

TEACHING NOTES FOR THE DON'T ASK, DON'T TELL CASE STUDY

The Don't Ask, Don't Tell case study builds off a series of events that many law students not only remember, but are reminded of every Fall during recruiting season. Upon taking office in 1992, Bill Clinton immediately became embroiled in a heated dispute over eliminating the Department of Defense (DoD) ban on gays serving in the military. Seeking to fulfill an early campaign promise, his initiative met fierce opposition both within and outside the new administration. Today, the issue remains a lively one at law schools both because of the Solomon Amendment, which restricts federal funds to schools that exclude military recruiters, and general opposition to the ban on gays in the military. As a result of publicity surrounding the July, 1999, murder of Private First Class Barry Winchell, the Don't Ask Don't Tell policy became a prominent news item. During the primary, Democratic presidential candidates Gore and Bradley both called for a reassessment of the policy while the Republican candidates either supported the policy or called for tougher measures against gays in the military. President Clinton, meanwhile, has candidly admitted it doesn't work. Ask most students about the Don't Ask, Don't Tell policy, though, and they'll likely respond with a general sense that it provides some measure of protection to homosexuals serving in the armed forces. Following this class, they'll understand far better how, through the process of negotiation, the different layers of administrative process transformed the original policy to one that now has the opposite effect as intended.

Depending on how you frame the case study for your class, it can address three basic questions that go to the heart of administrative law. The case study provides an opportunity:

- * To explore the different means of control over agency action.
These include the stated public policy of the President, Executive Orders, Statutes, Regulations, and Non-legislative rules.
- * To show the dynamic interplay of actors within the administrative process.
The final DoD policy differed substantially from Clinton's stated policy goals at the outset. Who were the institutional players that brought this about? More generally, how is it that the explicit policy of the President (who, after all, directs the Executive Branch) could be transformed into the final Don't Ask, Don't Tell policy?
- * To examine the role of rhetoric in the administrative state.
The Don't Ask, Don't Tell policy was supposed to bring about a shift in focus from status to conduct. Prior to the murder of PFC Winchell, positive rhetoric surrounding the policy had persuaded much of the public that the policy benefited homosexuals in the military. How was this achieved?

Before reviewing how one might structure the class discussion, the following sections review in detail the factual transformation of the Don't Ask, Don't Tell policy. Simply tracing the evolution of the policy into practice provides an important perspective on the administrative law process. The stages of development were: Clinton's public policy declarations, his proposed executive order, congressional legislation, promulgation of non-legislative (i.e. interpretive) rules, and adjudications under the policy. Those interested in learning more about the history of the policy should read Janet Halley's book, *Don't: A Reader's Guide to the Military's Anti-Gay Policy* (Duke University Press 1999).

Public Policy of Executive Branch

It's useful at the outset of the class to flesh out Clinton's initial policy goals in order to compare, later, how the final policy differed in substance. The Department of Defense (DoD) and separate branches of the military have long had a formal policy in place requiring separation for members deemed to be homosexual. Prior to the Clinton Administration, the military's regulatory definition of a homosexual was a person who engages in, attempts to engage in, or intends to engage in homosexual acts. The standard for establishing homosexuality was known as the SAM test (Statement, Act or Marriage). Such a ban was explicitly status-based. If you were shown to be gay, you were discharged.

Clinton's initial policy, as explained in the *Washington Post* article in the reading materials (attachment A), was to end the ban on homosexuals in the armed forces. He proposed a two-pronged strategy. The first goal was to require equal application of the Uniform Code of Military Justice's (UCMJ) criminal sanction against sodomy (attachment B). The UCMJ's prohibition was not, on its face, directed against homosexuals, yet in practice it had not been applied against heterosexuals.¹ Clinton sought to ensure evenhanded application of the sodomy ban, for both homosexuals and heterosexuals. The second objective was to change the military's focus from homosexual status to conduct. The practice of dismissal had been based on status: if you were gay, you were out. Clinton's intent was that homosexuals should be free to remain in the military so long as they did not engage in prohibited conduct. He wanted to shift to a regime based on conduct, where homosexuals would be judged not for who they are, but what they do.

Clinton presented his opposition to the ban on gays in the military in a rhetorically powerful image. With a stroke of his pen he would end this ban by signing an executive order, just as Harry Truman had ended military desegregation almost 50 years earlier. If your class has not already covered executive orders, this provides an opportunity to explain the authority of orders that are binding within Executive branch.

¹ In practice, service members accused of sodomy had made use of the so-called "Queen for a Day" exception, arguing that their behavior was an aberration from their "normal" heterosexual status. Clinton's proposed changes would have eliminated this defense.

Why didn't Clinton simply sign the executive order the same way Truman had? As the readings make clear, he had a real fear of Congressional reversal. Senator Mitchell, the Leader of the Senate, informed Clinton that there were 70 votes to pass legislation statutorily overturning any executive order he signed. This would have resulted in not only a reversal of policy, but a statutorily-based reversal that was veto-proof. To make matters worse, during this same period Clinton faced a threat by the Joint Chiefs of Staff (including the popular General Colin Powell, considered a possible presidential candidate in 1996) to resign. In short, Clinton's option of an executive order was mooted.

As an aside, you may want to ask the class what the Joint Chiefs of Staff are under the APA. Under section 551(1), they are an agency (i.e. an "authority of the Government of the United States" not falling under the (A)-(H) exceptions). Do the students think it is appropriate for an agency's senior staff to threaten resignation in protest of a president's policy? Should Clinton have called their bluff?

Congressional Legislation

Throughout the Don't Ask, Don't Tell controversy, congressional opponents used legislation as a threat to be bargained away. The readings contain excerpts from the Senate floor debate in February, after Clinton had given up on an executive order and was seeking a compromise resolution with Congress. The material is intended to give students a sense of what a floor debate record actually looks like, exposing them to an aspect of legislative history that often is not presented in class. Both Senator Mitchell, on behalf of the Administration, and Senator Dole proposed amendments. How did they differ? The differences are set out below and you may want to ask the class why these differences would matter.

Dole's amendment called for Congressional review of regulations, Executive orders, and directives concerning gays in the military.

Mitchell's called for the Secretary of DoD to conduct a review and report to Congress

Dole required all changes in policy to be carried out as Congressional legislation.

Mitchell had no such requirement.

Clinton signed the Mitchell amendment into law as part of his administration's first piece of major legislation. He also set in place an interim policy, prior to completion of the DoD review, providing Don't Ask protections only for homosexual applicants to the military, *not* service members who had already enlisted and were serving. This is why Colonel Margarethe Cammermeyer (in the *Washington Post* article) advises enlisted soldiers not to tell people they're gay.

Despite silence on Congressional review in the Mitchell amendment and the implicit agreement that any legislation would be based on the recommendations of the DoD review, the Senate Armed Services Committee moved ahead and held an oversight hearing whose results were included in a statute, the National Defense Authorization Act for 1994. This marked the first time a ban on homosexuals in the military had ever been addressed in federal legislation.

The reading materials contain both relevant excerpts from the statute and President Clinton's remarks on what the legislation meant. This presents a valuable opportunity to discuss the role of rhetoric in administrative law. What did Clinton represent the law will do?

- * Soldiers will be judged on basis of conduct, not sexual orientation.
- * No asking about sexual orientation during enlistment.
- * An open statement that a soldier is homosexual creates a rebuttable presumption to engage in prohibited conduct, and the soldier will be given an opportunity to refute the presumption.
- * UCMJ provisions will be enforced evenhandedly toward heterosexuals and homosexuals (the DoD review had, surprisingly to some, recommended an evenhanded enforcement policy toward sodomy).

The statute text, on its face, presents a different picture (as we'll see, the DoD directives implementing the statute create an even greater divergence).

- * In the preamble (section (a)(15)), the law establishes a general policy that presence in the armed forces of a person who demonstrates a propensity or intent to engage in homosexual acts creates an unacceptable risk to military capability.

Contrast this with Clinton's remarks, where he emphasized that gays had served with distinction in the armed services and should continue to serve.

- * Separation from the armed forces is required if a member (as set out in sections (b)(1)-(3)):

- engaged, attempted to engage, or solicited another to engage in homosexual act, unless:

such conduct is departure from usual and customary behavior;

under all circumstances is unlikely to occur;

or shows no propensity or intent to engage in homosexual acts.

together, these are known as the "Queen for a Day" exemption and are, obviously, based on status

- made a statement that he/she is homosexual, or words to that effect, unless accused can demonstrate not a person who engages in or has propensity to engage in homosexual acts.

reliance on “propensity” toward homosexuality was new;

Note that the statute contains no definition of “propensity”

- married or attempted to marry same sex.

on their face, these seem the same as the SAM requirements from the earlier regulations (depending on what “homosexual acts” means)

* The statute defines homosexual act as:

- bodily contact between members of same sex to satisfy sexual desires;

- or, bodily contact a reasonable person would understand to demonstrate intent or propensity to engage in homosexual acts.

As before, note that the statute contains no definition of “propensity” and that its definition is based on a “reasonable

* The statute provides the opportunity for the accused to demonstrate that he or she is not a homosexual, has not committed homosexual acts, or does not have propensity to engage in such acts (section 654(b)(2))

Before, there was no rebuttable presumption in place. If a member engaged in a statement, act, or marriage (known as the SAM test), it led to immediate separation. This rebuttable presumption, on its face, represented an important improvement.

* The “Don’t Ask” protection is not in the statute

In brief, Clinton portrayed the Congressional legislation as largely retaining his goals, but it doesn’t. There are no Don’t Ask protections, no requirement of evenhanded enforcement, the Queen for a Day defense is retained, and homosexual act is so broadly defined that status comes to qualify as conduct (discussed in the next section).

DoD Directive

The DoD Directive is a non-legislative (i.e. interpretive) rule. Asking whether it should have been promulgated through notice-and-comment rulemaking raises two interesting issues for discussion. The first concerns the purpose of the directive, is it creating new duties or simply clarifying the statute? The second is that the APA exceptions to 553 rulemaking procedures – exception for military functions (section 553(a)(1)) and agency management or personnel matters (553(a)(2)) – may obviate the need for rulemaking.

As with many non-legislative rules, the directive sets out the nuts and bolts of implementing the statute. The investigation itself is a three-stage process. If the commander finds the requirements for a reasonable basis for discharge exists, he or she can initiate an inquiry and, depending on the results, can refer the inquiry to the Administrative Separation Board. As the Guidelines for Fact Finding Inquiries in the materials makes clear (Section D), the decisions to initiate a hearing and refer to the Board rest entirely in the commander's discretion. His or her decision cannot be appealed and, as Section E makes clear, the procedures create no substantive or procedural rights.

In undertaking a fact-finding inquiry, the commanding officer must receive credible information that there is a basis for discharge (i.e., that the accused has engaged in a homosexual act, said he or she was homosexual or indicated propensity, married or attempted to marry). Mere suspicion, opinions of others, rumor, or associational activity such as drinking at a gay bar or gay rights parades should not be regarded as credible basis for investigation. But a basis may be found in reports that a reliable person heard or observed a service member engaging in homosexual acts, statement, or marriage (recall the fact pattern at the Rusty Nail), heard or discovered a spoken or written statement that a *reasonable person* would believe was intended to convey propensity or intent to engage in homosexual acts, or observed a non-verbal statement that a *reasonable person* would believe was intended to convey propensity or intent to engage in homosexual acts. To put this in a more concrete context, consider the guidance provided in a Navy Code 34 Memo providing guidance for the Navy's conduct in Don't Ask, Don't Tell investigations. The memo tells investigating officers to:

...be creative. Where the case is premised on a statement alone, the recorder should attempt to find evidence to corroborate the statement and to sustain the presumption flowing logically from the statement. In terms of hearing preparation, the goal of the recorded is to make the strongest case possible... Although a statement alone may constitute a prima facie case, a recorder should present the board with additional evidence demonstrating that a discharge is warranted by the unequivocal desire of the respondent to commit homosexual acts.

It's worth asking the class whether, as Janet Halley argues, this type of standard creates a culture of surveillance, in which members must avoid giving anyone a hint of "conduct that manifests a propensity."

What about homosexual questionnaires? Commanders can't ask or require the accused to reveal if they are homosexual, bisexual, or straight. But upon receipt of credible information of homosexual conduct, commanders *can* ask service members if they engaged in such conduct. The accused can choose not to discuss the matter further, but this hardly rebuts the presumption of homosexuality and, in any case, the commander can then consider other available information (discussed later in the teaching notes). The accused's only defense lies in proving that he or she is *not* a person who engages in, attempts to engage in, or has propensity to engage in homosexual acts.

Is meeting this burden, however, conduct-based (as the new policy is supposed to be) or status-based? The Directive's definitions of "homosexual" and "homosexual act" are largely the same as in the statute – turning on whether the accused or their actions show a propensity or intent to engage in homosexual acts. But isn't this using status as a proxy for conduct? Consider the text in clause H(a).

A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.

Thus does status become conduct. Propensity, the DoD would argue, simply indicates a statistical likelihood that service members will engage in harmful conduct. Besides, the accused is given the opportunity to rebut this presumption, presenting evidence to demonstrate that he or she has no propensity or intent to engage in homosexual acts. But doesn't this rebuttal require proving status, making use of the Queen for a Day exception? As Halley argues, the focus on propensity and placement of the burden of persuasion on the accused creates a heavy handicap, achieving substantive outcomes under guise of a merely technical change in procedure.

Class Discussion

As discussed above, the key to leading the class discussion, and understanding the Don't Ask, Don't Tell story, is the realization that a broad definition of homosexual act, driven by the term "propensity," transforms a conduct-based distinction into a status-based one. I describe below the structure I used to conduct the class (with the assistance of Janet Halley and Stacey Sobel), though clearly there are many ways effectively to present the material.

When passing out the materials a week beforehand, I split the class in two based on last name, with half representing Smith and half Doe. At the beginning of class, I explained that the topic of gays in the military was contentious, with strong feelings on both sides of the issue. The purpose of today's class was not to debate the merits of the substantive policy but, rather, to explore together the dynamic of administrative law and seek to understand how Clinton's initial policy transformed into the current practice.

I selected one person from each group and asked them to give a five minute presentation to their commanding officer counseling why or why not to proceed. I deliberately chose one person who argued to move forward, and one to cease the discharge proceedings. Most of their analysis focused on the Guidelines for Fact Finding Inquiries Into Homosexual Conduct (near the end of the reading materials). Beyond the legal analysis, their presentations brought out clearly that the decision to proceed depends critically on how one reads the facts. An "objective" interpretation of the reasonable person standard was not possible. One could read the facts most favorably for the accused, arguing that no real intent or propensity had been shown but, equally, the facts

could be portrayed as clearly meeting the reasonable person's vision of propensity. In either case, the total discretion of the commander becomes paramount. Following the presentations, I asked the class to show by raising hands how many recommended to proceed. Out of a class of 65 students, only 5 recommended proceeding. This proved a useful fact since, as the discussion unfolded, it became clear that in real life both Doe and Smith would most likely have been subject to discharge hearings.

Before commencing a discussion on the legal issues, I asked the class to set out the governmental bodies involved in the Don't Ask, Don't Tell debate and their likely interests. From the case study text, these would clearly include the President, Congress, DoD, and the Joint Chiefs of Staff. They would also include NGOs (both gay rights groups and veterans groups), the Department of Justice (which likely played an important role in drafting text), and the Courts. I then set out, through asking students, the legal requirements for separation in the statute and directive (described above). This involved close reading of the text to determine how the definitions for propensity, statement, and act, play into the legal test that Captain Delta must use as well as his wide scope of discretion.

The next part of class, led by Janet Halley, recounted the history of the Don't Ask, Don't Tell policy, raising many of the points discussed in the preceding sections. In particular, she focused on a discussion of how the presumption of propensity can be rebutted. What must the refutation show? From the statute, the accused must demonstrate no intent or propensity to engage in homosexual acts. Yet these derive directly from the service member's status. Ironically, as the class discovered for itself, the major change from the original DoD policy was to transform a partly act-based standard into a status-based standard.

Stacey Sobel, senior attorney with the Servicemember's Legal Defense Network, then led a discussion on the implementation of the Don't Ask, Don't Tell policy. The last part of the materials presents the DoD's review of the policy's effectiveness, acknowledging that the number of service members discharged for homosexual conduct since 1994 has increased every year (the numbers had decreased every year from 1982-1994). DoD argues that a large majority of the dismissals are based on homosexual statements, mostly voluntary disclosures, and that over 98% of dismissals under the policy have been honorable, general, or uncharacterized. Concluding that, since discharges for homosexual acts and marriages have declined by 20% over past 3 years and most discharges for homosexual conduct are uncontested, accusations of witch hunts for gays in the military have been unfounded.

Stacey asked the class to contrast the outcomes of a series of her cases. An air force officer testified that he had recently realized that he was homosexual, but had not engaged, and did not intend to engage, in prohibited conduct. He drew a sharp distinction between homosexual "attraction" and "doing it." He was discharged. In another case, a servicemember said that he was a homosexual, that he had "feelings toward men and women" but "sexual feelings" only for women, and had decided not to engage in same-sex conduct because he feared "catching a disease." The Separation Board held

that he had rebutted the presumption and could retain his job. The point in describing these two cases is that, in practice, those accused have only been able to rebut accusations by proving status, not conduct.

Kevin Smith was beaten up outside of a gay bar in Texas and returned to the base with bruises and stitches, but was afraid to tell his command what had happened. Someone passed the story on to his commanding officer, though, and Smith was harassed until he admitted he was gay. He was discharged, his admission considered a voluntary statement. Another client had served in the military for 16 years but never been asked if he was gay. His ex-boyfriend turned over incriminating e-mails to his commanding officer and he is in the process of being discharged without retirement benefits. In the case that most disturbed the class, a Marine Corporal had been processed for discharge because he told a navy psychologist he wondered whether he might be gay and asked her about sexual orientation. The psychologist reported the discussion to his commanding officer and the corporal has since been discharged. Students may be surprised to hear that soldiers do not have the same privileges in military as in civilian life. There are no legal protections for discussion with a chaplain, doctor, parents, family, or former co-workers.

In the most highly publicized case arising from the Don't Ask, Don't Tell policy, Private First Class Barry Winchell was murdered in Kentucky in July, 1999. Winchell's problems arose when his roommate told their sergeant that someone had been dropped off at a gay bar the night before (the roommate had, in fact, dropped off Winchell). Winchell's sergeant then proceeded to ask each member of the platoon what he had done that night. After speaking to everyone, he determined that the person must have been PFC Winchell. The sergeant reported this to his first sergeant, but was told he should not proceed further. Nonetheless, as the rumors persisted, the sergeant asked Winchell if he was gay. Winchell, fearing for his safety, lied and said "no." The rumors alone proved damaging, however, and, as the later court martial established, Winchell was harassed on a daily basis for four months prior to his murder.

In addressing the DoD Review Panel's statistics, Stacey Sobel stated that three to four people get discharged every day under the Don't Ask, Don't Tell policy, an 86% increase over the past five years. There were 1,149 discharges in 1998 alone. Because the policy creates no procedural or substantive rights, and therefore no remedies, violations of the policy have also increased. To date, no one has ever been held accountable for violations of the policy.

Sobel argued that voluntary statement discharges have increased because gay service members are being pursued and placed in a Catch-22. If you admit you're gay, you're discharged for a statement. If you lie, you've violated the military code of conduct.

The end of the class addressed what steps could be taken to bring the policy closer into line with the original Don't Ask, Don't Tell goals. As background, it might be useful to tell the class that the policy has been upheld in five circuit court decisions based

on equal protection and first amendment arguments, declaring that the policy is based on conduct, not status. The Supreme Court has not granted certiorari on any of the cases. In the recent Abel case, after the ACLU lost at the appellate level it chose not to ask for cert. The class may also be interested to hear that that United Kingdom recently lost a decision before the European Court of Human Rights, which stated that the ban on gays in the British military violated the European Convention on Human Rights. To date, the only NATO countries that have limiting provisions on service by homosexuals are the United States and Turkey (Iran and Iraq also have similar restrictions).

Don't Ask, Don't Tell is a moving target. Gore, Bradley, and both Clintons have criticized its current state, but not offered solutions. Assuming the statutory basis for Don't Ask, Don't Tell stays on the books in the near term, changes will need to come about either through regulation or non-legislative rules that reform its implementation. The extent to which these actions will meaningfully change what is, at its core, a discretionary decision, however, remains to be seen. Stacey Sobel argues that the best reform would be for the military simply to follow its policy, since at present they do ask, pursue and harass. The recommendations at the end of the DoD review (attachment G) provide a basis for discussion, but the Servicemembers Legal Defense Network, among others, has called these wholly inadequate. For recent developments, check out the websites:

www.sldn.org <Servicemembers Legal Defense Network>
dont.stanford.edu <the website for Janet Halley's book>

The book website also contains many more relevant documents in case you wish to increase the primary documents available to the students for their analysis. If you have further questions about teaching the case, please e-mail me at salzman@american.edu.