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# The AALS Sexual Orientation Policy: The Argument against Barring Military Recruiters from Law School Campuses

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# THE AALS SEXUAL ORIENTATION POLICY: THE ARGUMENT AGAINST BARRING MILITARY RECRUITERS FROM LAW SCHOOL CAMPUSES

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## I. INTRODUCTION

Each year approximately one hundred and fifty law firms and other prospective employers interview or solicit resumes of law students at the West Virginia University College of Law;<sup>1</sup> however, one organization that has been recruiting talent at the College of Law for decades was conspicuously absent last year—the United States Armed Forces' Judge Advocate General (JAG) Corps.<sup>2</sup> The West Virginia University College of Law and sixty-eight other major law schools currently ban military recruiters from their campus.<sup>3</sup> The general rea-

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1. Signed statement of Carroll Kelly Morrison, Assistant Dean for Placement at West Virginia University College of Law Placement Office para. 1 (on file with author).

2. Approximately three West Virginia University College of Law graduates a year enter the JAG Corps. Chief amongst the law school's distinguished military lawyers is Brigadier General Kenneth D. Gray, USA, a 1969 graduate of the College of Law, who became the first black general in the Army JAG Corps in 1990. General Gray currently commands the U.S. Army Legal Services Agency and is the Chief Judge on the U.S. Army Court of Military Review.

3. Unofficial Air Force JAG Department listing obtained from HQ USAF/JAX at the Pentagon. This index of law schools indicates which law schools military recruiters can and cannot visit to recruit students. However, because university policies barring military recruiters from campus recruiting change on a regular basis, the Air Force has designated this

son for this policy is that the United States Armed Forces discriminates against homosexuals.<sup>4</sup> Every federal appellate court faced with

document as unofficial. *See infra* note 47.

4. Department of Defense (DOD) Directive 1332.14 establishes the basis upon which homosexuals are barred from the military, specifically stating that:

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

32 C.F.R. pt. 41, app. A, pt. 1-H.1.a (1992)

The military policy is based upon federal law, the Uniform Code of Military Justice (U.C.M.J.), which makes sodomy a felony offense:

(a) Any [servicemember] who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

10 U.S.C. § 925 (1988).

Under art. 36 of the U.C.M.J., the President is authorized the supplement U.C.M.J. 10 U.S.C. § 836 (1988). In the Manual for Courts-Martial, the President limited the maximum punishment for consensual sodomy to a "[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for five years." Exec. Order 12473, Manual for Courts-Martial, Part IV, para. 51(e) (1984).

Twenty-one states and the District of Columbia also criminalize the act of consensual sodomy. *See* ALA. CODE § 13A-6-65(a)(3) (1975); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1988); ARK. CODE ANN. § 5-14-122 (Michie 1987); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. ch. 800.02 (1987); GA. CODE ANN. § 16-6-2 (Michie 1988); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. ANN. CODE art. 27, §§ 553-54 (1987); MICH. COMP. LAWS ANN. §§ 750.158, 750.338 (West 1991); MINN. STAT. § 609.293 (1987); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1986); MONT. CODE ANN. §§ 45-2-101(20), 45-5-505 (1990); NEV. REV. STAT. § 201.190 (1991); N.C. GEN. STAT. § 14-177 (1991); OKLA. STAT. ANN. tit. 21, § 886 (West 1983); R.I. GEN. LAWS § 11-10-1 (1981); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (Michie 1988). The constitutionality of these laws was upheld in *Bowers v. Hardwick*, 478 U.S. 186 (1986).

An analysis of the justness and legality of such laws and policies is beyond the scope of this Note. For a recent examination of this topic, see Craig W. Stedman, Com-

this issue has held that the United States Armed Forces do not unlawfully discriminate against homosexuals.<sup>5</sup> Despite this, the West Virginia College of Law, along with most of the member law schools in the American Association of Law Schools (AALS), continues to bar JAG recruiters.<sup>6</sup>

This Note will examine AALS accreditation standards and show how they differ from those set by other accrediting agencies. It will then examine applicable federal and state laws which preempt publicly funded law schools from banning military recruiters from their campuses. Finally, it will survey laws in ten states that keep publicly funded colleges and universities from barring military recruiters, and conclude that the West Virginia Legislature should pass a similar law.

## II. THE AALS AND ITS SEXUAL ORIENTATION POLICY

The AALS is a "voluntary association of law schools."<sup>7</sup> The purpose of the AALS, according to its articles of incorporation, is "the improvement of the legal profession through legal education."<sup>8</sup> Over

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ment, *The Constitution, the Military, and Homosexuals: Should the Military's Policies Concerning Homosexuals be Modified?*, 95 DICK. L. REV. 321 (1991).

5. See, e.g., *Steffan v. Cheney*, 920 F.2d 74 (D.C. Cir. 1990); *Doe v. Garrett*, 903 F.2d 1455 (11th Cir. 1990), cert. denied, 111 S. Ct. 1102 (1991); *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Falk v. Secretary of the Army*, 870 F.2d 941 (2d Cir. 1988); *United States v. Clift*, 834 F.2d 414 (4th Cir. 1987); *Matthews v. Marsh*, 755 F.2d 182 (1st Cir. 1985); *Rich v. Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984); *Ballenger v. Marsh*, 708 F.2d 349 (8th Cir. 1983); *Neal v. Secretary of the Navy*, 639 F.2d 1029 (3d Cir. 1981); *Beller v. Middendorf*, 632 F.2d 788 (9th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

6. The West Virginia University College of Law has been a fully accredited member of the AALS since 1914. ASSOCIATION OF AMERICAN LAW SCHOOLS, *Association Handbook* 13 (1991) [hereinafter *Association Handbook*].

7. Betsy Levin, *The AALS Accreditation Process and Berkeley*, 41 J. LEGAL EDUC. 373, 374 (1991). The AALS is an organization made up of law schools which pay dues to the national governing body. The AALS derives approximately half of its income from member schools. *Association Handbook*, supra note 6, at 1. West Virginia University College of Law pays \$5,700 a year to the AALS in dues. AALS Bylaw 2-3.

8. Articles of Incorporation of The Association of American Law Schools, Inc., Article 3.

the years, the AALS has facilitated its purpose by conducting faculty recruitment conferences and professional development programs to help faculty focus on pedagogical issues that arise in teaching law.<sup>9</sup> The AALS also publishes and distributes, at no charge to its member schools, the *AALS Newsletter*, the *AALS Directory of Law Teachers*, and the *Journal of Legal Education*.<sup>10</sup> The *Journal of Legal Education* is a scholarly journal that deals with many of the issues facing legal education and the law in general.<sup>11</sup> Other services that the AALS provides to its members include the Law School Consultant Service, listing names and addresses of individuals whom law school deans have used as consultants on various aspects of their law school programs, and the *Curriculum Clearinghouse*, listing significant curriculum changes at law schools throughout the country.<sup>12</sup>

The AALS is neither an officially recognized accrediting agency nor does it set standards for admission to the legal profession.<sup>13</sup> In 1900, when the AALS was first established, it was the only accrediting agency of law schools; however, by the 1920s the American Bar Association (ABA) assumed control of the licensing role.<sup>14</sup> Today, the U.S. Department of Education and every state recognizes the ABA as the official accrediting agency for professional schools of law.<sup>15</sup> On the other hand, the AALS is not recognized as the official accrediting agency for professional schools of law, by any organization public or private. Additionally, graduation from an AALS accredited program is not required for admission to the Bar in any state.<sup>16</sup> There are law schools that are ABA accredited but are not AALS accredited.<sup>17</sup> ABA

9. *Association Handbook*, *supra* note 6, at 2-3.

10. *Id.*

11. *Id.*

12. *Id.* at 4.

13. Levin, *supra* note 7, at 374.

14. *Id.*

15. *Id.* at 373. Graduation from an ABA-approved law school satisfies the legal education requirements for admission to the bar in all jurisdictions in the United States. *Id.* (citing ABA Section of Legal Education and Admission to the Bar, *A Review of Legal Education in the United States 1* (1991)).

16. *See id.*

17. Of the 176 ABA-approved law schools, 158 are AALS members. *Association Handbook*, *supra* note 6, at 1.

accreditation is based upon a law school's curriculum,<sup>18</sup> faculty competence,<sup>19</sup> admission policies,<sup>20</sup> ability to maintain and administer an adequate library,<sup>21</sup> and physical plant.<sup>22</sup> The criteria for AALS accreditation differ markedly from those of the ABA. Specifically, the AALS has determined that affirmative action—diversity of faculty, staff, and student body concerning race, color, and sex—and a law school's efforts to attain diversity should be considered in making accreditation decisions.<sup>23</sup> Additionally, the AALS bases its accreditation partially on whether on not employers using the law school's placement office discriminate based on sexual orientation.<sup>24</sup>

The AALS accreditation policy mandates that member law schools comply with its non-discrimination procedures. These procedures require member law schools to obtain assurances from prospective employers of non-discrimination in many areas, including sexual orientation.<sup>25</sup> Whenever an employer seeks the affirmative assistance of the law school or its placement office, by scheduling interviews with students, posting notices in the placement office concerning employment opportunities, referring students to particular employers, or placing literature concerning an individual employer in the placement library, the employer must sign a form stating that it does not discriminate in the area of sexual orientation.<sup>26</sup> The only prospective employer that

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18. American Bar Association, *Standards for Approval of Law Schools and Interpretations*, Standard 302 (1991).

19. *Id.* Standard 401.

20. *Id.* Standard 501.

21. *Id.* Standard 601.

22. *Id.* Standard 701.

23. AALS Bylaw 6-4.

24. AALS Bylaw 6-4(b); The clause dealing with sexual orientation was adopted by the AALS Executive Committee on Aug. 3, 1990. Memorandum from Betsy Levin, Executive Director, AALS, to Deans of Member Schools and Members of the House of Representatives 1 (Aug. 10, 1990).

25. AALS Bylaw 6-4(b).

26. Memorandum from Betsy Levin, Executive Director, AALS, to Deans of Member Schools, Members at the House of Representatives, Assistant Deans or Directors of Career Services Offices 2 (Dec. 3, 1990). Bylaw 6-4(b) "does not require a law school to obtain assurances from an employer when notices from the employer appear in a student-run law school or campus newspaper or are placed by student groups or outsiders on the general bulletin boards of the institution . . . . [T]he regulation does not require obtaining assur-

has been affected by this policy at West Virginia University College of Law is the United States Armed Forces.<sup>27</sup> The AALS accreditation policy is based on AALS Bylaw 6-4. AALS Bylaw 6-4 is concerned with diversity, which, according to the AALS, is non-discrimination and affirmative action.<sup>28</sup> AALS Bylaw 6-4(b) prohibits discrimination based upon sexual orientation even if the employer's actions are not illegal under applicable federal, state, or local law.<sup>29</sup> Therefore, member law schools which allow the JAG Corps to recruit on campus risk losing their AALS accreditation.

A law school's AALS accreditation is determined by confidential reports and documents. Although the AALS Executive Committee Regulations contain specific provisions for the confidentiality of accreditation reports and documents,<sup>30</sup> no reason is given for this confidentiality. One possible explanation for the high degree of secrecy surrounding the AALS accreditation process is that it is used by many law school deans and faculty to justify unpopular policies.<sup>31</sup> As part of the AALS accreditation process, law school deans are always asked "what bad things would you like the association to say about your law school in order to compel your university to give you the help you want?"<sup>32</sup> After the law school officials receive the unfavorable news

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ances from all legal employers included in general publications in the placement office library or in electronic databases." *Id.*

27. Morrison, *supra* note 1, para. 4.

28. Memorandum from Betsy Levin, Executive Director, AALS, to Deans of Member Schools and Members of the House of Representatives 1 (Aug. 10, 1990).

29. Memorandum from Betsy Levin, Executive Director, AALS, to Deans of Member Schools and Assistant Deans or Directors of Career Services Offices 2 (Apr. 2, 1991).

30. AALS Executive Committee Regulations, Chapter 5, §§ 5.5, 5.6(a) (1991).

31. See Paul D. Carrington, *Accreditation and the AALS: The Boalt Hall Affair*, 41 J. LEGAL EDUC. 363, 366 (1991). *But see* Levin, *supra* note 7, at 373; Marjorie M. Shultz, *Debating P.C. on "P.C."*, 41 J. LEGAL EDUC. 387 (1991). For Carrington's rebuttal see Paul D. Carrington, *Response to Levin and Shultz*, 41 J. LEGAL EDUC. 393 (1991).

32. Carrington, *supra* note 31, at 366 (Paul D. Carrington is Chadwick Professor of Law, Duke University School of Law, and is a former member of the AALS executive committee (1984-86) and former chairman of the AALS accreditation committee (1976-77, 1981)). *Id.* at 365 n.8.

The AALS has no comment on whether this question is still asked of law school deans. Telephone Interview with Alice Bullock, Deputy Director of the AALS (Aug. 27, 1992). Despite repeated attempts over a one month period to contact the AALS Executive

they requested, they inform the university's president that if the school does not follow a certain course of action, it will lose its AALS accreditation.<sup>33</sup> By employing the specter of the possible loss of accreditation, law school deans and faculty members have had success in acquiring funding and instituting controversial policies.<sup>34</sup>

One of the controversial policies which many law school deans and faculty have been attempting to impose upon their schools for years is a complete ban on military recruiting on law school campuses.<sup>35</sup> However, when some law school deans and faculty members attempted to ban military recruiters from their law school campuses they faced resistance from alumni, university presidents, the local media, students, or the Board of Trustees.<sup>36</sup> As the situation now stands,

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Director, Carl Monk, he refused to comment on this or any other issue related to this Note. Even after it was determined during the interview with Alice Bullock that Mr. Monk was the only person qualified to answer certain questions, this author was still denied an interview with Mr. Monk and answers to specific questions.

33. See Carrington, *supra* note 31.

34. Ken Myers, *It Gets Harder To Do The Right Thing; Recruiting By Military Causes Woe*, NAT'L L.J., Dec. 31, 1990 / Jan. 7, 1991, at 17 (University of Chicago Law School is granted an exemption from the University's policy to not ban the military from recruiting because of AALS accreditation standards).

35. See, e.g., David A. Kaplan, *Two California Schools Lift Ban On Visits by Anti-Gay Recruiters*, NAT'L L.J., Oct. 29, 1984, at 4 (Dean Jesse H. Cooper of Boalt Hall says he disagrees with University of California President David Gardner's decision to allow the military to recruit on the law school's campus); Lisa G. Markoff, *Military Banned*, NAT'L L.J., Oct. 30, 1989, at 4 (faculty at the University of Iowa College of Law vote to ban military recruiters); Myers, *supra* note 34 (UCLA law school, Dean Susan W. Prager allows military recruiters on campus to interview only because she was ordered to do so); Christopher J. Kalil, Comment, *SUNY Buffalo & Military Recruiters: Funding Unconstitutional Conditions?*, 39 BUFF. L. REV. 891, 896 (1991) (SUNY Buffalo President Steven Sample announced that the law faculty exceeded its authority by enacting a policy to ban military recruiters); Sherry Boschert, *Faculty Protests Military Recruiting*, N.Y. TIMES, Oct. 7, 1990, at 6 (State University at Stony Brook faculty vote to bar military recruiters); *Campus Crusade*, LEGAL TIMES, Oct. 14, 1991 (fifty percent of Georgetown's law faculty sign a petition to bar military recruiters); Steven Donzinger, U.P.I., Feb. 16, 1984 (faculty members at American University's Washington College of Law vote to ban army recruiters from campus until the military stops discriminating on the basis of sexual preference).

36. See, e.g., Kaplan, *supra* note 35 (University of California president David Gardner orders UCLA to lift its ban on military recruiters); Laurie J. Falik, Comment, *Exclusion of Military Recruiters from Public School Campuses: The Case Against Federal Preemption*, 39 UCLA L. REV. 941, 947 (1992) ("it is clear that more law school and university faculties would deny military recruiters access to school facilities if the decision were theirs. The



law school deans and faculty argue that if the military is not barred, the law school will lose its AALS accreditation.<sup>37</sup>

### III. WEST VIRGINIA UNIVERSITY COLLEGE OF LAW'S POLICY

The West Virginia University College of Law asserts that compliance with AALS Bylaw 6-4(b) is necessary to maintain its AALS accreditation.<sup>38</sup> The College of Law administration argues that AALS accreditation is important to the law school for two reasons.<sup>39</sup> First, while it is granted that students will not lose job opportunities in-state, the administration contends that student job opportunities will be lost out-of-state.<sup>40</sup> Second, the administration argues that the law school will lose prestige, which will create problems in hiring qualified faculty and obtaining good student applicants.<sup>41</sup>

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typical chain of events begins with a faculty vote . . . to deny recruiting privileges to armed forces representatives, followed by a contrary decision by university administrators."); Boschert, *supra* note 35 ("After faculties at the law schools of the State University at Buffalo, the University of Washington and the University of California at Los Angeles had voted to sever ties with the Judge Advocate General Program . . . the presidents of the three schools vetoed the measures."); *Campus Life: Virginia; Proposal to Ban Military Recruiters Is Overruled*, N.Y. TIMES, Feb. 17, 1991, at 56 (students at the University of Virginia Law School collect over 700 signatures asking the University's President to overrule the law faculties decision to bar military recruiters); William R. Cogar, *Washington & Lee Has Sullied Its Legacy*, RICHMOND TIMES-DISPATCH, Mar. 13, 1991, at 14 (alumni fight Washington and Lee law school's ban on military recruiters); *Law Sophomorphism*, RICHMOND TIMES-DISPATCH, Mar. 13, 1991, at 14 (editorial attacking the wisdom of Washington and Lee law school's ban on military recruiters); Elisabeth Van Nostrand, *Military Can Recruit at Stony Brook*, NEWSDAY, Dec. 1, 1990, at 4 (Stony Brook President John Marburger rejected a proposed policy that would have barred military recruiters from campus because the armed services do not admit homosexuals).

37. This is the argument which the West Virginia University College of Law uses to justify its ban on military recruiting at the law school campus. Memorandum from Donald G. Gifford, Dean of the West Virginia University College of Law, to David C. Hardesty, West Virginia Board of Trustees (Oct. 29, 1991).

38. *Id.*

39. *Id.* at 2; Interview with John W. Fisher, II, Interim Dean of the West Virginia University College of Law, in Morgantown, W. Va. (Aug. 31, 1992).

40. Interview with John W. Fisher, II, Interim Dean of the West Virginia University College of Law, in Morgantown, W. Va. (Aug. 31, 1992).

41. *Id.*

A survey of the out-of-state employers which either come to the law campus to interview or request resumes reveals that AALS accreditation status is not an important factor when determining whether or not to recruit students from a particular school.<sup>42</sup> The most common reasons why out-of-state employers recruit at West Virginia University College of Law have nothing to do with AALS accreditation. Many current out-of-state recruiters are law firms which have a West Virginia graduate as a senior partner. Other important factors include the geographical proximity of the employer to the law school, the historical reputation of the law school, and the employer's past experience with attorneys from the school. Four of the largest out-of-state employers have not even heard of AALS accreditation, and of those firms which had, only one gave it any weight in its decision to recruit at the West Virginia University College of Law.<sup>43</sup>

The Law School's argument that it will lose prestige causing problems in faculty hiring and lower admissions quality is more difficult to evaluate. The AALS undeniably has a greater reputation among law school faculty than the general population. In all probability, if a law school loses its AALS accreditation it may hurt that law school's ability to recruit and retain some faculty members. Perhaps a more important factor in determining whether or not to take a job at the West Virginia University College of Law is the rate of pay. Currently, the College of Law ranks near the bottom in the nation as far as law faculty salaries are concerned.<sup>44</sup> Correcting this problem could reduce

42. This information was gathered from a telephone survey of the ten top out-of-state employers of West Virginia University College of Law graduates. The survey was conducted between Sept. 10 and Sept. 18, 1992.

43. *Id.*

44. Table 1 compares the salaries of WVU College of Law faculty to the regional and national average salaries for law professors.

TABLE 1  
WVU LAW FACULTY SALARIES 1991-92 COMPARED

RANK	Average Salary WVU 1991-92 (\$)	Average Salary Region IV† 1991-92 (\$)	Average Salary Nationally 1991-92 (\$)	Average Salary S.U.G.‡ 1991-92 (\$)	WVU - % Above or Below Regional Average	WVU - % Above or Below National Average	WVU - % Above or Below S.U.G. Average
Professor	69,599	82,789	83,905	83,172	-15.93	-17.05	-16.32

the Law School's recruitment and retention problems. As for student applicants, if legal employers do not take AALS accreditation into consideration (or even know what it is) neither will students. Regardless, non-compliance with AALS Bylaw 6-4(b) will have little impact upon a law school's reputation because a law school is not likely to lose its AALS accreditation as a result of allowing military recruiters access to its campus.

The argument that a law school will lose its AALS accreditation as a result of its non-compliance with AALS Bylaw 6-4(b) crumbles under close scrutiny. No law school has ever lost its AALS accreditation for any reason.<sup>45</sup> Furthermore, AALS accreditation is based on overall satisfaction of AALS standards, and is not denied or withdrawn for failure to comply with a single bylaw.<sup>46</sup> Moreover, AALS Bylaw 6-4(b) is widely disregarded.<sup>47</sup> If the West Virginia University Col-

Associate Professor	57,644	58,036	60,073	57,397	-0.68	-4.04	0.43
All Ranks	67,520	71,583	74,993	73,071	-5.68	-9.96	-7.60
All Ranks WVU Weighted	67,520	78,484	79,760	78,689	-13.97	-15.35	-14.19
Sample Size	23	474	1,234	579	—	—	—

All salaries are based on a 9-10 month academic year. Institutions belong to the National Association of Universities and Land Grant Colleges.

† Region IV includes - West Virginia, Kentucky, Tennessee, North Carolina, South Carolina, Mississippi, Alabama, Georgia, Virginia, Florida and Louisiana.

‡ S.U.G. (Southern University Group) includes - West Virginia, Louisiana, Texas, Alabama, Maryland, Arkansas, Georgia, South Carolina, Virginia, Oklahoma, Mississippi, Tennessee, North Carolina, Florida, and Kentucky.

SOURCE: Oklahoma Salary Survey (1991-92).

45. See *Association Handbook*, *supra* note 6, at 10. The Dickinson School of Law resigned its membership in 1924; however, it was readmitted in 1934. *Id.*

46. AALS Bylaw 2.2(b).

47. According to an unofficial listing compiled by the Air Force JAG Corps, as of June 8, 1992 the following law schools do not enforce their sexual orientation policy against the JAG Corps: Alabama, Albany, Cincinnati, Cleveland Marshall, Colorado, Detroit, Illinois, Nebraska, Ohio State, St. Mary's, South Dakota, Tulsa, and Washington. Because of the volatility of this issue, this list is in a constant state of flux. There are some law schools which are AALS members and which do not bar military recruiters but are not

lege of Law were to disregard AALS Bylaw 6-4(b) and lose its AALS accreditation as a result, the AALS, if it applied its standards impartially, would have to take similar action against many other law schools, including some of the top schools in the country, i.e., the University of Virginia. It is therefore unlikely that the AALS will take any action against a school for not complying with Bylaw 6-4(b). Moreover, many universities are prohibited from complying with AALS Bylaw 6-4(b) by state law.<sup>48</sup> It would be highly irregular for an accreditation agency to require that a law school violate a state law in order to fulfill an accreditation criterion. Additionally, as the next section explores, AALS Bylaw 6-4(b) is preempted by federal law from being implemented by publicly funded institutions of higher learning.

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listed above. These schools include: The University of Virginia, William and Mary, The University of Richmond, George Mason, and Washington and Lee. Furthermore, some religious universities, such as Notre Dame and Georgetown, simply refused to adopt AALS Bylaw 6-4(b) as it related to sexual orientation. McKay Jenkins, *Gay-rights Battle Focuses on Ga., Bowers's Office; Fight for Legal Recognition Still Steeply Uphill in Ga.*, ATLANTA J. & CONST., Oct. 6, 1991, at D1. Moreover, there are some law schools which adopted the policy only to have it vetoed by the university board of trustees. These law schools include Emory, the University of Georgia, the University of Virginia and Georgia State University. *Id.*

The AALS has stated that they are not aware of any violations of Bylaw 6-4(b). When asked what measures the AALS intends to take against schools that violate Bylaw 6-4(b), the AALS refused to answer. Telephone Interview with Alice Bullock, Deputy Director of the AALS (Aug. 27, 1992).

48. States which have laws dealing with access to campuses by military recruiters are: Connecticut—CONN. GEN. STAT. § 10a-149a (1990); Illinois—ILL. REV. STAT. ch. 144 para. 47a (1991); Kentucky—KY. REV. STAT. ANN. § 164.352 (Baldwin 1992); Maryland—MD. CODE ANN., EDUC. § 15-103 (1991); New Hampshire—N.H. REV. STAT. ANN. § 186:68 (1991); New York—N.Y. EDUC. LAW § 2-a (McKinney 1992); North Carolina—N.C. GEN. STAT. § 116-33.1 (1991); Tennessee—TENN. CODE ANN. § 49-7-111 (1991); Virginia—VA. CODE ANN. §§ 2.1-380.1, 23-2.1:1 (Michie 1991); and Washington—WASH. REV. CODE ANN. § 28B.10.360 (West 1991).

The AALS has stated that they are not aware of any states which have laws requiring law schools to give military recruiters the same access to students as other prospective employers. When asked what would happen to a law school in such a state, the AALS refused to comment. Telephone Interview with Alice Bullock, Deputy Director of the AALS (Aug. 27, 1992).

IV. PREEMPTION<sup>49</sup>

The argument that public schools are preempted from banning the military from their campuses has been criticized by some.<sup>50</sup> A study of the issues, facts, and law, however, reveals that publicly funded law schools are clearly preempted from enforcing any policy that has the effect of banning military recruiters from their campuses. Policies that ban military recruiters from law school campuses are preempted according to two separate preemption theories. First, such a policy is unconstitutional because it conflicts with existing federal law. Second, the dominant federal interest doctrine invalidates this policy because it is an unconstitutional attempt by the states to regulate in a field reserved solely for the federal government.

A. *Conflict Preemption*

Conflict preemption occurs when it is impossible to comply with both the state and federal law, or when the state law "stands as an obstacle to the accomplishment . . . of the full purposes and objectives

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49. This Note is confined primarily to preemption arguments; however, it should be noted that many argue that the military has a First Amendment right of Free Speech to inform students of opportunities available to them in the armed forces. Although this view seems to be in conformity with the Supreme Court's holdings in *Widmar v. Vincent*, 454 U.S. 263, 267-77 (1981) (holding that the University of Missouri's exclusionary policy which barred religious organizations from the campus violated the fundamental principle that a state regulation of speech should be content-neutral, and that any regulation must be necessary to serve a compelling state interest and be narrowly drawn to achieve that end); *Healy v. James*, 408 U.S. 169, 180, 181, 184 (1972) (finding "the college classroom with its surrounding environs is peculiarly 'the marketplace of ideas . . .'" and also that students enjoy First Amendment rights of speech and association on a campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (holding that campuses of public universities possess many of the characteristics of a public forum), a recent district court of Minnesota case has held that military recruiters can be barred from a public university because the character of the speech is commercial. *Nomi v. Regents for the Univ. of Minn.*, 796 F. Supp. 412 (D. Minn. 1992).

50. See Falik, *supra* note 36, at 941.

of Congress.”<sup>51</sup> In these situations “the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.”<sup>52</sup> Conflict preemption is a result of the statutory hierarchy of the federal system which flows “directly from the substantive source of power of the congressional action coupled with the supremacy clause of article VI.”<sup>53</sup>

In 1981, the faculty of the publicly supported Temple University Law School voted to prohibit use of the school’s placement office by any employer who discriminated on the basis of sexual orientation.<sup>54</sup> Their decision effectively excluded representatives of the Armed Forces from the law school campus. On October 15, 1982, Temple University President Peter Liacouras overruled the law faculty and ordered that the military be allowed to recruit through the law school’s placement office.<sup>55</sup>

In the fall of 1982 two law students at Temple University were denied interviews with the JAG Corps, presumably because they were gay.<sup>56</sup> The two students filed a complaint with the Philadelphia Commission on Human Relations (Commission) stating that the law school had violated the Philadelphia Fair Practices Ordinance by allowing the JAG Corps to recruit on campus.<sup>57</sup> Soon thereafter the Commission ordered the law school to “cease and desist from allowing the use of the Placement Office facilities by the JAG Corps.”<sup>58</sup> The United States and Temple filed a complaint alleging that the ordinance as applied to the law school violated the Supremacy Clause of the United States Constitution.<sup>59</sup> The United States and Temple subsequently

51. *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941).

52. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 209 (1824).

53. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 479 (2d ed. 1988).

54. Dick Pothier, *Temple Law School Told to Allow Army Recruiting Visits*, PHILA. INQUIRER, Oct. 15, 1982, at B1.

55. *Id.*; Dick Pothier, *Army Visit Protested at Temple*, PHILA. INQUIRER, Oct. 16, 1982, at B1.

56. *United States v. City of Philadelphia*, 798 F.2d 81, 84 (3d Cir. 1986).

57. *Id.*

58. *Id.*

59. U.S. CONST. art. VI, cl. 2. (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the

filed summary judgment motions which were granted by the United States District Court for the Eastern District of Pennsylvania.<sup>60</sup> The court wrote that the Commission's cease-and-desist order was an unlawful interference with "the constitutional powers of the United States in raising and supporting an army."<sup>61</sup> The court further held that the Constitution gives Congress the power "to raise and support armies" and inherent in that is "the power to encourage citizens . . . to cooperate with the military."<sup>62</sup>

On appeal, the United States Court of Appeals for the Third Circuit unanimously decided that the Commission's order prohibiting the law school from allowing the military to use its facilities, based on the military's policy towards homosexuals, was preempted by federal law.<sup>63</sup> *United States v. City of Philadelphia*<sup>64</sup> is the only case thus far which has directly dealt with the issue of whether or not policies which have the effect of banning military recruiters from college campuses are preempted by federal law.

The court in *City of Philadelphia* held that "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance."<sup>65</sup> The court reached this conclusion by looking at "the long-standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters."<sup>66</sup> This policy is reflected in various congressional enactments.<sup>67</sup>

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Land . . .").

60. *City of Philadelphia*, 798 F.2d at 85.

61. David A. Kaplan, *City Can't Require School to Bar Army Recruiters From Its Campus*, NAT'L L.J., Oct. 7, 1985, at 4.

62. *Id.*; *Temple Univ. v. City of Philadelphia*, No. 85-1423 (E.D. Pa. 1985).

63. *City of Philadelphia*, 798 F.2d at 88-89.

64. 798 F.2d 81 (3d Cir. 1986).

65. *Id.* at 86.

66. *Id.*

67. 10 U.S.C. § 503(a) (1991); DDA Act of 1973, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972); DDA Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905 (1970); NASA Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968); 32 C.F.R. § 216 (1992).

Congress has ordered the Secretary of Defense to “conduct intensive recruiting campaigns to obtain enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, and Regular Coast Guard.”<sup>68</sup> Furthermore, Congress has stated that this directive means that “educational institutions in the United States, the Commonwealth of Puerto Rico, and the territories of the United States should cooperate with the Armed Forces by allowing recruiting personnel access to such institutions.”<sup>69</sup> These laws are required “for Congress to carry out effectively its constitutional authority to raise and support armies.”<sup>70</sup>

Congress has also passed laws to ensure that military recruiters have access to college and university campuses. The National Aeronautics and Space Administration Authorization (NASA) Act of 1969 has a provision that prohibits NASA funding of institutions of higher learning that bar recruiting personnel of the Armed Forces of the United States.<sup>71</sup> The Department of Defense Authorization Act of 1971 (DDA Act of 1971)<sup>72</sup> and the Department of Defense Authorization Act of 1973 (DDA Act of 1973)<sup>73</sup> also have provisions for cutting off DOD funding to institutions of higher learning that bar military recruiting personnel from their campuses. In explaining the DDA Act of 1973 to the full House of Representatives, Congressman F. Edward Hebert, Chairman of the House Armed Services Committee, stated that the bill had a

prohibition against expenditure of defense funds at institutions of higher learning when recruiting personnel of the Armed Forces are barred by policy or where the institution, as a matter of policy, eliminates ROTC. If institutions of higher learning want to sever their relationship with the Armed Forces . . . we think the separation should be complete . . . .

We don't want to tempt their morality with Government dollars . . . .

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68. 10 U.S.C. § 503(a) (1991).

69. DDA Act of 1981, Pub. L. No. 96-342, Title III, § 302(d), 94 Stat. 1077, 1083 (1980).

70. DDA Act of 1983, Pub. L. No. 97-252, Title XI, § 1114(a), 96 Stat. 718, 748 (1982).

71. NASA Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82 (1968).

72. DDA Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905, 914 (1970).

73. DDA Act of 1973, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972).



. . . [W]here the education is paid for by the Government and the individual is being paid by the Government and the education is for the Government's purpose. we (sic) think the Congress should determine Government policy . . . .<sup>74</sup>

Representative Hebert's feelings and the DDA Act of 1973 were subsequently codified.<sup>75</sup> The Codified DDA Act states that "funds appropriated for the Department of Defense may not be used at any institution of higher learning if the Secretary of Defense or designee determines that recruiting personnel of any Military Service are barred by the policy of the institution from the premises of the institution."<sup>76</sup>

Although no college or university has ever lost its DOD funding under the Codified DDA Act, on several occasions universities have changed their policy in order to comply with the law. In 1982 the Army's Judge Advocate General, Major General Hugh J. Clausen, sent letters to six universities outlining the possible loss of DOD funding in accordance with the Codified DDA Act if those universities did not start allowing military recruiters access to their law schools.<sup>77</sup> Shortly thereafter, two University of California law schools that had previously excluded military recruiters were ordered by the University of California President, David Gardner, to end their ban.<sup>78</sup> In the winter of 1990, Drake University, because of its law school's compliance with the AALS sexual orientation policy, was threatened with loss of its DOD funding.<sup>79</sup> After being notified of the Codified DDA Act and

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74. 118 CONG. REC. 22,436-37 (1972) (statement of Rep. Hebert).

75. 32 C.F.R. § 216 (1992) (Identification of Institutions of Higher Learning That Bar Recruiting Personnel From Their Premises) (The Codified DDA Act).

76. 32 C.F.R. § 216.3 (1992).

77. Ruth Marcus, *Army, Law Schools in Showdown on Gay Rights*, WASH. POST, July 24, 1982, at A1; Warren Weaver, Jr., *Recruiting Ban May Cost 6 Colleges Defense Pacts*, N.Y. TIMES, July 25, 1982, at 26.

When Temple University President Peter Liacouras ordered the Temple law school faculty to allow military recruiters access to the law school's placement office he was accused of "giving in to threats by the Army to withhold military research funds from universities whose law schools banned Army recruiters." President Liacouras denied that General Clausen's letter effected his decision to allow the recruiters on campus. Dick Pothier, *Army Visit Protested At Temple*, PHILA. INQUIRER, Oct. 16, 1982 at B1.

78. The two law schools are UCLA and Boalt Hall. Kaplan, *supra* note 35.

79. Goldie Blumenstyk, *Marine Corps Fights Attempts to Block Campus Recruiting*:

its possible effect on the Drake College of Pharmacy and Health Sciences' \$10-million dollar DOD grant, Drake University's president, Michael R. Ferrari, ordered the law school to lift its ban on military recruiters.<sup>80</sup> Similarly, in November of 1991 when the University of Kansas' thirteen DOD grants were threatened because of its ban on military recruiters, the university quickly reversed its policy.<sup>81</sup>

The court in *City of Philadelphia* relied heavily upon the Codified DDA Act in finding that Congress deemed access to colleges and universities by military recruiters to be of "paramount importance."<sup>82</sup> It has been argued, however, that the court placed too much importance upon the Codified DDA Act, and was wrong in dismissing as irrelevant the exception to the funding prohibition.<sup>83</sup> The Codified DDA Act provides that research and development grants shall not be withheld from a school, even if that school bars military recruiters, "if the Secretary of Defense, or designee, determines that the expenditure is a continuation or a renewal of a previous program with the institution that is likely to make a significant contribution to the defense effort."<sup>84</sup> This exception has been characterized as a "large loophole" in the funding prohibition;<sup>85</sup> however, an examination of the exception supports the court's findings.

Lieutenant Commander Steve Deudermann is currently in charge of the application of the Codified DDA Act.<sup>86</sup> Commander Deudermann recently stated that there is currently no academic institution which can be granted the exception.<sup>87</sup> Even if a university were granted the exception, it would apply only to the grant which the

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1972 federal law cited in response to rifts over rules on homosexuals, *CHRONICLE OF HIGHER EDUC.*, Jan. 16, 1991, at A30.

80. *Id.*

81. *Id.*

82. *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986).

83. Falik, *supra* note 36, at 963.

84. 32 C.F.R. § 216.3(d) (1992).

85. Falik, *supra* note 36, at 963.

86. Telephone Interview with Lieutenant Commander Steve Deudermann, United States Navy, Assistant Director of Education Policy, Office of the Assistant Secretary of Defense for Force Management and Personnel (Accession Policy) (Aug. 24, 1992).

87. *Id.*

Secretary of Defense or his designee determines is likely to make a "significant contribution to the defense effort,"<sup>88</sup>—the university which bars military recruiters would still lose its other DOD grants.<sup>89</sup> This exception is not a large loophole, but a narrowly tailored addition to the law. Therefore, the court in *City of Philadelphia* was correct in using the Codified DDA Act to show that Congress deemed access to universities by military recruiters to be of "paramount importance."<sup>90</sup>

The court's findings are buttressed by the legislative history of the DDA Acts. The court cites at length the committee report which accompanied the DDA Act of 1973:

the Committee believes that [the] national interest is best served by colleges and universities which provide for the full spectrum of opportunities for various career fields, including the military field through the Reserve Officers Training Corps program, and by the opportunity for students to talk to all recruiting sources, including military recruiters.<sup>91</sup>

The Court of Appeals for the Third Circuit has been heavily criticized for leaving out the part of the committee report which states that the committee "does not believe that Congress in any way should try to impose its will on . . . colleges and universities."<sup>92</sup> It has been argued that the "full quotation from the committee report demonstrates that Congress never intended to do more than encourage colleges and universities to accord recruiting privileges to representatives of the armed forces," and thus public universities are not prohibited from barring military recruiters.<sup>93</sup>

However, an examination of the operations of Congress and the law reveals that the court was on the mark in its interpretation of the DDA Act. The addition to the quotation shows nothing, except perhaps

88. 32 C.F.R. § 216.3(d) (1992).

89. Telephone Interview with Lieutenant Commander Steve Deudermann, United States Navy, Assistant Director of Education Policy, Office of the Assistant Secretary of Defense for Force Management and Personnel (Accession Policy) (Aug. 24, 1992).

90. *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986).

91. *Id.* at 87; H.R. REP. No. 92-1149, 92d Cong., 2d Sess. 79 (1972).

92. Falik, *supra* note 36, at 964 (quoting H.R. REP. No. 92-1149, 92d Cong., 2d Sess. 79 (1972)).

93. *Id.*

a classic example of Orwellian doublespeak. On one hand, Congress is threatening to withhold millions of dollars from colleges and universities if they do not allow military recruiters access to facilities, while on the other hand, Congress is saying that this action is not meant to influence the colleges or impose Congress' will. What is the loss of millions of dollars intended to do if not to influence the school's decision and impose Congress' will? Furthermore, even if Congress is only trying to "encourage"<sup>94</sup> colleges and universities not to bar military recruiters, this encouragement is enough to trigger preemption under current law. According to Professor Laurence H. Tribe a "state action must ordinarily be invalidated if its effect is to discourage conduct that federal action specifically seeks to encourage."<sup>95</sup> Therefore, the court in *City of Philadelphia* was correct in citing the committee report as a "buttress"<sup>96</sup> to its finding that Congress deemed access to colleges and universities by military recruiters to be of "paramount importance."<sup>97</sup>

In *City of Philadelphia* the court reasoned that the DDA Acts of 1971 and 1973 represented a "discernible Congressional policy" which conflicted with the Commission's order banning military recruiters from Temple University's law school.<sup>98</sup> When the court's rationale and holding are applied to the AALS sexual orientation policy barring military recruiters from many publicly funded law schools, including West Virginia University College of Law, it is clear that member law schools cannot follow the AALS policy without placing themselves in the same situation as Temple University's law school. If a state institution, such as the West Virginia University College of Law, is following AALS Bylaw 6-4(b), it is a state act in direct conflict with Con-

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94. *Id.*

95. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 482-83 (2d ed. 1988); See *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (striking down a state law which required dividing up the interest in railroad retirement income upon divorce of a future beneficiary because it discourages the early retirement of railroad employees which Congress sought to encourage by offering the benefit); *Nash v. Florida Indus. Comm'n*, 389 U.S. 235 (1967) (holding that a state law cannot stand that either frustrates the purpose of the national legislature or impairs the efficiency of a federal government agency).

96. *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986).

97. *Id.*

98. *Id.* at 87.

gressional intent. "Congress has deemed critical to their ability to conduct 'intensive recruiting campaigns'" full and unfettered access to law schools by the Armed Forces of the United States of America.<sup>99</sup> Therefore, West Virginia University College of Law and many other AALS member law schools are in violation of the Supremacy Clause of the United States Constitution and risk losing federal funding.

Thus, according to the conflict preemption doctrine, a publicly funded law school is preempted from applying the AALS sexual orientation policy against the Armed Forces of the United States of America. Conflict preemption is only one of two preemption theories under which the AALS sexual orientation policy may be struck down when applied by law schools to bar military recruiters. The other preemption concept is dominant federal interest preemption.

### B. Dominant Federal Interest Preemption

Dominant federal interest preemption occurs when the dominance of a federal power is made clear by the Constitution and the federal power is "intimately blended and intertwined with responsibilities of the national government."<sup>100</sup> Where such a sphere of federal power exists, it will be assumed that a state may not legislate in the same field.<sup>101</sup> In other words, states are preempted from acting in areas where the federal government has a dominant federal interest.

One case which addresses the dominant federal interest theory of preemption is *Zschernig v. Miller*.<sup>102</sup> In *Zschernig*, the Supreme Court invalidated a state probate regulation which denied remittance to nonresident alien legatees whenever they could not prove reciprocal rights for Americans under the laws of their country.<sup>103</sup> It is impor-

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99. *Id.*

100. *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941); *See also Zschernig v. Miller*, 389 U.S. 429, 436 (1968); *Hillsborough County v. Automated Medical Labs.*, 471 U.S. 707, 719 (1985).

101. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

102. 389 U.S. 429 (1968).

103. *Id.* at 430-31, 440. At one time, ten states had statutes similar to the Oregon statute cited in *Zschernig*. These statutes were commonly called "iron curtain" statutes, because they were most frequently applied to aliens in countries in eastern Europe. ELIAS

tant to note that the case did not involve a federal act, and the United States did not show any empirical data or instance in which the foreign policy of the United States had been adversely affected by the Oregon law. Regardless, the Supreme Court held that the law was preempted because it interfered with foreign affairs and international relations—"matters which the Constitution entrusts solely to the Federal Government."<sup>104</sup> In a concurring opinion Justices Stewart and Brennan stated that the Oregon law launched the state "upon a prohibited voyage into a domain of exclusively federal competence . . . where the Constitution contemplates that only the National Government shall operate."<sup>105</sup>

State action is also precluded in an area where an existing dominant federal power has not yet been exercised. It has long been held by the Supreme Court that "[w]henver the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures, as if they had been expressly forbidden to act on it."<sup>106</sup>

In order to properly appreciate the nature of the power to raise armies it is necessary to look at the historical developments of that power. Under the Articles of Confederation, the federal government's ability to raise and support armies was weak. First, while the Articles of Confederation gave "the United States in Congress assembled" the "sole and exclusive right and power of determining on peace and war,"<sup>107</sup> it was declared in the same article that the government "shall never engage in war unless nine States assent to the same."<sup>108</sup> Second, the Articles of Confederation directed that "all charges of war . . . shall be defrayed out of a common treasury . . . supplied by the several States."<sup>109</sup> This system of government created "an almost

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CLARK ET AL., GRATUITOUS TRANSFERS 35 (1985).

104. *Zschemig*, 389 U.S. at 436.

105. *Id.* at 442.

106. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193 (1819).

107. ARTICLES OF CONFEDERATION art. IX.

108. *Id.* § 6.

109. ARTICLES OF CONFEDERATION art. VIII.

total lack of the concerted powers which are necessary to that swift and decisive action often required in National emergencies."<sup>110</sup>

In order to rectify this and other problems with the Articles of Confederation, the Founding Fathers forged a new system of government that granted much broader powers to Congress and the president. The war-making powers in Article I, section eight of the United States Constitution grant the Congress plenary power in the military sphere. The members of the Constitutional Convention realized that the very nature of the power to raise and maintain a national army mandates that it be vested exclusively in the federal government, and that the several states should be preempted from acting in this sphere.

The United States Constitution expressly reserves to the federal government the power to raise armies.<sup>111</sup> Thus, the federal government has a dominant federal interest in raising a national army. The Supreme Court has held that "judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies . . . is challenged."<sup>112</sup> The federal government can "determine, without question from any state authority, how the armies shall be raised; whether by voluntary enlistment or forced draft; the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned."<sup>113</sup> No state may interfere with the federal government's power to raise armies.<sup>114</sup> This power may be exercised by Congress without approval from any state authority.<sup>115</sup> Just as states are prohibited from making laws which intrude into the area of foreign policy, they are similarly prohibited from implementing laws which interfere with the Congressional acts of raising, supporting,

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110. THOMAS NORTON, *THE CONSTITUTION OF THE UNITED STATES: ITS SOURCES AND ITS APPLICATION* 75 (1987).

111. U.S. CONST. art. I, § 8, cl. 12 ("The Congress shall have the power to . . . raise and support Armies . . .").

112. *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

113. *Tarble's Case*, 80 U.S. (13 Wall) 397, 408 (1871).

114. *Id.*

115. *Id.*

and training armies.<sup>116</sup> In both fields, the federal government has a dominant interest which the Supreme Court has steadfastly protected when states attempt to interfere.

Some have argued that the dominant federal interest theory does not apply to anti-discrimination policies which ban military recruiters from university campuses. They contend that there is no "empirical proof that the failure of military recruiters to gain access to certain professional school or university campuses has impeded their mission, nor is it likely that such impediment will occur in the future."<sup>117</sup> However, as is illustrated by the *Zschernig* case, no empirical proof of interference is necessary to preempt a state law under the dominant federal interest theory. In a concurring opinion Justices Stewart and Brennan stated that the point of the case was not whether the state law interfered with the federal government's ability to conduct foreign affairs, but

with the basic allocation of power between the States and the Nation. Resolution of so fundamental a constitutional issue cannot vary from day to day with the shifting winds at the State Department. Today, we are told, Oregon's statute does not conflict with the national interest. Tomorrow it may. But, however that may be, the fact remains that the conduct of our foreign affairs is entrusted under the Constitution to the National Government, not to the probate courts of the several States.<sup>118</sup>

Similarly, whether universities can bar military recruiters does not depend on whether such a ban will have an adverse effect upon the military's ability to commission qualified personnel, but whether states can act in areas exclusively reserved to the federal government. In the case of raising and maintaining armies the power is clearly vested in the federal government and not the public universities of the several states; therefore, any attempt by the states to act in this area is preempted by federal law in accordance with the Supremacy Clause.<sup>119</sup>

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116. *Perpich v. Department of Defense*, 496 U.S. 334, 350-51 (1990).

117. Falik, *supra* note 36, at 973, 975.

118. *Zschernig v. Miller*, 389 U.S. 429, 433 (1968).

119. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . .").



Under the dominant federal interest theory there need not be any interference for the Court to hold that a state's act is void. Nevertheless, if the Court considers the impact caused by many law schools barring military recruiters, it may easily find that the policy interferes with Congress' ability to raise armies. The Court is not bound by the effects of just one state's law, but may look beyond to the impact which would occur if other states passed similar laws. In *Burbank v. Lockheed Air Terminal, Inc.*<sup>120</sup> the Supreme Court sustained a pre-emption attack on a local effort to curb airport noise. Writing for the majority, Justice Douglas drew on multiple burden considerations. He recognized that noise control "is of course deepseated in the police power of the States," but he added: "If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow."<sup>121</sup>

Therefore, in determining whether the West Virginia University College of Law is prohibited from banning military recruiters, the courts would look beyond what impact West Virginia University College of Law's military ban has on Congress' ability to raise armies. The courts would look at the impact that such a policy would have if every university passed a similar policy. It is all too obvious that if military recruiters are denied access to every public university campus it will seriously undermine Congress' power to raise armies.<sup>122</sup>

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120. 411 U.S. 624 (1973).

121. *Id.* at 638-39.

122. It is doubtful that a military ban on college campuses would hurt the Armed Forces' ability to recruit infantry or artillery enlisted men and officers; however, most of the military's on campus recruitment efforts are aimed at professional and graduate students, i.e., students in the fields of law, medicine, and engineering. *See United States v. City of Philadelphia*, 798 F.2d 81, 87 (3d Cir. 1986) (citing declarations from Lieutenant General Edgar A. Chavarrie, the Deputy Assistant Secretary of Defense for Military Personnel and Force Management).

The military has found that campus recruiting represents the most effective way to fill the critical shortages of persons possessing professional and other highly specialized skills. *Id.*

## V. STATE LAWS

Although federal law prohibits publicly supported law schools, colleges, universities, and high schools from barring military recruiters, ten states have taken steps to ensure that schools are in compliance with the law and do not lose federal funding as a result of a policy which bans military recruiters.<sup>123</sup> While some states have not had occasion to use their law, others have vigorously enforced it.

On September 20, 1991, the New York State Senate expressed indignant outrage at a New York State Division of Human Rights Office of Lesbian and Gay Concerns ruling that banned military recruiters from the publicly funded State University Center at Buffalo.<sup>124</sup> Senate leaders denounced the ruling as "an insult to everyone who ever served in the armed forces."<sup>125</sup> Governor Mario Cuomo quickly distanced himself from the executive department ruling when he was informed that the ruling conflicted with the state's education law that allows the military to "recruit anywhere that private employers are allowed to do so."<sup>126</sup> In an announcement issued the same day as the ruling, the Governor called the ruling "unenforceable."<sup>127</sup> The Governor went on to comment on the extremely negative effect such a ruling would have upon the university's \$3.8 million in DOD funding.<sup>128</sup>

One year later the New York State education law<sup>129</sup> was the subject of a New York State Supreme Court case after the Rochester City School Board banned military recruiters because of the military's policy towards homosexuals.<sup>130</sup> When a group of parents brought suit

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123. See *supra* note 48.

124. Sam H. Verhovek, *Albany Bars Military on Campus Over Gay Bias But Reverses Action*, N.Y. TIMES, Sept. 21, 1991, at 1.

125. *Id.*

126. *Id.*; N.Y. EDUC. LAW § 2-a (McKinney 1992).

127. Verhovek, *supra* note 124, at 1.

128. *Id.* (the loss of DOD funding is in reference to 32 C.F.R. § 216 (1992)).

129. N.Y. EDUC. LAW § 2-a (McKinney 1992) (this law covers boards of education of any public school as well as publicly funded universities).

130. *Lloyd v. Grella*, 580 N.Y.S.2d 988 (1992).

against the School Board, the court held that the obvious intent of the law was to guarantee or secure access by military recruiters to schools.<sup>131</sup> Therefore, the court concluded that the School Board's decision was preempted by state law and the military must be granted access to public schools on an equal footing with other employers.<sup>132</sup>

New York is not the only state which has actively enforced its law granting military recruiters access to publicly funded institutions of higher learning. Connecticut has also implemented its law.<sup>133</sup> After a group of gay and lesbian law students at the University of Connecticut filed suit against the University for allowing military recruiters on campus, university officials responded by showing that they were merely following the state's law requiring them to give recruiters from the military the same access as other employers.<sup>134</sup>

New York and Connecticut are not alone in their efforts to ensure equal job opportunity for all students. Many other state legislatures have passed similar laws requiring that publicly funded institutions of higher learning give military recruiters access to college and university campuses.<sup>135</sup> North Carolina's law is illustrative<sup>136</sup> of these laws:

If a board of trustees provides access to its buildings and campus and the student information directory to persons or groups which make students aware of occupational or educational options, the board of trustees shall provide access on the same basis to official recruiting representatives of the military forces of the State and of the United States for the purpose of informing students of educational and career opportunities available in the military.<sup>137</sup>

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131. *Id.* at 991.

132. *Id.* at 992.

133. The Connecticut law was passed in response to attempts by the University of Connecticut law faculty to bar military recruiters from the law school. David Lauter, *Open Faculty Meetings Don't Draw Crowd*, NAT'L L.J., Jan. 9, 1984, at 4.

134. Katherine Farrish, *Gay Students Sue UConn To Ban Recruitment; Gay Students Sue UConn Law School; Action Seeking Ban On Military Recruiting*, HARTFORD COURANT, May 21, 1992, at A1 (The Connecticut law can be found at CONN. GEN. STAT. § 10a-149a (1990)).

135. *See supra* note 48.

136. All of these state laws are similar.

137. N.C. GEN. STAT. § 116-33.1 (1981).

This law, as well as similar laws in Connecticut, Illinois, Kentucky, Maryland, New Hampshire, New York, Tennessee, Virginia, and Washington, effectively prohibit law schools in those states from barring military recruiters. The AALS has not stated what its policy will be towards law schools in these states.<sup>138</sup>

The State of West Virginia has a law which requires the board of regents to "maintain and continue its United States army reserve officers training corps and United States air force reserve officers training corps programs."<sup>139</sup> This law also requires the board of regents to cooperate with the federal government as far as practicable with any federal law providing aid to West Virginia University for giving military instruction.<sup>140</sup> Although this law protects Reserve Officer Training Corps programs at state funded institutions of higher learning, it does not protect the United States Armed Forces' ability to recruit students on campuses in this state. The State of West Virginia does not have a law like three of its border states and seven other states that specifically grants the military rights to recruit on publicly funded college and university campuses.

## VI. CONCLUSION

Currently, West Virginia is behind other states in its efforts to protect students from outside forces which would deny equal access to all job opportunities. More tragic is that in today's austere economy, the West Virginia University College of Law is denying law students equal access to hard to find jobs. Such anti-student actions indicate where the primary interests of the faculty and administration of the College of Law actually lie.

In these tough economic times, students should be allowed unencumbered access to all possible employers who are in compliance with federal and state law. As shown above, the United States Armed Forces do not unlawfully discriminate against anyone. Furthermore,

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138. *See supra* note 48.

139. W. VA. CODE § 18-11-6 (1992).

140. *Id.*

federal law bars military members from engaging in homosexual conduct and the military has no authority to change the law.<sup>141</sup> It is not up to the law school faculty of a state funded institution to make and interpret laws; those powers rest in the hands of the courts and the legislature. The West Virginia Legislature should put a stop to law faculty attempts to make and control state policy, especially when the faculty's actions are so clearly at odds with federal law and jeopardize federal funding at several institutions of higher education in the state of West Virginia.<sup>142</sup>

Publicly funded law schools are preempted from barring military recruiters by the Armies Clause of the Constitution. The power to raise armies is a national one which may not in any way be engaged in by the states. Congress has unquestionably determined that access to colleges and universities is vital in order for our national armies to be properly raised. Therefore, any university policy which impedes the access of military recruiters to state funded campuses is in direct conflict with federal law. Such a policy also subjects the institution to loss of DOD funded research.

Law school deans and faculty argue that a school will lose its AALS accreditation if military recruiters are not barred. This argument is spurious at best and fails in reasoned analysis. It is incredible to predict that a law school will lose its AALS accreditation because it

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141. See *supra* note 4.

142. In a state university system, the pertinent question is whether the Department of Defense can withdraw funds from other state schools. In *Board of Governors v. United States Dep't of Labor*, 917 F.2d 812, 816 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2013 (1991), the United States Court of Appeals for the Fourth Circuit held that the various campuses of the University of North Carolina system were merely sub-agencies of a single state agency. Thus, the court held that even campuses which had not contracted with the federal government were subject to federal contract provisions. *Id.* at 818. When the holding in this case is applied to the West Virginia higher education system established by W. VA. CODE, ch. 18B, it is highly likely that the West Virginia University College of Law's policy may affect the entire West Virginia higher education system. Therefore, Department of Defense grants not only at West Virginia University but also such grants at Marshall University, the University of West Virginia College of Graduate Studies, Potomac State College of West Virginia, West Virginia University at Parkersburg and the School of Osteopathic Medicine are subject to termination. Thus, the actions of a few faculty members at West Virginia University College of Law threatens federal grants at several West Virginia higher education institutions.

refuses to accede to the AALS sexual orientation policy, especially given the fact that so many law schools across the nation openly ignore the AALS policy.<sup>143</sup> Even in the unlikely event that a school does lose its accreditation, the overall effect is likely to be minimal—a reduction in the relative prestige of law professors.

The West Virginia Legislature should pass a law that guarantees students attending any publicly funded institution of higher learning equal access to all interested job recruiters. Such a law will ensure that colleges and universities in this State conform to federal law. Also, such a law will allow students, not faculty, and not an out-of-state accrediting agency, to make placement decisions for themselves.

Many reading this Note may think that the issue is moot as a result of our recent presidential election. Such a conclusion would be premature. First, the recent public debate on this issue indicates that the President-elect may have difficulty in convincing Congress to change the federal law criminalizing sodomy in the military.<sup>144</sup> Second, many of those who currently argue that military recruiters should be banned from colleges and universities because of the military's policy regarding homosexuals also assert that the military discriminates based upon age, physical disability, and gender. Therefore, while one bone of contention may soon disappear, there are many other grounds for anti-military faculty to bar representatives of the Armed Forces of the United States of America from publicly supported institutions of higher learning in West Virginia and across the country.

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143. See *supra* note 47.

144. E.g., Tony Mauro, *Sodomy Law Hurdle to Gays in the Military*, USA TODAY, Nov. 17, 1992, at A4.

