

'Don't ask, don't tell' a bad deal for gays in the military, Halley says

By Elaine Ray

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When Law Professor Janet Halley set out to write about the Clinton administration's 1993 regulations for implementing the military's "don't ask, don't tell" policy, she expected the result to be a 30-page paper. After all, gay rights legislation was something she had researched and written about since the '80s, when she was a law student at Yale. However, the policy and its many iterations proved so complex that she ended up writing a book.

Don't: A Reader's Guide to the Military's Anti-Gay Policy published by Duke University Press this year, is an exhaustive analysis of the rhetoric and the realities that shaped the policy. Her research also has resulted in the Don't Ask, Don't Tell, Don't Pursue Database (<http://dont.stanford.edu/>), a digital archive of related military documents compiled by librarians at Stanford's Robert Crown Law Library.

Halley, the Robert E. Paradise Faculty Scholar, says the Clinton administration's efforts to soften the anti-gay statute set forth by Congress did little but add fuel to the homophobic fire. Even new guidelines issued by the Defense Department in August fall short, she says.

"President Clinton wanted to end discrimination in the armed forces, but he has instead presided over the institutionalization of anti-gay animus," Halley wrote in an Aug. 22 op-ed piece published in the Los Angeles Times.

Military commanders still ask service members whether they are gay, and soldiers have no legal protection when the question is put to them, Halley says. Furthermore, while the Clinton administration has insisted that the regulations apply to sexual behavior and not sexual orientation, they require commanders to initiate proceedings against service members who "manifest a propensity" to engage in homosexual acts.

Last month, as Halley was preparing to leave the Farm to do a semester-long stint as a visiting professor at Harvard, she took some time to talk about her recent work.

SR: What was the genesis of the Don't Ask, Don't Tell Database?

JH: This is the work of Paul Lomio [assistant director of information services] and a group of other people in the law library. To research the book, Paul and I were working hard to get documents, and we found out that they're really hard to get. There are a lot of very obscure things that are important to know about if you're going to understand the history of this piece of sexuality regulation. For instance, before 1983, the military sexuality policy was under the management of the individual branches of military service, so you had to find out what the

Marines were doing, what the Army was doing. Each one was separate. The way they change it is they just take the old stuff out of the loose-leaf and put in the new stuff and just put the other stuff in the basement. Finding that stuff is hard.

Paul got up relationships with military librarians all over the country and just sweet-talked them into finding this stuff, and he never gave up. Paul came up with the idea that we could post them on the web and make them available that way.

SR: What is your synopsis of the book?

JH: My goal was to figure out why Clinton thought he was regulating conduct, not status, and why gay rights advocates were saying that it was a regulation of status, not conduct. I knew they were both wrong, but it took me a long time to figure out why. The policy sets up a meaning system in which the relationship between status and conduct can almost always be operated to the disadvantage of same-sex whatever. Whether it's same-sex conduct at the moment or same-sex identity, it's always going to be functioning in an anti-gay way. It's a piece of artwork, this policy.

What I found was that everybody thinks it's about "don't ask, don't tell, don't pursue." That's not where the action is in the policy. The action in the policy is in the clauses that say that you can be kicked out if you engage in sexual contacts that manifest a "propensity." It's about what shows what, and the Clinton people have made that worse. They say any conduct that manifests a propensity gets you kicked out or gets you into the [discharge] process, and you would have to prove then that you have no propensity ♦ which is really an interesting project to attempt for anyone.

For instance, there's a case that I just heard about in which a woman turned down the heterosexual overture of a fellow service member. He thought that meant that she was a lesbian. She was put through the whole process. She didn't have to have sex with another woman to get kicked out, she didn't have to say she was gay, she just had to create in somebody's mind the reasonable inference that she was gay. And guess how you can do it? Turning down a man's sexual invitation.

I talked to one woman who said that if you have short hair and a black watch and you're a woman, in some units in the military that manifests a propensity.

So one of the things I'm so interested in is that that's so mobile, it can change. You've got to think about it, you've got to watch out, and you've got to think what would my commander be thinking might be conduct that manifests a propensity. So you have to plant your commander's head in your head and let that regulate your behavior. I find that to be a very, very unhealthy kind of control.

It's surprising to me that people would think that it advances the cause of heterosexuals to live under that. So I'm trying to point out to people who think they might benefit from the policy that they probably don't benefit much. They can have their heterosexuality, but now they have it with

paranoia.

SR: What kinds of reactions have you gotten?

JH: Surprise. People think the action is elsewhere.

The book functions in a lot of dimensions. It's a law-reform piece, but it's also a piece of high queer theory, and it's also law and humanities work of the kind that I'm trying to encourage students to do. So there's a lot of different people that I'm engaged with over it. Whether it's going to be controversial or effective in any sense is too early to know.

SR: The Department of Defense recently revised the guidelines.

JH: The Service Members Legal Defense Network was doing kind of inside-the-Beltway politics to get some new regs, and they produced some new regs that I think are a complete shell game. There's a little bit of stuff about training for anti-harassment purposes, but everything about the "don't pursue" stuff was already there. They're repeating themselves, and they announce that it's new.

The most important thing is that the military finally was convinced by a particularly brutal murder that they had an anti-gay harassment problem. I think they at least figured out that people being subject to investigation were exposed, and they weren't doing anything to protect them. But I would say that the policy with its paranoid features produces this. If you're straight and you want to not be in any danger under the policy, the best thing I figure you can do is act really anti-gay. The policy produces this harassment. It's not just a byproduct; it's not something that's coming out of someplace else.

SR: Did they make any recommendations about changing this propensity language?

JH: No, no. In fact, the new directives all act as though this is simply conduct regulation.

SR: In your book, you quoted the president as saying it's not status, it's conduct and people who play by the rules . . .

JH: Isn't that amazing? He just sleepwalked through this whole thing. He just didn't understand. He thought his people were writing regs that said if you engage in same-sex fellatio you'll get kicked out, and at the very same time they were saying if you engage in conduct that manifests a propensity you will be kicked out. He just didn't get it. I think he was completely blindsided by how intense the feelings are around sexuality politics and how strong and well-organized and normal sounding anti-gay talk is.

SR: Do you think he has a better understanding now, or does it matter?

JH: I don't know. I think there are a lot of really well-meaning people who get jobs in government, and they end up administering policy and they think they're trying to make it less draconian. It's very much about how individual units enforce it. There are a lot of people who

think it's OK, it's not bad, as long as they don't flaunt it ♦ it's OK, everybody knows, open secret, no problem. But that's not true. The policy can be tightened up and may very well have all these paranoid effects next door. So I think that there's a lot of unjustified complacency in government about it, which I would bet is Clinton's attitude.

SR: What if there weren't this resulting harassment? What if it were what Clinton thought it was? Would it be good?

JH: I think the goal has to be that there is no differentiation in treatment of same-sex and cross-sex erotic anything, or identities shaped along those lines. I think that you want the least amount of regulation of sexuality you can have and still get your goals. The military has goals. It is a distinctive organization and, for instance, they have stronger reasons to have anti-nepotism rules than a law school. Favoritism might be more destructive in that context. So I don't know what the right level of sexuality in the military is. But my push would be always [to] try to have less. If people want to have sex with each other and the work gets done, fine.

SR: What about this notion of good order?

JH: And unit cohesion. You can induce people to get upset about other people's relationships. It's easy. So I wouldn't want to cut much slack to the argument that it upsets Private Smith to know that Private Jones and Private Williams are attracted to each other. I just am not interested in hearing from him about it. But he can make it look as though you don't have good order because he begins to panic and act upset and won't work with them. We shouldn't feed that fire by overestimating these good order arguments. A policy like "don't ask, don't tell" ensures that we'll never have it in the United States because everybody has to be anti-gay to keep from coming under the scrutiny of the policy. So it's circular. Break the circle would be my answer to that question.

SR: When they were formulating this policy, a study that wasn't widely published that said that having homosexuals in the military . . .

JH: Would be OK. There was a Rand Report. It said that if the top military command came out and said "gay people in the military are no problem, get used to it.," the idea is people in the military are used to obeying orders. That's what they do. And you can give them that order too. If top command was behind a true lift-the-ban kind of change, it would be fine. Rand is a respectable think tank. They went into it with their eyes open, not as a political group making up polemics, so it's a credible conclusion.

Les Aspin [the late former secretary of defense] kept it out of circulation until after he had finished his round of the negotiations, which I thought was very anti-democratic, because if activists had known about it, then people could have developed arguments from it and Congress would have known about it. I think the conclusion is probably right, even in America, in this sexually paranoid culture that we've got.

SR