5-20-2014

Federal Judge Turns Back Hunt for Gays in the Department of Justice

Joanna L. Grossman
Maurice A. Deane School of Law at Hofstra University

Verdict

May 20, 2014
Joanna L. Grossman

Federal Judge Turns Back Hunt for Gays in the Department of Justice

> "*The Department of Justice is increasingly home to a bevy of leftist activists pursuing narrow ideological agendas at the expense of the public interest. And Justice officials want to keep this all a secret—as shown by the fact that we had to file a FOIA lawsuit to get basic information about the Attorney General's collusion with homosexual activists/government employees.*"

If someone told you these words were spoken in the 1950s, would you be surprised? Perhaps not, since a powerful, if understudied, aspect of McCarthyism was an active and largely successful effort to purge gays from federal civil service jobs. But what if you were told they were uttered in defense of a lawsuit filed *in the year 2012* by a conservative "watchdog" group that apparently napped through the civil rights movement, the end of the cold war, and the gay rights revolution? Now that might surprise you.

This **statement was made (http://www.judicialwatch.org/blog/tag/department-of-justice/)** by Tom Fitton, the president of Judicial Watch, in a press release to announce that his group had filed a Freedom of Information Act (FOIA) lawsuit to compel the Department of Justice to release "all records concerning, referring to, or relating to the National LGBT Bar Association's 2012 Lavender Law Conference & Career Fair." That Attorney General Eric Holder spoke at this LGBT-focused event was sufficient trigger for Judicial Watch's concern that DOJ has been taken over by homosexuals.

Although DOJ officials did release over one hundred pages of documents in response to this request, it withheld others and redacted several to avoid releasing personal or identifying information about individual employees. Judicial Watch sued over the withheld and redacted documents. In **a recent ruling (http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2013cv00949/160643/18)**, federal district judge Ellen Segal Huvelle sided with DOJ on grounds that the group's interest in obtaining the information requested was insufficient to outweigh the invasion of federal employees' privacy. Her ruling is clearly correct, but the very fact that this request was filed is a good reason to reconsider the history that we ought to avoid repeating.

Purging Gays from the Federal Government

The 1950s was a socially and sexually restrained time and being open about one's sexual orientation was not a practical option for gay men and women. Even the American Civil Liberties Union (ACLU), an ardent defender

of civil rights, distanced itself from any notion of gay rights, issuing a policy statement in 1957 that sodomy bans were constitutional if "deemed socially necessary or beneficial" by state and local governments. Challenges to such laws were "beyond the province of the Union."

The federal government, meanwhile, conducted a systematic purge in the civil service. Beginning in 1947, the State Department began its campaign against both communists and gays. Hundreds of cases were begun and many led to firings. The effort spread to other federal agencies. (Excellent books on this topic include: We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics (Mark Blasius & Shane Phelan eds., 1997); David K. Johnson, The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government (2004); Margot Canaday, The Straight State: Sexuality and Citizenship in Twentieth-Century America (2004)).

In 1950, the Senate **issued a resolution (https://ecf.cand.uscourts.gov/cand/09cv2292/evidence/PX2337.pdf)** ordering a subcommittee to investigate the employment of gays and "other sex perverts" in the federal government. Later that year, the subcommittee issued an interim report in which it tried to document the "extent of the employment of homosexuals and other sex perverts in Government," the "reasons why their employment in the Government is undesirable," and the "efficacy of the methods used in dealing with the problem."

The report did not concern itself with "so-called latent sex perverts, namely, those persons who knowingly or unknowingly have tendencies or inclinations toward homosexuality or other types of sex perversion, but who, by the exercise of self-restraint or for other reasons do not indulge in overt acts of perversion." It was only the "overt" homosexuals who presented a problem. And those were deemed "generally unsuitable" for employment, as well as obvious security risks. Homosexual activity was considered "so contrary to the normal accepted standards of social behavior that persons who engage in such activity are looked upon as outcasts by society generally."

Moreover, because homosexual acts were both criminal and immoral, these individuals would be obvious targets of blackmailers; threats to "out" gay men and women could be used to coerce them to give out classified information. This would be all the easier, because gays had weak "moral fiber" and because "perverts" tended to "congregate at the same restaurants, night clubs, and bars," where any spy could find them and develop a relationship. Prevention of employment in the first instance, the report concluded, was the key to eradicating homosexuality from the civil service system.

In the three years prior to the issuance of the report, 1700 applicants were denied civil service jobs because of a history of homosexuality under a federal regulation providing that a civil service employee could be removed for "infamous . . . , immoral, or notoriously disgraceful conduct" and for "any . . . other disqualification which makes the individual unfit for the service." On the other hand, the report noted, most federal agencies had taken insufficient steps to fire employees whose homosexuality was later discovered and were reluctant to document the problem in a way that would prevent these workers from moving to another agency. Agency heads were encouraged to get their heads out of the sand and take appropriate steps to get rid of people for whom there was "no place in the United States Government." Dwight Eisenhower's campaign for the Presidency included a slogan, "Let's Clean House," and a promise to rid the federal government of both communism and sexual perversion.

The federal government waged war against gay people for two decades. It began to lose steam with a 1969 court ruling, ***Norton v. Macy*** **(http://law.justia.com/cases/federal/appellate-courts/F2/417/1161/190082/)**, in which a federal appellate court held that "the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity." The case overturned the dismissal of a budget analyst for NASA, who had made an off-duty homosexual advance in a private car. At a minimum, the court reasoned, the civil service commission would have to show a direct relationship between his conduct and the efficiency of the service. Moral condemnation or "transitory institutional discomfiture" by NASA because "one of its own was caught *in flagrante delictu*" was not enough to justify the firing.

That same week was the Stonewall Riot, an event that is widely, albeit inaccurately, credited with signaling the

start of the gay rights movement. Almost twenty years earlier, in 1950, the Mattachine Society had formed in response to the federal government's purge of gays. Its mission was to educate people about homosexuality—which it described as "not a virtue, but rather a handicap"—and minimize persecution. It launched an attack on the anti-gay efforts of the 1950s. In 1975, the Civil Service Commission regulations were officially changed to eliminate "immoral conduct," the prong used to purge gays and lesbians, as a bar to employment with the federal government. In 1998, President Clinton issued Executive Order 13087, which prohibits discrimination based on sexual orientation in the civilian federal workforce.

The federal government continued to openly discriminate against gays and lesbians in military—as it had done for most of American history—until 1993, when President Bill Clinton issued the *Don't Ask, Don't Tell* policy. Under that policy, gays and lesbians could not be excluded or dismissed from the military unless they engaged in homosexual conduct. Although this policy was supposed to make it easier for gays and lesbians to engage in military service, 14,500 service members were dismissed under it. The policy was abolished in December 2010, during President Obama's first term in office and replaced with a policy of non-discrimination, parallel to the one governing federal civil service.

Meanwhile, society moved at a much faster pace than the federal government to embrace gay rights, including, in the last ten years, the rapid-fire adoption of laws allowing marriage in over one-third of the states. Gay and lesbian individuals have gained legal protections against discrimination in almost every arena—employment, education, and family life, to take the most obvious examples. The protections are not comprehensive enough, however. For decades, Congress has debated **a federal anti-discrimination law (http://verdict.justia.com/2013/11/12/enda-rainbow-workforce)** to protect LGBT employees, but it has yet to become law. The landscape today would have been unimaginable to those 1950s senators.

Yet, in 2012, Judicial Watch filed a FOIA petition to smoke out whether DOJ might have been taken over by homosexuals.

The Ruling in *Judicial Watch v. United States Department of Justice*

Judicial Watch's request was filed under FOIA, a federal law that took effect in 1967. FOIA provides that any person has a right, enforceable in court, to obtain access to federal agency records, except to the extent that such records (or portions of them) are protected from public disclosure by one of the enumerated exemptions.

The request sought all documents related to Holder's speech at the Lavender Law conference and information that might lead them to identify gay employees at DOJ. DOJ turned over many documents, but claimed exemptions for, among other things, documents "discussing the drafting of the Attorney General's speech;" "the e-mail address of the Attorney General;" "the cell phone number of third parties associated with an LGBT organization;" and e-mails "among Department employees, including personal commentary and discussions among colleagues inferring the sexual orientation of some Department employees who would be involved at the conference."

Judicial Watch did not challenge all of DOJ's claimed exemptions, but did argue in the lawsuit that it was entitled to the "release of all other portions of these e-mails in which DOJ employees discuss the sexual orientation of other employees." DOJ moved for summary judgment on the grounds that those documents were properly withheld pursuant to a "deliberate process" exemption, which allows the government to hold back materials that would show various positions it considered before issuing a statement or regulation or other final document. It also argued that parts of the withheld documents were properly withheld because they "allude[] to the sexual preference of a very small number of individuals whose identities are readily identifiable by the specific context of the deliberations, and the redaction of names and/or their job titles would not protect their identities." Releasing the full, unredacted documents would, therefore, unjustifiably invade the privacy of those individuals.

In the ruling, Judge Huvelle agreed that the deliberate process privilege was correctly invoked by DOJ with respect to the documents it withheld or redacted. This exemption is necessary to avoid chilling free and open discussion within an agency while it debates its positions. This exemption extends to discussions that precede an official speech by the Attorney General. Judicial Watch suggested that DOJ had not properly claimed this

exemption, but the court disagreed.

Moreover, the court ruled that DOJ was independently justified in withholding and redacting in the manner it did on grounds of privacy. One of the enumerated exemptions in FOIA protects against the disclosure of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." This exemption has been interpreted broadly, the court noted, to "exempt not just files, but also bits of personal information such as names and addresses, the release of which would 'create[] a palpable threat to privacy.'" Applying this exemption requires the court to weigh the public's interest in obtaining the information against the privacy interests of those affected by disclosure.

Here, it was no contest. The court concluded, after an *in camera* review of certain documents, that the identity of individual employees whose sexual orientation was discussed would be readily discernible based on context clues. It is proper, the judge wrote, to allow the withholding of documents that create "a palpable threat to privacy." This is especially so when balanced against "at most, the relatively inconsequential (if not non-existent) interests identified" in the records request.

Conclusion

This lawsuit harkens back to a dark time in the federal government, when gay and lesbian employees faced dire threats to their livelihood. Then, the federal government was the instigator—both declaring them unfit and then hunting them down like dogs. But at least it found the error of its ways and, along with society, embraced non-discrimination norms and policies that made a more inclusive work force possible. Judicial Watch might have us return to those days, but Judge Huvelle was right to turn them away.

Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of Inside the Castle: Law and the Family in 20th Century America (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of Gender Equality: Dimensions of Women's Equal Citizenship (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.
Follow @JoannaGrossman

Posted In Government, Privacy

Access this column at http://j.st/ZQJY
