

Newslines The military

Supreme Court sodomy ruling may change military law

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The Supreme Court's overturning of state laws against sodomy may affect the armed forces' ability to criminally prosecute its members, both heterosexual and homo-

sexual, for what military law calls "unnatural carnal copulation," according to experts.

Less than a week after the June 26 decision that consenting adults have a right to privacy, lawyers both inside and outside the Penta-

gon were reviewing the decision for its potential military impact.

The Defense Department cautioned it is too early to say what effect, if any, it might have.

But at the very least, the ruling has "cast a cloud over Article 125

of the Uniform Code of Military Justice, the sodomy provision," said attorney Eugene Fidell, president of the National Institute of Military Justice.

Fidell said the provision is expected to be challenged by defen-

dants who have pending Article 125 cases, as well as by people whose cases already are final but want their convictions overturned. The military "was unquestionably the most active jurisdiction" for prosecuting sodomy cases, he said.

Despite the Supreme Court ruling, "Article 125 remains in effect unless and until it is changed either through a specific court ruling or altered by congressional action," the Servicemembers Legal Defense Network warns on its Web site, www.sldn.org. SLDN is a national legal watchdog group that opposes the military's "don't ask, don't tell" policy against homosexuality.

The military law banning even consensual sodomy, including oral sex, applies both to heterosexuals and homosexuals. Two years ago, the NIMJ sponsored a committee of military legal experts called the Cox Commission that proposed repealing the military's rape and sodomy laws and replacing them with comprehensive criminal sexual laws similar to those in federal civilian judicial systems.

"This [Supreme Court] decision only adds fuel to the fire," said retired Coast Guard Capt. Kevin Barry, a former military judge. "It's time to examine the military justice system's ... structure for sex crimes."

The majority of military sodomy charges — 90 percent to 95 percent — are filed in heterosexual cases of assault, rape or fraternization. Troops rarely are prosecuted for sodomy involving consensual sex, and when they are, it almost exclusively involves homosexuals, said Dixon Osburn, executive director of SLDN.

The military may decide there are ways to prosecute misbehavior and misconduct without employing the sodomy law, Osburn said.

He believes the ruling has a direct impact on Article 125 as well as the "don't ask, don't tell" policy. "The open question is whether the military itself can duck the constitutional questions under the guise of unit cohesion," Osburn said.

The Supreme Court ruled, in broad terms, that sodomy statutes around the country are unconstitutional, Osburn said.

"That would seem to suggest the military has no business regulating that kind of behavior," he said.

The military's policy on gays is predicated on the notion that homosexual conduct must be banned to maintain good order, discipline and unit cohesion.

Bill Cassara, a lawyer and former Army judge advocate general, said the Supreme Court ruling may keep the military from criminally prosecuting anyone for sodomy, but it won't affect "don't ask, don't tell" because the policy already has built-in privacy considerations. □