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May 26, 2010

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VIA FACSIMILE AND US MAIL

The Honorable Nancy Pelosi  
Speaker of the House  
United States House of Representatives  
Washington, DC 20515

Dear Speaker Pelosi:

We write today regarding your important efforts to extend anti-discrimination principles to access to military service. We hope that the following comments will be of assistance to you and to the House as it considers this reform.

Non-discrimination principles form a critical foundation for our democracy. The promise of opportunity for all and the aspirations of individuals to achieve underpin the character of American society. Without question, military service has played an important role over several generations in supporting the idea of individual improvement. Through specific training, as well as the development of personal characteristics such as discipline and responsibility, the military has been a path to greater capabilities and a better life for many young Americans. Military service has itself provided knowledge and has often led individuals to higher education. Beginning with the GI Bill of Rights after World War II, educational benefits provided to returning combat veterans created a potentially transformative educational path for individual veterans, and, in the process, strengthened the nation's capacities for innovation and productivity. In our law schools over the last 60 years we have seen the powerful effects of military experience and of this national assistance for veterans. We also understand that for many Americans military service has been a meaningful way to participate in our democracy.

Today, however, military service is not open to all who wish to serve our country. We hope that this year the Congress will act to provide equal access to military service, by extending non-discrimination principles to the many who are now discouraged or prevented from serving because of the current "Don't Ask, Don't Tell" policy.

## **Brief Background of the AALS**

Formed in 1900 for the purpose of improving the legal profession through legal education, the Association of American Law Schools (AALS) is a voluntary membership organization of 171 law schools. AALS membership has been regarded as an important indicator of the quality of a law school. The AALS pursues our purpose of strengthening legal education through two principal vehicles (1) a membership process which periodically evaluates law schools, and (2) programs for law teachers and administrators, designed to encourage innovation, further strong teaching and excellent curricula and foster a climate of inquiry through teaching and research that will strengthen the law and the legal profession.

Only rarely does the AALS speak in the legislative process or seek to address a court in the context of a case before it. We consider doing so only in circumstances where our core educational values or the educational programs and related judgments of member schools are strongly implicated. We regard the issue before you now as one of those moments.

## **A Historical Look at Non-Discrimination Principles**

A neutral look at our national history on issues of discrimination since the end of World War II makes clear that each of the watersheds in 20<sup>th</sup> century non-discrimination law were not the obvious decisions that one could assume in retrospect, but rather were hotly contested. The House that passed the Civil Rights Act of 1964 had only twelve female members. At the time of the vote on the historic legislation, there were nine minority members in the House, all of them male. One was an Asian American from the young state of Hawaii (World War II veteran Spark Matsunaga, who was twice wounded in battle while serving with Japanese-American segregated units sent to war while many family members of his fellow soldiers had been assigned to relocation centers on the West coast). Three were Latinos, representing districts in Texas, New Mexico, and California. The remaining five were all African-Americans from northern states. And the House and history would have to wait for nine more years before the first post-Reconstruction African American from the South was seated in the House of Representatives.

Ending racial segregation in the military took Presidential action. It was President Eisenhower's view that federal institutions should be at the forefront of upholding the ideal of racial equality. Then as now, discrimination on the part of the federal government is fundamentally and deeply troubling. As a revered military leader, Eisenhower as President was able to bring about implementation of President Truman's 1948 Executive Order to desegregate the military. The Women's Armed Services Integration Act of 1948 gave women permanent status in the Army, Navy, Marines (and later Air Force and Coast Guard) and from the 1960's through the present women have been granted further access to opportunity in the military.

## **AALS Non-Discrimination Policies**

The AALS acted to require its members to avoid discrimination based on race or color in 1951. Nineteen years later, in 1970, a requirement of non-discrimination covering women was added to the AALS By-Laws. Two decades ago the AALS membership acted to include discrimination based on sexual orientation in the list of prohibited categories of discrimination for AALS member schools.<sup>1</sup>

The concept of non-discrimination is critical to our democracy and crucial to the training of lawyers who, among others, act as stewards of democratic ideals. The role of law and lawyers in our society is to further the orderly conduct of the society, including the resolution of disputes, and to construct respect for the law and to establish and ensure the qualities that will engender that respect, such as fairness, level playing fields, and equality of opportunity. Inherently then, law schools place a high priority on trying to instill in lawyers their civic responsibilities and their role in furthering democratic values.

The application of non-discrimination principles to career opportunities for law students became and remains a particularly troublesome issue in the wake of passage of the Solomon Amendment in 1996. In light of that federal law, the AALS fashioned a compromise in the application of its own non-discrimination principles. That compromise allows military recruiters on law school campuses but requires member schools to “ameliorate” that presence and make clear the inconsistency between the schools’ non-discrimination policies and the military’s exclusion of openly gay and lesbian individuals. The purpose was to ensure that each law school community would communicate its inclusive and non-discriminatory values to all members of the community. This compromise, while deemed the best solution within the legal context in which the AALS found itself, is inherently and deeply troublesome for two reasons. University-based law schools implicitly sanction discrimination based on sexual orientation when they include military recruiters rather than reject the federal funds so important to their academic programs. At the same time, attempts made by individual law schools and the AALS to ensure that the full law school community understands why a discriminatory employer has been permitted access to the schools’ career services have understandably (but wrongly) been interpreted as indicative of the “anti-military” attitudes of law schools, their leaders, and the AALS. We emphasize that the AALS is supportive of our military and recognizes that as the military has become more inclusive it has become stronger both internally and in the public’s perception. We depend on the many young Americans whose courage and commitment enables them to join the armed services in order to actively participate in the defense of the nation. It is the nobility of that service and the inability of American citizens who are openly gay or lesbian

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<sup>1</sup> AALS Bylaw § Section 6-3 states that each member school undertakes to “provide equality of opportunity in legal education for all ... enrolled students ... without discrimination or segregation on the ground of race, color, religion, national origin, sex, age disability, or sexual orientation.”

to serve that has prompted the AALS to argue consistently for inclusion of these citizens in military service. The AALS is committed to both non-discrimination and a strong military, with access to opportunities in the military for all students at our member schools, regardless of their sexual orientation.

The current law places the democratic ideal that individuals should be judged as individuals and not based upon group-based characteristics in a secondary status to funding higher education programs. As such, it inherently damages our democracy. Repealing the current law and extending non-discrimination principles to include sexual orientation will support and strengthen our democratic values and strengthen the military.

### **Additional Advantages of Applying Non-Discrimination Principles to Military Service**

Repeal of the “Don’t Ask, Don’t Tell” policy is certain to ensure a larger pool of citizens who seek to serve their country in the military, a much-needed result particularly during this time of heavy on-going demands for those who are now serving. Furthermore, the extension of non-discrimination principles to the service of individuals regardless of their sexual orientation will generate broader support for our military branches. Over time, as military personnel work together toward common purposes in service of the nation, greater understanding and respect are likely to be furthered in our broader culture. A diverse society depends on its ability to develop qualities of tolerance and over-arching shared values; American democracy and the opportunities it has exemplified are grounded in the concept of a multi-faceted diversity, protected by guarantees of individual liberties.

### **Conclusion**

The AALS urges Congress to act soon to remove the restrictions on military service that now exist, extending the opportunity of military service without regard to the sexual orientation of those who seek to volunteer for this important service to our nation.

Sincerely,

A handwritten signature in blue ink, appearing to read "Susan Westerberg Prager".

Susan Westerberg Prager