on either a permanent or temporary basis unless they qualify for one of a handful of narrowly defined waivers.

The current regulatory bar to entry for HIV-positive foreign nationals divides families, deprives American businesses and universities of talented workers and students, and keeps away researchers and scientists working against the HIV/AIDS epidemic. For these reasons, **the administration should remove HIV from the list of "communicable disease[s] of public health significance" in federal regulations.**

Providing Asylum to Individuals Persecuted Because of Their HIV Status or Gender Identity

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

In general, what constitutes "membership in a particular social group" is determined by precedent established by the BIA and reviewed by the attorney general. **BIA should recognize HIV-positive and transgender petitioners as members of a "particular social group" because they meet the BIA definition of being unable to change their HIV status or gender identity.**

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Judicial and Executive Appointments

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

Appointing Fair-Minded Justices and Judges

Appointments to the federal judiciary are a president's most enduring legacies. Because Supreme Court justices and lower-court judges serve life terms, and because the courts seldom reverse their own precedents, each new justice shapes decisions that will be felt by generations to come.

In recent years, we have seen important legal victories in cases such as *Romer v. Evans*, which held that a state could not make it more difficult for LGB people to secure protections through the legislative process, and *Lawrence v. Texas*, in which the Court concluded that a state could not impose criminal penalties for private, adult, noncommercial, consensual sexual relations. These cases signal that

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

HRC believes that an assessment of temperament worthy of lifetime appointments should include the following:

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

Executive-Branch Appointments

Although executive branch officials serve only during the president's term and at the president's pleasure, their decisions and priorities drive the administration's policies in many areas, including those of particular interest to LGBT Americans. As the breadth of topics covered in this summary indicates, the president's appointments to every branch of government can have a material impact on the well-being of LGBT people.

Two positions in the Bush administration—attorney general and surgeon general—provide case studies in ways that an appointment can influence policy and an administration's oversight can hamper progress.

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Conclusion

The next administration has an opportunity to implement policies that improve access to medical care, workplace equality, family protections, public health, and community safety for the LGBT

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that the government serves this community as it never has before.

President-elect Obama, through executive actions and appointments throughout the executive branch, can and should act to alleviate the challenges faced by LGBT Americans. Such action is consistent with his long-standing commitment to pro-LGBT legislation in the U.S. Senate and the Illinois Legislature. We encourage President-elect Obama to continue this work in his role as the head of the executive branch.

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