

Case Study -- Don't Ask, Don't Tell, Don't Pursue

In the middle of his 1992 presidential campaign, candidate Bill Clinton pledged to follow Harry Truman's historic Executive Order in 1948 banning segregation in the armed services. Clinton declared that upon entering office he would, with a stroke of his pen, end the ban on gays in the military.

The military policy Clinton intended to change was explicitly status-based. In addition to the Uniform Code of Military Justice's penalties for sodomy, the Department of Defense (DoD) had long required the discharge of any service member deemed to be homosexual, defined as "a person, regardless of sex, who engages in, desires to engage in, or intends to engage in homosexual acts." In practice, a soldier could be discharged from the service if he or she met the SAM conditions: Statement of orientation (admission of being homosexual), Act (including hand-holding, sex, dancing) or Marriage (commitment ceremony).

In a press conference soon after his election as 42nd president of the United States, Clinton stated that this would all change. His new policy would shift from status to conduct. It would exclude gay service members not for who they are but for what they do. The military's ban on homosexual acts would continue. The ban on homosexuals would not.

Clinton's Secretary of Defense, Les Aspin, drafted an executive order to carry out the president's campaign promise. His initiative, however, ran into strong and vocal opposition from both the Joint Chiefs of Staff and Congress. George Mitchell, a democrat from Maine and leader of the Senate, told Clinton that there were enough votes on Capital Hill to legislatively overrule his Executive Order. In seeking a compromise with Congress, over the next six months Clinton's administration negotiated the first statute governing sexual orientation in the military. In the meantime, Clinton installed an "interim policy" suspending some of the Department of Defense's regulations on separation policies for homosexual soldiers. The final result, Clinton proudly declared at the time of the statute's passage, was:

a policy that is a substantial advance over the one in place when I took office. I have ordered Secretary Aspin to issue a directive consisting of these essential elements: One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice, now 6 months old, of not asking about sexual orientation in the enlistment process will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption; in other words, to demonstrate that he or she intends to live by the rules of conduct that apply in the military service...

As General Colin Powell, head of the Joint Chiefs of Staff, explained, this policy represented a major shift in DoD policy. "We will not," he declared, "witch hunt, chase or pursue orientation."

John Doe and Mary Smith are both soldiers in the U.S. Army with unblemished military records of 4 years service. Doe keeps to himself and does not spend off-duty time with his fellow soldiers. It is widely rumored in his platoon that he's gay. Smith is outgoing, outspoken, and has dates with men from off the base. She strongly supports civil liberties and has marched in gay rights parades, but none of her fellow soldiers has ever considered she might be homosexual.

On the evening of August 1st, Smith and Doe go to the local club, The Rusty Nail, a happening night spot that is also a well-known gay bar. Doe meets up with another man he apparently knows well who is dressed in a T-shirt that reads, "I ain't straight and I ain't broken." They sit at the corner of the bar talking, join a large circle of people dancing to the band and, in the crowded floor, seem to bump against each other a few times. A few hours later, as they are leaving together a soldier hears them mention the words, "commitment ceremony" and notices they're wearing the same style rings.

Smith hangs out with a group of five women and dances with them on the floor. When a drunk soldier comes up and asks Smith to dance and she says no, the soldier says in a loud voice, "no big deal, dyke!" Smith laughingly replies, "yeah, that's it, go bother someone who's straight," and grabs one of her friends to dance an exaggerated tango together. Two other women in the group hold hands when walking to and from the dance floor. When leaving the bar, Smith hugs one of the women goodbye and gives her a kiss on the cheek.

Two weeks later, Smith and Doe are informed that reports on their activities at The Rusty Nail have been passed on to their commanding officer, Captain Delta. He determines that these reports could represent credible information of gay conduct and has opened an inquiry into the matter. Captain Delta appoints Sergeant Beta as the Inquiry Officer. Beta gives Smith and Doe a document entitled, "Homosexual/Bisexual Questionnaire." It asks questions such as, "Have you ever stated that you're a homosexual?", "Do you intend to engage in homosexual acts in the future?", "Do you have the propensity or intent to engage in homosexual acts?" Smith says she is heterosexual but resents the way she's being treated and refuses to fill out the questionnaire. Doe says and writes nothing. Beta also interviews Smith and Doe's fellow soldiers, some of their relatives, their doctors on the military base, and other people at The Rusty Nail, asking if they can relate any stories or conversations that would suggest Smith or Doe are homosexual.

Sergeant Beta passes on his Report of Investigation to Captain Delta before flying off to join the troops in the Persian Gulf. If, in the judgment of Captain Delta, the charge of gay conduct at the Rusty Nail is substantiated he will pass the matter up to an Administrative Separation Board which has the authority to order the discharge of Smith and Doe as an Honorable Discharge, General Discharge (Under Honorable Conditions), or Other Than Honorable Discharge. If separation is anything less than an Honorable Discharge, the soldier may be required to pay back the educational grants provided by the military and risk losing eligibility for certain veterans benefits (such as the G.I. Bill's educational benefits).

You are a JAG attorney and the legal officer on Captain Delta's staff. Assume that Beta's report offers nothing material beyond the events described above. After reading the enclosed materials carefully, write a memo to Captain Delta (3 pages maximum) explaining the legal arguments in favor of and against recommending an Administrative Separation Board hearing for John Doe (if your last name starts with A-K) or Mary Smith (if your last name starts with L-Z). Delta is not a lawyer. He wants to know what the statute and DoD directive requires him to do. He asks you not discuss the constitutional due process or equal protection issues involved.¹

Attachments:

- A - [Washington Post, *Discharged Colonel Places Hopes on Clinton's Promise*](#)
- B - [Uniform Code of Military Justice, 10 U.S.C. Sec. 925](#)
- C - [Senate floor debate, February 4, 1993](#)
- D - [Clinton press conference, July 19, 1993](#)
- E - [Section 571 of the National Defense Authorization Act for Fiscal Year 1994](#)
- F - [Department of Defense Directive 1332.14 C Enlisted Administrative Separations](#)
- G - [Report to the Secretary of Defense: Review of the Effectiveness of the Application and Enforcement of the Department's Policy on Homosexual Conduct in the Military](#)

¹ This case study is based on Professor Janet Halley's fine book, *DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY* (1999). The case study was developed with the helpful assistance of Professor Halley and Stacey Sobel, Senior Attorney at the Servicemembers' Legal Defense Network.