

GUILTY AS CHARGED†

*Jay Hatheway**

Article 125, Uniform Code of Military Justice

- (a) Any person subject to this chapter 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.
- (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

The following essay relates the first constitutional challenge to the statutory prohibition of homosexuality in the Armed Forces. Specifically, this is the story of my 1975 court martial during which time I was represented by the Lawyers Military Defense Committee and the American Civil Liberties Union (“ACLU”). Our goal was to overturn Article 125, the sodomy statute of the Uniform Code of Military Justice. Despite the failure of the ACLU to persuade the United States Supreme Court to reject the sodomy statute, precedent setting arguments were created which influenced subsequent attempts to refute the ban on homosexuals and homosexual behavior.

The time period during which the trial and appeals took place witnessed the confluence of several factors that laid the foundation for this legal assault, and provided a timely opportunity for an end to the discrimination against gays and lesbians in uniform. The anti-war, femi-

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nist, and civil rights movements of the late sixties and early seventies seriously challenged the status quo, and gave rise to a new political culture of personal empowerment among the politically marginalized. Inspired by the success of these movements, homosexual Americans began to organize in the aftermath of the June 28, 1969 police raid on the Stonewall Inn in Greenwich Village, New York, and in the process gave birth to the gay rights movement.¹ Subsequent to the organizing efforts of thousands of gays and lesbians, the American Civil Liberties Union threw its considerable weight behind efforts to repeal sodomy statutes nationwide.

Some of the new organizations, such as the Gay Liberation Front, were considered radical, and were inspired by a Marxist philosophy that condemned all oppression as a consequence of capitalism. Not only homosexuals, but also people of color, women, and workers were to be gathered up in a vast movement of national liberation. Other organizations, such as the Gay Activists Alliance, were less ideological, and were single-mindedly concerned with the plight of the American homosexual. Common to both, however, was a realization that gays and lesbians constituted an oppressed minority whose civil rights had been abrogated by virtue of their status as homosexuals. The mission of the new gay movement was to secure those civil rights in a manner consistent with the claims of women and African Americans. The claims of American homosexuals were thus to be folded into the much larger national civil rights movement, even as this larger movement initially rejected those claims. Nevertheless, the gay rights movement was able to galvanize thousands, and as the 1970s progressed, gays became more politically visible. Together with anti-war protesters, civil rights activists, and feminists, gays and lesbians agitated and made their views clear.²

The armed forces were not immune from these developments, and by 1975, the Army was in turmoil. African American, female, and homosexual soldiers were recalcitrant, and began to argue for equal treatment consistent with the demands of their civilian counterparts. Furthermore, the collapse of the American war effort in Vietnam saw a general disintegration of morale and discipline that threatened the very essence of military preparedness as then understood. Thousands of GIs

1. See generally DONN TEAL, *THE GAY MILITANTS: HOW GAY LIBERATION BEGAN IN AMERICA, 1969-1971* (St. Martin's Press 1971).

2. See generally JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (Univ. of Chicago Press 1983). DUDLEY CLENDINEN & ADAM NAGOURNEY, *OUT FOR GOOD: THE STRUGGLE TO BUILD A GAY RIGHTS MOVEMENT IN AMERICA* (Simon & Schuster 1999).

espoused anti-war positions, and publicly questioned America's role in the world. In an effort to reestablish its authority, the military became obdurate. While some concessions were made on the basis of race and gender with respect to rank and occupational specialty, anti war protesters were quickly discharged, and gay soldiers were subjected to official opprobrium and horrendous misconduct by those in command.

From the command's point of view, homosexuality was an insidious perversion, which destroyed unit cohesion and undermined military discipline. This attitude mirrored that of society at large, and the military felt it had an obligation to treat homosexuals accordingly. Homosexuality would not be officially tolerated under any conditions, and soldiers considered perverted were punished, usually by humiliation, physical assault, and an automatic dishonorable discharge. Unlike skin color or gender, the military believed homosexuality was a very sick choice made by a very disturbed mind. Mental illness was not conducive to unit cohesiveness, and had to be eliminated. Because the issue dealt with the sensitive subject of sexual desire, it was all the more serious.

It is within this context that lesbian and gay soldiers reached out to the civilian gay rights movement for help, and the issue of gays in the military was born. In March, 1975, Air Force Tech Sergeant Len Matlovich informed the Secretary of the Air Force that he was gay, and five months later after I had been accused of homosexual sodomy, the two of us joined forces under the direction of American Civil Liberties Union and developed a dual legal challenge to the prohibition on homosexuality which if successful, would have allowed lesbians and gays the right to serve, and do so with their sexuality intact. Whereas Len was the first to challenge the regulations, which banned homosexual soldiers from active duty, I was the first to attempt to have the federal statute, which proscribed homosexual sexual behavior overturned.³ As the first constitutional challenge to the military's sodomy statute, my court martial thus provides an insight into the original arguments, which were employed by the ACLU while simultaneously shedding light upon the Army's counter positions.

The ACLU relied upon two essential arguments in support of their assumption that the sodomy statute was unconstitutional as applied to gays and lesbians. First, selective prosecution of only homosexual sodomy under Article 125 was impermissible, and second, prohibitions against homosexual sodomy violate the Establishment Clause of the

3. See generally RANDY SHILTS, *CONDUCT UNBECOMING: GAYS & LESBIANS IN THE U.S. MILITARY*, (St. Martin's Press 1993).

First Amendment. The Secretary of the Army argued one primary position, namely that the military was a special community with the right to regulate the behavior of its members.

According to the ACLU,

Hatheway's allegations at court-martial in support of his motion to dismiss his criminal charge raised two impermissible classifications upon which the decision to court-martial him was based. The first was the homosexual, as opposed to the heterosexual, nature of the act. The second was his gender. The Court of Appeals held that selective prosecution of homosexual acts under Article 125 . . . bore a substantial relationship to the military's important interests in prohibiting acts of homosexual sodomy.

This holding is [erroneous]. First, prosecutorial discrimination by military officials is in direct conflict with the military's express needs for strict order and discipline. Such selective use of the criminal law, which systematically allows certain forms of proscribed conduct to go unpunished, does not further the concept of order To the contrary, it enhances in the minds of service members the idea that the rule of law is what a particular convening authority at a given time chooses it to be.

Second, where prosecutorial discrimination occurs in the enforcement of the [UCMJ], the practice strikes at the heart of civilian control of the military. . . . The . . . convening authority, who selectively enforces Article 125 against only homosexual sodomy, in effect thwarts the will of Congress by punishing only homosexual acts while intentionally allowing heterosexual acts of sodomy to go unpunished.

Third, the very nature of the military weighs in favor of heightened judicial scrutiny in the area of selective enforcement of the criminal law by military officials. In the civilian community, prosecutorial abuses are checked to some extent by the democratic process. Service members, however, do not possess the right to vote their convening authority out of office. Thus, judicial scrutiny is the only effective means of insuring that enforcement of the criminal law by military officials does not become an arbitrary sword in the hands of a court-martial convening authority for use against certain troops.⁴

4. Petitioner's Brief at 12-16, *Hatheway v. Secretary of the Army*, 454 U.S. 864 (1981) (No.

A second argument dealt with the Establishment Clause,

As demonstrated by one of the witnesses at Hatheway's court-martial, prohibitions against sodomy have a demonstrable Judeo-Christian history and purpose. The Court of Appeals found that sodomy laws, such as Article 125, have not undergone substantial revisions since their inception and that they have not been advocated by secular groups. Nevertheless, the Court found that the Army's interest in 'preventing disruptive conduct' provides a secular purpose and effect for the enforcement of the sodomy prohibitions of Article 125.

As this [Supreme] Court stated in 'Committee for Public Education and Religious Liberty v. Nyquist,' to be valid under the Establishment Clause, a law must pass a three-prong test: (1) it must reflect a clearly secular purpose; (2) its primary effect must be to neither advance nor inhibit religion; and (3) it must avoid excessive government entanglement with religion.

Article 125 prohibits sodomitic acts per se. It is important to notice that the broad prohibitions of Article 125 require only proof of the sexual act itself and not proof that the act under the circumstances did injury to the secular interest of the military. Thus, enforcement of the criminal prohibitions of Article 125 without requiring proof of injury to the legitimate interest of the military entangles the government with the advancement of religious orthodoxy because it involves it in criminal prosecution regardless of whether the acts in question did injury to a governmental interest. [Therefore] the court-martial of homosexual acts under Article 125 in which no proof that the sexual acts did injury to the interest of the military is required, is an unnecessary entanglement with the furtherance of the Judeo-Christian concept of sin, and therefore violative of the Establishment Clause.⁵

The Secretary of the Army had the support of the United States Court of Appeals, Ninth Circuit, which argued in favor of homosexual prohibitions due to their disruptive nature,

The government has a compelling interest in maintaining a strong military force. Underlying our holding in *Beller[v. Middendorf]* was the judgment that those who engage in homosexual acts severely compro-

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5. *Id.* at 21-25.

mise the government's ability to maintain such a force. That judgment was the basis for our holding that the Navy's policy of discharging all such persons was constitutionally permissible.

The convening authority may select those cases for referral to a court-martial, which involve violations of the UCMJ, which are most likely to undermine discipline and order in the military. In light of *Beller*, we hold that selection of cases involving homosexual acts for Article 125 prosecutions bears a substantial relationship to an important governmental interest.⁶

Yet more was at stake than legal principles. On a personal level, this is the story of how I was treated by members of my unit and by the Judge Advocate General. I was humiliated before my peers, physically and psychologically abused, isolated, and driven at one time to consider suicide as the only way out. While we could not prove official misconduct, the Army initiated a campaign of deception from the moment the incident was reported that culminated in false accusations against which I was defenseless. Because the Army suspected I was gay, they used that insight one week before I was to have been separated, and brought sodomy charges against me for behavior, which they believed I, as a gay person, must have engaged in. Why else, they argued, would I have been alone with a GI with my pants down? Thus to a very real extent, the trial was as much about being gay as acting gay, and how the armed forces conflated the two in their accusation of homosexual sodomy.

I suppose that I should not have been surprised. I was, after all, a commissioned Green Beret intelligence officer in charge of a myriad of secrets so sensitive that only a handful of soldiers in Europe had access to them. Any hint of scandal was sufficient to drive the command into fits of rage, which indeed, is precisely what occurred. It has been almost thirty years since my trial, but the sting of the Army's vituperation is still felt.

As far as I know, I have always been gay, and so it was in spite of this awareness that I accepted an Army ROTC four-year scholarship to Claremont McKenna College in 1967. Unconcerned about the consequences to me if my sexual orientation were discovered, I accepted my commission in the spring of 1971, and with little fanfare, I eventually made my way through jump school, the Defense Language Institute, Monterey, California, and Special Forces training at Ft. Bragg, North

6. *Hatheway vs. Secretary of Army*, 641 F.2d 1376, 1382 (1981).

Carolina. In November 1972, I arrived at Flint Kaserne, Bad Tolz, the Federal Republic, home to the 10th Special Forces Group (Airborne), Europe. I was immediately assigned to an A-team as executive officer, and for the next several months did what was expected of me as a team member. The following year, I was fortuitously assigned to the Army's language school in Oberammergau where I was immersed in German, and where, to my great delight, I became involved in my first gay relationship with a local man who graciously taught me how to speak, drink, and eat like a true Bavarian. After some several months of what I can only describe as bliss, I returned to my unit, and was assigned the relatively important position of battalion S2, Intelligence.

Unlike the A-Teams, which were constantly out in the field, the S2 was literally welded to the headquarters battalion, permanently stationed in the Kaserne proper. As such, I had very little opportunity to travel, and thus found myself interacting with headquarters staff, who, it turned out were incredibly nosy. For my part, I began quietly dating first one, then another, ignorant of the fact that I was being watched by any number of silent eyes as I went about my illicit business. By 1974, the post commander had been apprised that I was not quite like all the other men, and indeed, was in all probably a "queer," as was later explained to me when I was told I was under investigation. Shaken, but determined to keep my secret a secret, I simply lay low for the duration of the investigation, which as it turned out, found the allegations to be without merit. With lukewarm apologies and a stern warning that faggots would not be tolerated, I returned to my job even as most people let me know that I really was queer after all. Undaunted, I went about my business, and once again secretly began to date. Eventually, I was able to establish a fairly stable relationship that continued until my partner left the service and returned to the States.

By 1975, I was getting anxious to leave, and filed early separation papers. My initial tour of duty was supposed to have been for five years, but it was increasing apparent that most of my fellow soldiers just assumed I was gay if only because I didn't date and was known to be in the company of but one soldier, himself frequently the butt of crude homophobic jokes. By late spring, my early separation had been approved, and I quietly prepared to make my exit, set for early August. Time passed quickly and uneventfully, such that by early August I had completely cleared post and was waiting for my departure on the 11. On the 7th, I found myself in line at our mailroom for my final pickup, when a soldier behind me struck up a conversation about my being a "short-timer." After a few pleasantries, he invited me up to his room for a go-

ing-way drink, which I quickly accepted. Later that afternoon we found ourselves enjoying each other's company as well as his scotch, when literally out of the blue he began to make sexual overtures. I was both humored and horrified, but in any event, I refused his advances, upon which he clumsily pulled my pants down against my objections. Just then, his roommate entered the room, blanched, and left as fast as he had come in. From that moment, my life became a nightmare.

After adjusting myself, I too, left and returned to my apartment, hoping that all of this would just go away. Although anxious, I went about finalizing my departure, and then on the 10th, I received a phone call from the commander's office in which the adjutant informed me that the Colonel wanted to see me ASAP. I jumped into my last pair of fatigues, walked over to the post headquarters, and after some twenty minutes, entered the commander's office, only to find him surrounded by his senior officers. With virtually no warning, the commander then proceeded to read me my rights, and then forthwith accused me of having committed homosexual sodomy, a violation of Article 125, with another soldier. I was stunned. As I was to discover later, the roommate who had so suddenly entered the room assumed that I had been engaged in sex acts, and had consequently told the command.

For the next six months, my life was a living hell. Unwilling to defend me because of the nature of the charges, the Judge Advocate General's office got me in contact with a American civilian attorney out of Stuttgart who represented the ACLU. Thus began our long legal ordeal that rocked my post and contributed to my humiliation by members of not only my unit, but from JAG as well. Because the post was small, rumors spread fast, and the rumor that the delay in my departure was due to a sodomy investigation was too rich to disregard. Soon the entire command knew what was up, and I gradually became the recipient of crude remarks and verbal abuse, culminating with a physical attack by one officer in my own apartment. In order to avoid this sort of thing, I spent as much time as I could with my attorney in Stuttgart. Yet in spite of this strategy, the military was relentless in its attempts of wear me down. I was physically shadowed wherever I went and our phones were tapped. When the person who had made advances against me in his room was shown to be lying to save his skin, the military granted him immunity from prosecution, and order him to tell the "truth." And when it looked as though that tactic would fail, the military actually found an ex-GI in the States who agreed to testify that I was a member of a homosexual drug ring, and that I was involved in the illicit sales of heroin. Not content to stop here, I was also ordered to undergo neuro-

psychological testing during which time more than 50 small pins were inserted under my skin in a ring around my head, resulting in much bleeding down my face and neck. Not surprisingly, the test only proved that I was sane, and psychologically fit, a finding that was not welcome by the authorities. In a move reminiscent of the government's actions against Daniel Ellsberg, the office in which my psychological report was stored was broken into, the report lifted, and re-written by an anonymous agent who then returned it to its proper location. When apprised of this, the military judge, while astonished, did nothing.

The trial itself began in November 1975. The first order of business was the voir dire, and it did not go well for us. The judge was slow to allow my attorney to ask specific questions of each of the jurors. He was, he stated, afraid that we might not be able to impanel a jury if we kept up with our line of questioning, which focused around the issues of discrimination against homosexuals and predispositions in sentencing. We were able to discover, however, that the jurors frequently referred to gays as queers or homos, and that there was a tendency to know what type of a sentence I would receive even before the trial had begun. Although the former was of no concern, the latter resulted in a juror being replaced, even as the rationale was explained before the entire jury. After that, no juror indicated he was inflexible as to sentencing.

The trial essentially revolved around whether or not the person I had been drinking with had lied, but in spite of our ability to demonstrate over and over again the scope and nature of his continued lying, the prosecution always referred to the immunity. In short, one cannot lie if one is ordered to tell the truth. We clearly made the case that the government's main witness not only lied in the courtroom, but indeed had been investigated in previous instances for drug use in which he had knowingly lied and had been reduced in rank. Our strategy was all to no avail.

Eventually I was asked to testify on my own behalf. We had discussed the merits of this several times, and because of the peculiar position I found myself in, we agreed it would be a good thing. My situation was peculiar because I had inadvertently submitted to the government a written statement of my involvement that was a quasi admittance of guilt. This was not a smart move on my part, but when I was first indicted, I was frightened beyond reason, and asked if there might be something I might do, to which the adjutant replied firmly that a statement attesting to what had occurred would be very useful. How useful to the prosecution did not cross my mind, thus in a near frenzy of panic, I wrote a sworn statement that said I could not remember all the details,

fearful that if I were to go into too much detail, I would be accused of being a homosexual! Needless to say, since I stated that I could not remember all the details, this was used against me in court since I could not know in detail what had occurred without opening myself to perjury. And since the man who entered the room could, by his own testimony corroborate the fact that my pants were down, the jury had its required "three person attestation" that indeed sodomy had taken place, this in spite of the fact that everyone admitted that no sex acts were actually seen, and that I and my alleged sex partner were at opposite ends of the room. That sex be observed was obviously not a major concern; that there might have been sex was, and a mere hint of sexual impropriety was more than sufficient to allow the jury to vote unanimously, "guilty as charged." At the sentencing phase, the military argued in favor of hard labor, but fortunately wiser heads prevailed, and I was sentenced to dismissal under condition less than honorable for the good of the service. Ironically, I was elated in so far as the ordeal was now concluded and I could get on with the rest of my life, which after 10 years of what I now recognize to have been a severe stress syndrome, I did.

For their part, the ACLU, represented by my civilian attorney who in fact worked for an affiliate organization, the Lawyers' Military Defense Committee anticipated how the Army would react. Thus at the very inception of these proceedings, it was explained to me that on the merits of the case, we were probably going to lose, but that we might be able to mount an effective constitutional challenge to Article 125, as previously outlined in the introduction. This of course, we did, even though the judge was not disposed to tackle constitutional issues "in my court." Indeed, our strategy allowed us to link up with Len Matlovich who was challenging the army regs out of Washington, DC. Since we were also in contact with the DC branch of the ACLU, it was decided that we would move forward with a dual attack: Len would challenge the regulations that forbade gays to serve, and I would challenge the UCMJ statutory prohibition against same sex sexual relations. Unfortunately both are more or less intact today, although there is some vague talk of revising the sodomy statute to be in conformity with the recent Supreme court decision to overturn *Hardwick v. Bowers*.

The reasons for the court martial were not too difficult to discern. For one thing, in the 1970s as the War in Vietnam came to an end, and the draft was concluded, a professional volunteer army was on the horizon, and many in uniform felt that if gays were allowed to serve, then it would be extremely difficult to obtain recruits, particularly if parents objected to their sons and daughters serving around "queers." Another rea-

son relates to the very dual strategy we employed: if Len were successful, then gays could serve, and since so many commanders hated gays, there was always the option of the Article 125, thus I was used as an example of what could happen if gays served absent any regs. The truth is, even we believed that there was a slim chance the courts would overturn 125. Perhaps the most important reason, however, has to do with image. This was the period of the Cod War, and the US had a vested interest in projecting power world wide, not unlike today. In this instance, there was a consensus that homosexuals in the services would project the wrong image to our putative enemies, in that homosexuals were conceived of as weak, limp-wristed perverts, and to have them openly in the service would project the image to the world that the US itself was weak and perverted, certainly an image the US did not want. Such, by the way, holds valid today in so far as the Arab Muslim, contrary to popular myth, rejects homosexuality as ungodly, impure, and unmanly, and the death penalty is frequently the consequence of coming out in the Middle East, especially Saudi Arabia. Thus to succeed against Al Qaeda, we must once again project the image of unbridled manliness and purity, two qualities that many in the US defense establishment are unwilling to concede to homosexuals.

As we revisit "Don't Ask, Don't Tell" ten years after its adoption, many of the same reasons for excluding homosexuals hold sway. Unfortunately the rationale for banning gay men and women is predicated upon false assumptions about both the nature and causes of homosexuality that still inform top military commanders. Furthermore, as we go about the nasty business of our war on terrorism, policy planners demand the same manly image we attempted to project and protect during the Cold War; anything less would be interpreted as a sign of weakness.

