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Contact: Indra Lusero, Assistant Director, 303-902-9402, indralusero@palmcenter.ucsb.edu

SCHOLARS DEBATE RECENT MILITARY SODOMY DECISION Some Praise Soundness of Court's Rationale While Others Raise Questions

Santa Barbara, CA, September 9, 2004 -- Following a recent court decision that declined to overturn the constitutionality of criminalizing private, consensual sodomy in the military, experts have expressed disagreements about the decision's soundness as well as its implications for the future of 'Don't Ask, Don't Tell' and privacy rights in general.

After the Supreme Court's 2003 ruling in *Lawrence v. Texas* that decriminalized sodomy in the civilian sector, Technical Sergeant Eric Marcum appealed his conviction for private, consensual sodomy on the grounds that the military's sodomy ban is unconstitutional.

In its August 23 decision in *U.S. v. Marcum*, the Court of Appeals for the Armed Forces (CAAF) in Washington D.C. ruled that Marcum's conduct is not subject to the protections afforded by the *Lawrence* ruling. As a result, the military may continue to criminalize private, consensual sodomy, which, according to Article 125 of the Uniform Code of Military Justice, is subject to five years imprisonment per incident.

In remarks made to researchers at the Center for the Study of Sexual Minorities in the Military (CSSMM) at the University of California, Santa Barbara, some experts praised aspects of the Court's decision while others raised concerns.

Tobias Wolff, Assistant Professor of Law at the University of California, Davis and a leading expert on gays in the military, said that, "While the result that the court reached is unfortunate, there is reason for optimism in its opinion. The court recognized that members of the military have privacy rights in their civilian lives, and it acknowledged that gay people are equally entitled to those rights. For the tens of thousands of gay men and lesbians in uniform, that is a step in the right direction."

Diane Mazur, Professor of Law at the University of Florida and another leading expert, viewed the decision as positively resisting the court's longstanding tradition of deferring to the military in equal protection cases. Even though "it has often been assumed that the military gets a free pass from the Constitution," Mazur said, in this opinion, the "court does not rely on 'deference' to Congress or to the



military as the easy way out."

Other experts, however, expressed concern. Harvard Law School Professor Janet Halley, author of an important book on gays in the military and a CSSMM board member, asked, "Does sodomy lose its constitutional status unless it is super-equal and super-consented to -- not in fact, but according to the ideas of the court? Stay tuned." CAAF ruled that notwithstanding his partner's prior solicitation of sexual contact, as well as a lower court's rejection of the claim that Marcum coerced his partner, because the two men held different ranks, Marcum's partner was "situated in a relationship where consent might not easily be refused." As such, the court declined to apply Lawrence's protections to their conduct.

Halley added, "This decision exposes the latent dangers of Lawrence in a military that continues to wage 'Don't Ask, Don't Tell.' Lawrence invited courts to find exceptions to the right of privacy it announced -- and -- no surprise -- this one did."

CSSMM Director Aaron Belkin raised additional concerns. "In a little-noticed passage," Belkin said, "the court referred to its standards for addressing constitutional questions when national security and constitutional rights are both paramount interests. But there are no national security stakes to this case."

In its brief in the Marcum case, the government argued that decriminalizing private, consensual sodomy would undermine national security. In response, Professor Charles Moskos, principle architect of "Don't Ask, Don't Tell", signed an amicus brief ([click here to download an MS Word version of the brief](#)) stressing that as long as prohibitions against sexual conduct on base as well as fraternization remain in effect, decriminalizing sodomy would not harm the military.

Belkin explained that by invoking national security, "the court smuggles in an assenting nod to the government's premise that national security is at stake in such a way that it relieves itself of having to explain why the premise is valid, even when the country's top experts on the matter have insisted that it is not. The government's premise could have serious implications for future cases involving 'Don't Ask, Don't Tell.'"

Others, however, disagreed. Servicemembers Legal Defense Network, a Washington D.C. advocacy group, stated in a press release that the "decision has no impact on 'Don't Ask, Don't Tell,'" and Mazur noted that "'Don't Ask, Don't Tell' was adopted before Lawrence and while Bowers was still valid, suggesting that constitutional underpinning for 'Don't Ask, Don't Tell' has been disturbed.



The Center for the Study of Sexual Minorities in the Military is an official research unit of the University of California, Santa Barbara. The Center is governed by a distinguished board of advisors including the Honorable Lawrence J. Korb of the Council on Foreign Relations, Honorable Coit Blacker of Stanford University and Professor Janet Halley of Harvard Law School. Its mission is to promote the study of gays, lesbians, and other sexual minorities in the armed forces.