



Military Law: United States

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The United States military is governed by a set of laws, distinct from civilian law, that is known as the Uniform Code of Military Justice (UCMJ). Adopted in 1950, these laws revised the Articles of War that the United States military had officially approved during World War I.

The U. S. military inherited the Articles of War directly from the British Articles of War, which had guided the U. S. military since the Revolutionary War. Sodomy was not formally criminalized in U. S. military law until the Articles of War went into effect in 1917.

Similar to the Articles of War, the UCMJ created a standard body of law that governs all service members in the United States military. Not only did the UCMJ standardize military codes of conduct and stipulate criminal acts and behavior, but it also consolidated the disparate policies and practices regarding the treatment of homosexuals and homosexual activity in the 1940s.

Attempting to Achieve Consistency

Prior to World War II, the U. S. military often applied the prohibitions against homosexual activity inconsistently. Even though the Articles of War prohibited sodomy, very few men were court-martialed for committing it; rather the military more often discharged men accused of sodomy through administrative proceedings, forced them to resign their commissions, or allowed them to continue serving if a conviction was unlikely.

During World War II, military officials intensely debated the regulations regarding homosexual activity in an attempt to refine policies and create greater consistency. For example, the army revised its regulations on homosexuality twenty-four times between 1941 and 1945. It revised them an additional seventeen times between 1945 and 1950, when the UCMJ went into effect.

During these debates, officials struggled to maintain the strict ban on homosexuality laid out in Article 93 of the Articles of War, which criminalized homosexual conduct, but also to allow for some flexibility in individual cases. To this end, the military requested the Committee on Neuropsychiatry of the National Research Council to advise it on how it should treat homosexual service members.

Classifying Homosexuals

The council responded by classifying homosexuals into three categories: the true or confirmed homosexual, who was fixed in his sexual orientation; the homosexual who committed criminal acts in addition to sodomy; and the "casual" homosexual, who engaged in homosexuality for any number of reasons, including immaturity, curiosity, or inebriation.

In spite of the committee's attempts to carefully codify homosexuality, its official typology created additional confusion that plagued the military for decades, especially with regard to the "casual"

homosexual.

Uncertain if it could rehabilitate such individuals, the military wrestled for years with the question of what to do with service members who engaged in homosexual activity infrequently or only once, but did not identify as gay or lesbian. It often responded by unofficially allowing such individuals to pass unnoticed, while cracking down on the more visibly gay- or lesbian-identified personnel.

The UCMJ Definition of Sodomy

When the military codified the UCMJ in 1950, it broadened the definition of sodomy to include oral sex, sex between women, and "unnatural" sex between men and women.

The sodomy statute, Article 125, stipulates, "Any person who is subject to this charter 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." It also states, "Any person found guilty of sodomy shall be punished as a court-martial may direct."

Discriminatory Enforcement

Yet the UCMJ is not applied equally to all service members in spite of its comprehensive language. In its study of the sodomy statute, Servicemembers Legal Defense Network analyzed court-martial appeal records in the United States military from January 2000 to June 2001 to determine whether sodomy statutes target gay service members. It found that fewer than half of the heterosexual sexual misconduct cases involved sodomy as the primary charge, whereas in every case of sexual misconduct involving homosexual acts it was the principal charge.

According to SLDN, when sodomy occurs between consensual heterosexual adults--and it is roughly estimated that at least 75% of heterosexual personnel engage in some form of sodomy as defined by the UCMJ--it goes largely unnoticed and unpunished. Yet this is not the case for homosexual personnel, who are often prosecuted solely for engaging in sodomy. This double standard illustrates the arbitrary and discriminatory nature of the United States military law as it is applied against homosexual personnel.

The United States Supreme Court's recent invalidation of sodomy laws as unconstitutional in the landmark ruling *Lawrence v. Texas* (2003) will almost certainly also apply to the UCMJ's prohibition of sodomy.

Other Policies

As damaging as Article 125 has been and can be to the careers of gay and lesbian service members, it is not the primary mechanism that the military uses to maintain its ban on homosexual personnel. Since 1950 the Department of Defense has continued to supplement military law with a series of memorandums, directives, and policies that reinforce its anti-gay stance.

For example, in 1982, the Department of Defense issued Directive 1332.4, which stated, "Homosexuality is incompatible with military service." This directive elaborated on Article 125 and subsequent policies that each branch had implemented during the 1960s and 1970s. Because personnel policies regarding homosexuality were applied unevenly within each branch and across the branches, the Department of Defense had faced a number of court challenges. The courts responded by stipulating that it must create and enforce a consistent policy. The result was a policy that expressly prohibited both homosexuals and homosexual activity in the military.

"Don't Ask, Don't Tell"

Acivilian law passed by the United States Congress, commonly known as "Don't Ask, Don't Tell," was the most

powerful restraint on gay men and lesbians in the military from its passage in 1993 until its repeal in 2011. When it was passed, it continued the long-standing United States military tradition of prohibiting homosexuality, even as it attempted to appear more tolerant. The reality was that as of 2000, the annual number of gay and lesbian discharges rose to roughly 1200, considerably more than was the case before the adoption of "Don't Ask, Don't Tell."

Even though "Don't Ask, Don't Tell" was the law under which most gay men and lesbians were expelled from the military in the years from 1993 until 2011, the military also used Article 125 the law against sodomy--to justify the policies and procedures that banned gay and lesbian service members. Yet as Margot Canaday concluded in her study of the impact of such laws on policies toward homosexuals, "The notion that sodomy statutes somehow support the ban on homosexual personnel in the military is erroneous."

Using three case studies, including the Australian Defense Force, the South African Defense Forces, and the Miami Beach Police Department, she found that these organization successfully lifted bans on homosexual personnel while sodomy laws remained in existence.

Critiques of the Policy

These recent studies suggest that military laws with regard to homosexuality were outdated relics that persisted because they bolstered the anti-gay prejudice that military leaders deemed necessary for the military to operate effectively.

The policies that excluded homosexuals from service in the military have been criticized on a number of grounds. Rather than preserving group cohesion, the policy, critics say, actually promoted divisiveness. Moreover, it proved to be an expensive policy that promoted a hostile working environment, wasted crucial resources on unnecessary investigations, and forced many qualified service members to leave the military, depriving the services of many needed talents.

In spite of the laws and regulations prohibiting homosexual conduct and homosexual personnel, gay men and lesbians continued to serve in the U. S. military, as they always have done, often with distinction. As many scholars and critics of those laws and regulations have argued, the lives of gay and lesbian military personnel and the military itself are likely to be decidedly improved now that the military has abandoned the outmoded policies and committed itself to promote tolerance in its ranks.

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