

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,)	BRIEF OF SOCIAL SCIENTISTS AND
<i>Appellee,</i>)	MILITARY EXPERTS AS <i>AMICI CURIAE</i>
)	
v.)	USCA Dkt. No. 02-0944/AF
)	
Technical Sergeant (E-6))	Crim. App. No. 34216
ERIC P. MARCUM)	
524-96-3314, USAF,)	
<i>Appellant</i>)	

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES:

Introduction

Amici curiae are the following distinguished social scientists and experts on military issues: Dr. Charles Moskos, Admiral B. R. Inman, USN (Ret), Dr. Christopher Dandeker, Dr. Elizabeth Kier, Dr. Robert MacCoun, Dr. Laura Miller, Dr. David Segal, Dr. Mady Segal, and Dr. Aaron Belkin. While *amici* take no position on the ultimate legal and constitutional issues presented in this case, they submit this brief to offer the Court their extensive expertise on the following narrow but significant issue raised by the government: Whether decriminalizing private, consensual sodomy in the military will undermine unit cohesion, good order, and discipline or bring discredit on the military. Based on their substantial expertise, *amici* have concluded that the government's claim that decriminalizing private, consensual sodomy in the military would

undermine unit cohesion, good order and discipline or would discredit the armed forces is incorrect and unsupported by social scientific data.

Interest of Amici

Amici are leading scholars and experts on military issues, who have substantial and varied professional expertise relating to the Government's empirical assertion that decriminalizing private, consensual sodomy in the military would undermine unit cohesion, good order and discipline or would discredit the armed forces.

Dr. Charles Moskos is Professor of Sociology at Northwestern University and a principal architect of the "Don't Ask, Don't Tell" policy. He was awarded the Distinguished Service Medal, the United States Army's highest civilian decoration. He is the former Chair of the Inter-University Seminar on Armed Forces and Society (IUS), a distinguished international professional association of military experts, and has been a Fellow at the Woodrow Wilson International Center for Scholars, a Rockefeller Foundation Humanities Fellow, and a John Simon Guggenheim Memorial Foundation Fellow.

Admiral B. R. Inman, USN (Ret) served in the United States Navy for more than thirty years, retiring in 1982 with the permanent rank of Admiral. Recipient of the National Security Medal, Admiral Inman also served as Director of the National Security Agency, Deputy Director of Central Intelligence, and Vice Director of the Defense Intelligence Agency. He currently holds the Lyndon B. Johnson Centennial Chair in National Policy at the L.B.J. School of Public Affairs at the University of Texas.

Dr. Christopher Dandeker, a distinguished expert on British civil-military relations, is Professor of Military Sociology in the Department of War Studies at King's College London, where he chaired the Department of War Studies from 1997 to 2001. He has particular expertise in the area of personnel issues in the contemporary armed forces of Europe and North America and has lectured at military institutes and organizations in the United States, Europe, and South America. He is a Fellow of IUS and a member of its Council; an Associate Editor of the *Journal of Armed Forces and Society*; and Vice-President of the Research Committee, Armed Forces and Conflict Resolution of the International Sociological Association.

Dr. Elizabeth Kier is Associate Professor of Political Science at the University of Washington where her research focuses on international security and civil-military relations. Recipient of the Edgar S. Furniss Award in 1998 for exceptional contribution to the study of national and international security, Professor Kier is the author of the definitive study on unit cohesion and sexuality. She was formerly a Senior Fellow at the Belfer Center for Science and International Affairs at Harvard University, a fellow at the Center for International Security and Arms Control at Stanford University, and the Olin Institute for Strategic Studies at Harvard, and a Social Science Research Council-MacArthur Fellow in Peace and International Security.

Dr. Robert MacCoun is Professor of Public Policy at the Richard & Rhoda Goldman School of Public Policy and Professor of Law at Boalt Hall School of Law at the University of California, Berkeley. He has authored several pivotal

pieces concerning sexual orientation and military cohesion, including the chapter on unit cohesion in the RAND Corporation report on sexual orientation in the military.

Dr. Laura Miller is a military sociologist and author of “Do Military Policies on Gender and Sexuality Undermine Combat Effectiveness?” with John Allen Williams in *Soldiers and Civilians* (BCSIA-MIT Press, 2001). She was a member of the congressionally-mandated Panel to Investigate Sexual Misconduct at the United States Air Force Academy (2003), and has served as a consultant to the Congressional Commission on Military Training and Gender-Related Issues (1998-99), and the Secretary of the Army’s Senior Review Panel to Investigate Sexual Harassment (1997).

Dr. David Segal is a Distinguished Scholar-Teacher, Professor of Sociology, and Affiliate Professor of Government and Politics and of Public Affairs at the University of Maryland, where he is also the Director of the Center for Research on Military Organization. Recipient of the United States Army Medal for Outstanding Civilian Service in 1989 and 2000, Professor Segal is President of IUS and former President of the Research Committee on Armed Forces and Conflict Resolution of the International Sociological Association and former Chair of the Section on Peace and War of the American Sociological Association. He previously directed the sociological research program at the Army Research Institute for Behavioral and Social Sciences.

Dr. Mady Segal is Professor of Sociology at the University of Maryland, where she is also a faculty associate with the Center for International and

Security Studies, and Associate Director of the Center for Research on Military Organization. She also has been a Guest Scientist at the Department of Military Psychiatry at the Walter Reed Army Institute of Research, a Senior Research Scientist with the Army Research Institute for the Behavioral and Social Sciences, and a Visiting Professor of Sociology in the Department of Behavioral Sciences and Leadership at the United States Military Academy at West Point. She has served as a member of the Naval Research Advisory Committee on Quality of Life (2000) and a member of the Congressional Commission on Military Training and Gender-Related Issues (1998-99).

Dr. Aaron Belkin is Assistant Professor of Political Science at the University of California, Santa Barbara and Director of the Center for the Study of Sexual Minorities in the Military, a university-based research institute on sexuality and the military. Professor Belkin has published many peer-review journal articles on unit cohesion and sexuality.

Argument

The government has asserted that the decriminalization of private, consensual sodomy in the military would undermine unit cohesion, good order, and discipline and would discredit the armed forces. This is an empirical, rather than a legal assertion. Based on *amici's* substantial professional expertise on these issues, this claim by the government is incorrect and unsupported by social science data. *Amici* submit that, while *any* sexual activity that occurs in shared military spaces, such as in the barracks or onboard a ship, or that involves fraternization, adultery, abuse of trust, public

indecent, or coercion can undermine unit cohesion, good order and discipline or discredit the armed forces, the social science data do not support—and in fact undermine—the government’s claim that decriminalization of private, consensual sodomy would do so.

I

UNIT COHESION IN HISTORY AND THEORY

The original rationale for the Uniform Code of Military Justice (“UCMJ”) Article 125 prohibition on sodomy was unrelated to the preservation of unit cohesion. Rather, the Article 125 prohibition was included in the UCMJ so that military criminal courts would have jurisdiction parallel to the civilian courts to adjudicate common law prohibitions, such as those against murder, robbery, and arson.¹ This lack of historical connection between Article 125’s criminalization of private, consensual sodomy and the military’s concern for unit cohesion is not surprising given that social science data does not support the claim that decriminalization of private, consensual sodomy would undermine unit cohesion.

The most significant, early studies of unit cohesion emphasized the importance of cohesion for motivating combat soldiers in the Second World War.² While these studies addressed many factors that contribute to unit

¹ See 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 16 (2d ed. 1999).

² See Edward Shils & Morris Janowitz, *Cohesion & Disintegration in the Wehrmacht in World War II*, 12 *Pub. Opinion Q.*, Summer 1948 at 280-315; S.L.A. Marshall, *Men Against Fire: The Problem of Battle Command in Future*

cohesion, they did *not* identify the criminalization of private, consensual sodomy as a factor that enhances the development of unit cohesion.³

More recent, in-depth scholarship confirms the lack of empirical evidence that criminalizing private, consensual sodomy engenders unit cohesion or that decriminalizing such conduct would weaken unit cohesion. Two definitive reviews of the large pool of social-scientific literature on the determinants of unit cohesion canvassed approximately 75 studies on unit cohesion, which, in turn, addressed dozens of specific determinants of unit cohesion such as leadership, turnover, interdependence, tasks accomplished, and other factors.⁴ Among this large number of studies, *no studies* suggest that prohibition of sodomy is necessary for preserving or developing unit cohesion, or that decriminalizing sodomy would undermine cohesion.⁵

In short, there is no historical connection between the military's concern for unit cohesion and Article 125's criminalization of private, consensual

War (William Morrow 1947); Samuel A. Stouffer *et al.*, *2 The American Soldier: Combat & Its Aftermath* (Princeton Univ. Press 1949).

³ See Shils & Janowitz, *supra* note 2, at 280-315; Marshall, *Men Against Fire*, *supra* note 2; Stouffer *et al.*, *2 The American Soldier*, *supra* note 2.

⁴ See Elizabeth Kier, *Homosexuals in the U.S. Military: Open Integration & Combat Effectiveness*, *Int'l Security*, Fall 1998, at 5-39; Robert MacCoun, *What is Known About Unit Cohesion & Military Performance?*, in National Defense Research Institute, *Sexual Orientation & U.S. Military Personnel Policy: Options & Assessment* 283-331 (RAND 1993).

⁵ See Kier, *Homosexuals in the U.S. Military*, *supra* note 4; MacCoun, *What is Known About Unit Cohesion & Military Performance?*, *supra* note 4.

sodomy. Nor is there any social scientific data to support the notion that decriminalizing sodomy would undermine unit cohesion.

II

UNIT COHESION AND SODOMY IN THE UNITED STATES ARMED FORCES

Social science research indicates that sodomy is generally private, consensual behavior that does not implicate concerns about unit cohesion, order, or discipline because it does not occur in shared military spaces or involve fraternization, adultery, abuse of trust, public indecency, or coercion. The Rand Corporation concludes that “it seems reasonable to assume, based on general population estimates, that a majority of both married and unmarried military personnel engage in oral sexual activity, at least occasionally.”⁶ Indeed, it is likely that a substantial percentage of American service members have engaged in sodomy as defined by Article 125 (which does not distinguish between heterosexual and homosexual sodomy), and are therefore in violation of the UCMJ.

Any sexual activity, whether heterosexual or homosexual, can undermine unit cohesion, good order, and discipline and discredit the armed forces when it occurs in shared military spaces, such as in the barracks or onboard a ship, or when it involves fraternization, adultery, abuse of trust, public indecency, or

⁶ See *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, *supra* note 4, at 58 (citing surveys indicating that 88% of men and 87% of women surveyed considered oral sex to be “very normal” or “all right” and that 79% of U.S. men between ages 20-39, including 80% of married men, had received oral sex).

coercion. Social science data indicate that sodomy is generally private, consensual behavior that does not fall under any of those special factual settings. Therefore, from the standpoint of its impact on unit cohesion, good order and discipline, it should be treated no differently from other forms of permitted private, sexual activity between consenting adults (such as fornication). Accordingly, *if*, in this case, there was any detriment to unit cohesion, that detriment could not have followed simply from engaging in private, consensual sodomy. Decriminalizing private, consensual sodomy outside of shared military spaces will not undermine cohesion, good order, and discipline or bring discredit on the military as long as prohibitions on fraternization, adultery, abuse of trust, public indecency, and coercion remain in effect.

III

UNIT COHESION IN ANALOGOUS NON-U.S. MILITARIES

The militaries of many of our allies, including the United Kingdom, Israel, Canada, and Australia, allow their service members to engage in private, consensual sodomy.⁷ In the United Kingdom, for example, the military decriminalized private, consensual sodomy in 1994.⁸ There are no data to

⁷ See, e.g., http://www.ilga.org/Information/Legal_survey/ilga_world_legal_survey%20introduction.htm.

⁸ See http://www.legislation.hmso.gov.uk/acts/acts1994/Ukpga_19940033_en_15.htm#end.

suggest that the decriminalization of sodomy has undermined unit cohesion, good order and discipline, or brought discredit on the British military or any other foreign armed services.

Conclusion

The government's empirical assertion that decriminalizing sodomy in the military would undermine unit cohesion, good order, and discipline or would discredit the armed forces is incorrect and unsupported by social scientific data. As long as prohibitions on fraternization, adultery, abuse of trust, public indecency, and coercion remain in effect, there is no evidence that decriminalizing sodomy that occurs in private will harm the armed forces.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on October 2, 2003, the original and seven copies of the foregoing brief were delivered to the Court and copies thereof were mailed to Colonel LeEllen Coacher, Chief, Government Trial and Appellate Counsel Division; Colonel Beverly B. Knott, Chief, Appellate Defense Division; and

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