

# The Military's Ban on Consensual Sodomy in a Post-*Lawrence* World

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## INTRODUCTION

In *United States v. Marcum*<sup>1</sup> and *United States v. Stirewalt*,<sup>2</sup> the Court of Appeals for the Armed Forces (CAAF) upheld the conviction of armed servicemembers for violating Article 125<sup>3</sup> (“Article 125”) of the Uniform Code of Military Justice (UCMJ) by engaging in consensual sodomy with another member of the armed forces.<sup>4</sup> In reaching these decisions, the CAAF determined that the United States Supreme Court’s holding in *Lawrence v. Texas*,<sup>5</sup> which invalidated state criminal sanctions against private and consensual acts of sodomy, did not provide a “facial” challenge to the military’s ban on sodomy.<sup>6</sup> This means that constitutional objections to Article 125 must be addressed on a case-by-case basis.<sup>7</sup> In both *Marcum* and *Stirewalt*, the CAAF found that the military’s ban on sodomy was constitutional as applied to the defendants.<sup>8</sup>

Contrary to these rulings, the CAAF should have declared Article 125 unconstitutional because its proscription on sodomy is not in keeping with *Lawrence*, which recognized a right to private sexual

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1. 60 M.J. 198 (C.A.A.F. 2004).

2. 60 M.J. 297 (C.A.A.F. 2004).

3. 10 U.S.C. § 925 (2005) (“Article 125”). Under Article 125, the military has formally banned the practice of sodomy, whether consensual or not.

4. *Stirewalt*, 60 M.J. at 305; *Marcum*, 60 M.J. at 200.

5. 539 U.S. 558 (2003).

6. *Stirewalt*, 60 M.J. at 304; *Marcum*, 60 M.J. at 206.

7. *Stirewalt*, 60 M.J. at 304; *Marcum*, 60 M.J. at 206.

8. *Stirewalt*, 60 M.J. at 304; *Marcum*, 60 M.J. at 208.

acts between consenting adults. Further, because the military could have prosecuted both defendants under alternative UCMJ articles, there is no reason to continue prosecuting servicemembers under Article 125.

Part I of this Note addresses the background of the CAAF's decisions in *Marcum* and *Stirewalt*.<sup>9</sup> Part II focuses on the foundations and historical antecedents of the military's ban on sodomy, including military court decisions that explain the military's position. Part III explores the Supreme Court's opinion in *Bowers v. Hardwick*,<sup>10</sup> the military's interpretation of that decision, and detractors of the military's ban on sodomy. Part IV briefly discusses the Court's decision in *Lawrence*, and more specifically the implications of this decision on statutory bans on sodomy. Finally, Part V analyzes the CAAF's decisions in *Marcum* and *Stirewalt*, and concludes that both decisions were incorrect in light of *Lawrence*. Part V also provides policy alternatives that would place military law in better harmony with Supreme Court decisions and address secondary issues that affect military members charged with sodomy.

## I. SETTING THE STAGE: CAAF INTERPRETATION OF *LAWRENCE* IN THE MILITARY CONTEXT

### A. *Marcum*, *Homosexual Sodomy*, and *Post-Lawrence Interpretations*

While several different charges were levied against Technical Sergeant (TSgt) Marcum (E-6),<sup>11</sup> the CAAF only reviewed the charge of nonconsensual sodomy with Senior Airman (SrA) Harrison (E-4), who had initially reported the incident to authorities.<sup>12</sup> Although

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9. This Note will only focus on those issues dealing with the consensual sodomy ban. Additional issues addressed by the CAAF on appeal will be discussed inasmuch as they relate to the issue of the military sodomy ban.

10. 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. at 578.

11. TSgt Marcum was a supervising non-commissioned officer of intelligence analysts; his duties included supervising and training new airmen. *Marcum*, 60 M.J. at 200. He was charged with and convicted of "dereliction of duty by providing alcohol to individuals under the age of 21, non-forcible sodomy, forcible sodomy, assault consummated by a battery, indecent assault and three specifications of committing indecent acts in violation of Articles 92, 125, 128, and 134 [of the UCMJ]." *Id.* at 199.

12. *Id.* at 200. When TSgt Marcum was off-duty, he socialized often with airmen from his unit at parties, and, afterwards, airmen often spent the night at his off-base home. *Id.* The

convicted of nonconsensual sodomy, a panel of officers and other enlisted members determined that TSgt Marcum was “not guilty of forcible sodomy but guilty of non-forcible sodomy” against SrA Harrison.<sup>13</sup> Irrespective of the determination that his conduct was consensual, the panel noted that it is nonetheless prohibited by Article 125.<sup>14</sup>

On appeal, TSgt Marcum argued that the Supreme Court's decision in *Lawrence* effectively rendered Article 125 unconstitutional, and thus that his conviction for non-forcible sodomy should be reversed.<sup>15</sup> Comparing by analogy the Texas statute at issue in *Lawrence* with the military ban on sodomy, TSgt Marcum argued that “Article 125 suffers from the same constitutional deficiencies . . . because both statutes criminalize private consensual acts of sodomy between adults.”<sup>16</sup> The CAAF disagreed with this comparison because the military ban on sodomy proscribed far more

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charges against TSgt Marcum of consensual and nonconsensual sodomy stem from allegations levied by the subordinate airmen who stayed at TSgt Marcum's home. *Id.* Only the charges relating to his relationship with SrA Harrison were discussed on appeal. *Id.*

13. *Id.* at 201. During the initial trial, there was conflicting testimony concerning the incident. SrA Harrison testified that he had been sleeping and awoke to TSgt Marcum performing oral sex on him. *Id.* TSgt Marcum, on the other hand, testified to the opposite, and claimed that he did not use “force, coercion, pressure, intimidation or violence” to engage in any activities. *Id.* Further, TSgt Marcum claimed that all activity between himself and SrA Harrison was “equally participatory.” *Id.* However, SrA Harrison claimed that he was very upset and left the apartment soon after the incident took place. *Id.*

SrA Harrison testified that, subsequent to this incident, he and TSgt Marcum “danced together and kissed each other in the ‘European custom of men.’” *Id.* He also told TSgt Marcum that “he loved him, bought him a t-shirt, and sent him numerous e-mails.” *Id.* In addition, prior to the incident at controversy, TSgt Marcum and SrA Harrison both testified to an incident in which SrA Harrison attempted to be intimate with TSgt Marcum. *Id.*

14. *Id.* Article 125 states:

(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.

10 U.S.C. § 925 (2005). The Manual for Courts-Martial lists the elements of the offense of sodomy: “(1) That the accused engaged in unnatural carnal copulation with a certain other person or with an animal. (2) That the act was done with a child under the age of 16. (3) That the act was done by force and without the consent of the other person.” UNITED STATES MANUAL FOR COURTS-MARTIAL IV-79, ¶ 51.b.(1)-(3) (2002) [hereinafter COURT MARTIAL MANUAL].

15. *Marcum*, 60 M.J. at 202.

16. *Id.*

conduct than just consensual sodomy.<sup>17</sup> However, the CAAF did look to *Lawrence* to determine the proper standard of review for challenging Article 125 prosecutions.<sup>18</sup>

At the outset, the CAAF determined that, in the military environment, *Lawrence* requires a limited review of constitutional challenges to Article 125.<sup>19</sup> It then noted that “servicemembers, as a general matter, do not share the same autonomy as civilians.”<sup>20</sup> In addition, “an understanding of military culture and mission cautions against sweeping constitutional pronouncements that may not account for the nuance of military life.”<sup>21</sup> These observations led the CAAF to use a “contextual, as applied analysis, rather than facial review,” of Article 125.<sup>22</sup>

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17. *Id.* at 206. The court argued that while constitutional rights identified by the Supreme Court are generally applicable to members of the military, it would consider only the application of *Lawrence* to the conduct of TSgt Marcum specifically. *Id.* Citing *Sabri v. United States*, 541 U.S. 600 (2004), the court held that any challenge to Article 125 must be done in the context of the facts of the case, and not as a facial challenge to the statute. *Marcum*, 60 M.J. at 206. Noting that Article 125 encompasses both forcible and non-forcible sodomy, the court determined that “a facial challenge reaches too far” because “the *Lawrence* analysis is not at issue with respect to forcible sodomy.” *Id.*

18. *Marcum*, 60 M.J. at 206.

19. The CAAF held that *Lawrence* was unclear with respect to the standard of review that should be employed in determining whether Article 125 is permissible. Under the Supreme Court’s decision, either strict-scrutiny analysis or rational-basis review could be employed when analyzing sodomy statutes. *Id.* at 204–05. The CAAF interpreted this ambiguity as requiring a bifurcated analysis in which a court must determine if “the activity at issue falls within column A—conduct of a nature to bring it within the liberty interest identified in *Lawrence*, or within column B—factors identified by the Supreme Court as outside its *Lawrence* analysis.” *Id.* at 205. To support this position, the CAAF noted that the Court of Appeals of Arizona determined that the *Lawrence* Court employed “‘the rational basis test, rather than the strict scrutiny review utilized when fundamental rights are impinged.’” *Id.* at 204 (quoting *Standhardt v. Superior Court*, 77 P.3d 451, 457 (Ariz. Ct. App. 2003)). However, the CAAF also noted that California courts concluded that the *Lawrence* Court identified a “fundamental right . . . implicit in the Fourteenth Amendment,” which necessitates strict-scrutiny review. *Id.* (quoting *Fields v. Palmdale Sch. Dist.*, 271 F. Supp. 2d 1217, 1221 n.7 (C.D. Cal. 2003)). To settle these differing interpretations, the CAAF determined that because the “Supreme Court declined in the *civilian* context to expressly identify such a fundamental right [they would] not presume the existence of such a fundamental right in the *military* environment.” *Id.* at 205 (emphasis added).

20. *Id.* at 206.

21. *Id.*

22. *Id.* at 205. Thus, when reviewing a conviction for non-forcible sodomy, a military court should ask “whether Article 125 is constitutional as applied to Appellant’s conduct.” *Id.* at 206.

To determine if Article 125 is constitutional as applied in a particular case, the CAAF developed a test by which a military court must evaluate the charge. First, the court must ask whether the conduct falls within the individual's liberty interest, as defined by the Supreme Court.<sup>23</sup> Second, the court must determine whether there are any factors that would place the conduct outside of the *Lawrence* analysis.<sup>24</sup> Finally, the court must question whether there is a military reason to prohibit the conduct.<sup>25</sup> This analysis permits a military court to look at each charge of sodomy as "a discrete criminal conviction based on a discrete set of facts," and preserves the statute as a general proscription on sodomy, whether forcible and consensual.<sup>26</sup>

The CAAF reasoned that due to TSgt Marcum's status as SrA Harrison's superior, the sodomy at issue was not protected under *Lawrence*.<sup>27</sup> The court held that the relationship fell within the exceptions noted in the Supreme Court's decision, namely, that SrA Harrison may have been coerced or in a relationship in which consent may not be refused.<sup>28</sup> In addition, the CAAF found that general military principles supported the proscription of sodomy in this case.<sup>29</sup> Specifically, Air Force regulations forbid fraternization between superiors and subordinates.<sup>30</sup> Therefore, Tsgt Marcum and

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23. *Id.*

24. *Id.*

25. *Id.* at 206–07.

26. *Id.* at 206.

27. *Id.*

28. *Id.* at 208. The court explained that the prohibition against sexual contact between superiors and subordinates exists because a subordinate is "in a military position where 'consent might not easily be refused.'" *Id.* at 200 (citations omitted).

29. *Id.* at 207.

30. *Id.* The relevant Air Force instruction in place at the time stated:

Unduly familiar relationships between members in which one member exercises supervisory or command authority over the other can easily be or become unprofessional. Similarly, as differences in grade increase, even in the absence of a command or supervisory relationship, there may be more risk that the relationship will be, or be perceived to be unprofessional because senior members in military organizations normally exercise authority or some direct or indirect organizational influence over more junior members.

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Relationships are unprofessional, whether pursued on or off-duty, when they detract from the authority of superiors or result in, or reasonably create the appearance of,

SrA Harrison's conduct hindered military interests, which placed the conduct outside the liberty interest protected in *Lawrence*.<sup>31</sup>

### *B. Stirewalt and Consensual Heterosexual Sodomy Between Military Members*

Health Services Technician (HST) Stirewalt (E-5) was convicted of engaging in consensual sodomy with a service woman of higher rank (E-6), who was stationed at the same base as the defendant.<sup>32</sup> The CAAF, faced with a heterosexual challenge to the military sodomy ban, applied *Marcum* and determined that the sodomy ban was constitutional in this case as well.<sup>33</sup> Unlike in *Marcum*, however, there was no conflicting testimony concerning the consensual nature of the sodomy; it was clearly consensual.<sup>34</sup> Also unlike in *Marcum*, HST Stirewalt was charged with permitting a superior officer to commit sodomy on him.<sup>35</sup>

Like in *Marcum*, however, the CAAF relied on the military relationship of the defendant to the other party. The CAAF agreed, *arguendo*, that the defendant's actions fell "within the liberty interest identified by the Supreme Court and [did] not encompass behavior or factors outside the *Lawrence* analysis."<sup>36</sup> The key for the court in determining that the application of Article 125 was constitutional was that the sodomy occurred between two servicemembers, outside of marriage.<sup>37</sup> The CAAF determined that because the Coast Guard

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favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests.

*Id.* (quoting Dep't of the Air Force Instruction, 36-2909 Professional and Unprofessional Relationships ¶¶ 2.2, 3.1 (May 1, 1996)). The court noted that this instruction was in place to "avoid partiality, preferential treatment, and the improper use of one's rank." *Id.* By invoking the chain of command both to prevent the application of *Lawrence* and as a military-life exemption to constitutional analysis, the court is able to further strengthen its position.

31. *Id.* at 206.

32. *Stirewalt*, 60 M.J. at 303-04.

33. *Id.*; see also *supra* notes 23, 24, and 25 and accompanying text (stating *Marcum*'s three-part test).

34. *Stirewalt*, 60 M.J. at 304.

35. *Id.*

36. *Id.*

37. *Id.* The court ignored the first and second prongs of the *Marcum* test, but found that "Stirewalt's conduct . . . squarely implicates the third prong of the framework [which] asks whether there are additional factors that are relevant solely in the military environment." *Id.*

prohibited relationships between members within the same chain of command, the consensual sodomy was illegal.<sup>38</sup> Noting that the prohibition against fraternization was for “discipline and order,” the conviction for sodomy was upheld as a “matter of military discipline.”<sup>39</sup>

Both *Marcum* and *Stirewalt* squarely reflect that consensual sodomy is still illegal under Article 125. Although factually dissimilar, both cases relied upon the nature of the relationship between the servicemembers who engaged in sodomy to hold that their actions fell outside of the constitutional protection identified in *Lawrence*. Therefore, it is necessary to analyze the history and nature of the military ban on sodomy and the rationales for its retention to determine if the CAAF's interpretation of Article 125 is, in fact, consistent with *Lawrence*.

## II. HISTORY AND INTERPRETATION: THE SODOMY BAN'S EXPANDING INTERPRETATION OVER TIME

### A. *The History of Sodomy Bans in the U.S. Military*

The CAAF's predecessor, the Court of Military Appeals,<sup>40</sup> once noted that some forms of sodomy have been banned in the military

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38. *Id.* The court found that “Stirewalt’s conduct with [LTJG B] was more than a personal consensual relationship in the privacy of an off-base apartment. At the time of this relationship, [LTJG B] was one of seven officers on the USCGC SWEETGUM, a cutter with a crew of only 42. The conduct in question occurred between a commissioned department head and her subordinate enlisted crew member. . . .” *Id.* The relevant Coast Guard regulation states:

Romantic relationships between members are unacceptable when:

(1) Members have a supervisor and subordinate relationship . . . , or (2) Members are assigned to the same small shore unit (less than 60 members), or (3) Members are assigned to the same cutter . . . . The nature of operations and personnel interactions on cutters and small shore units makes romantic relationships between members assigned to such units the equivalent of relationships in the chain of command and, therefore, unacceptable. This policy applies regardless of rank, grade, or position.

*Id.* (quoting Coast Guard Personnel Manual ¶ 8.H.2.f. (1988)).

39. *Id.*

40. Congress designated the Court of Military Appeals as the CAAF in 1994. Court of Appeals for the Armed Forces, Establishment of the Court, <http://www.armfor.uscourts.gov/Establis.htm> (last visited Aug. 16, 2006).

“since time immemorial.”<sup>41</sup> Article 125 has its roots in the British Articles of War, adopted by the First Continental Congress,<sup>42</sup> which prohibited “sodomy and other unnatural crimes.”<sup>43</sup> In 1920, Congress amended the Articles of War to create Article 93, which specifically listed sodomy as a punishable offense.<sup>44</sup> In 1950, Congress enacted the UCMJ.<sup>45</sup> This included Article 125 and the offense of sodomy.<sup>46</sup> Article 125, unchanged since its codification, proscribes all “unnatural carnal copulation with another person of the same or opposite sex or with an animal.”<sup>47</sup>

### *B. Judicial Interpretation of the Breadth of Article 125*

Military tribunals accede that “Congress intended to proscribe a more general range of conduct than the origin of the term [sodomy] might suggest.”<sup>48</sup> The CAAF held that, although historical statutes against sodomy usually proscribed intercourse per-anum, Congress changed the language of the original Articles of War in enacting Article 125, thereby demonstrating “a legislative intention to define sodomy as including acts other than those within the scope of its common-law definition.”<sup>49</sup> In explaining the history of Article 125, the CAAF held that the legislative intent of the military ban on sodomy was to include both heterosexual and homosexual conduct,

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41. *United States v. Henderson*, 34 M.J. 174, 176 (C.A.A.F. 1992).

42. See JAMES E. VALLE, ROCKS & SHOALS: NAVAL DISCIPLINE IN THE AGE OF FIGHTING SAIL 40–41 (1980).

43. *United States v. Harris*, 8 M.J. 52, 53 (C.M.A. 1979). This prohibition was housed in Article 96 of the Articles of War. The Court of Military Affairs also noted that the crimes it proscribed “all carried the same maximum punishment.” *Id.*

44. *Id.*; see also Act of June 4, 1920, 41 Stat. 812.

45. *Harris*, 8 M.J. at 53. Congress, however, failed to define what sodomy entailed.

46. See *supra* note 3.

47. 10 U.S.C. § 925 (2005).

48. *United States v. Henderson*, 34 M.J. 174, 176 (C.A.A.F. 1992).

49. *Harris*, 8 M.J. at 54.



per-os and per-anum.<sup>50</sup> Thus, the reach of Article 125 is far greater than its historical antecedents.<sup>51</sup>

The CAAF has upheld convictions under the sodomy statute irrespective of the relationship between the members who engaged in the violation. For example, in *United States v. Harris* and *United States v. Scoby*, the CAAF described the breadth of Article 125 and held that it prohibits both consensual and nonconsensual sodomy.<sup>52</sup> In *Scoby*, the CAAF also disposed of constitutional challenges based on the Fourth Amendment's right to privacy.<sup>53</sup> In addition, lower military courts have held that marital bonds do not affect the application of Article 125 to military personnel.<sup>54</sup>

The CAAF has acknowledged that, while the scope of Article 125 is broad, there is no indication that private acts of sodomy are harmful to the military environment.<sup>55</sup> Moreover, in the 1990s,

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50. See generally *Harris*, 8 M.J. at 54–58 (providing a detailed history and legislative analysis of Article 125 and its predecessors). In the late 1990s, a lower military tribunal held that there is also no right for married individuals to engage in private, consensual sodomy. See *United States v. Kulow*, No. NCMC 96 01253, 1997 CCA LEXIS 484, at \*29 (N-M. Ct. Crim. App. Aug. 29, 1997).

51. Interpretation of Article 125 has been fairly consistent since its codification. Drawing on historical interpretations of laws against sodomy, military courts have held that “sodomy consists of a person taking into his or her mouth or anus the sexual organ of any other person or animal or placing his or her sexual organ in the mouth or anus of any other person or animal.” See, e.g., *Harris*, 8 M.J. at 58; see also COURT MARTIAL MANUAL, *supra* note 14, Pt. IV, ¶ 51b. Although the language of the statute proscribes “sodomy” without definition, the CAAF has found that the definition is not vague. It has ruled that the sodomy ban withstands vagueness challenges because “unnatural carnal copulation” has historical antecedents in English common law, thereby giving sufficient notice of what activities are proscribed. *United States v. Scoby*, 5 M.J. 160, 161–63 (C.M.A. 1978).

52. *Harris*, 8 M.J. at 53–59. At issue in *Harris* was whether cunnilingus was proscribed by Article 125; the court agreed that it was. *Id.* at 54. In *Scoby*, the court described the breadth of Article 125:

[It] prohibits every kind of unnatural carnal intercourse, whether accomplished by force or fraud, or with consent. Similarly, the article does not distinguish between an act committed in the privacy of one's home, with no person present other than the sexual partner, and the same act committed in a public place in front of a group of strangers, who fully apprehend the nature of the act.

*Scoby*, 5 M.J. at 163.

53. *Scoby*, 5 M.J. at 163–66.

54. See, e.g., *Kulow*, 1997 CCA LEXIS 484, at \*29 (holding that marriage does not insulate servicemembers from prosecution under Article 125).

55. *Scoby*, 5 M.J. at 165 (“The background material on the adoption of the UCMJ indicates Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community.”).

military courts acknowledged that convictions for consensual sodomy are difficult to uphold because there is not much justification for such a ban.<sup>56</sup> However, the military's ability to proscribe sodomy while avoiding constitutional challenge was bolstered by the Supreme Court's decision in *Bowers v. Hardwick*.<sup>57</sup>

### III. BOWERS AND MILITARY APPLICATION OF THE SUPREME COURT'S UPHOLDING OF SODOMY STATUTES

*Bowers* is a civilian case involving a Georgia statute that made consensual sodomy illegal. The Supreme Court upheld the statute, holding that it neither violated the individual's right to privacy nor his right to due process.<sup>58</sup> This decision served as the basis for the

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56. See *United States v. Fagg*, 34 M.J. 179, 180 (C.M.A. 1992) (“[W]e may sympathize with the accused regarding this particular conviction for what was unquestionably consensual conduct.”); see also *Kulow*, 1997 CCA LEXIS 484, at \*36 (“Had this offense been charged as consensual sodomy I would find it more troubling than I do in its present context. . .”).

57. *Bowers v. Hardwick*, 478 U.S. 186, 198 (1986).

58. *Id.* at 194. Although the Court ostensibly limited its decision to instances of homosexual sodomy, the historic ban on all acts of sodomy was important to its analysis. *Id.* at 192–94. The Court noted that a heterosexual couple was also a party to the original proceeding; however, they had been dismissed because “they had neither sustained, nor were in immediate danger of sustaining, any direct injury from the enforcement of the statute.” *Id.* at 188 n.2. The Court further noted that they “express[ed] no opinion on the constitutionality of the Georgia statute as applied to other [e.g., heterosexual] acts of sodomy.” *Id.* The Court also examined the pervasiveness of anti-sodomy statutes in history, which, in its opinion, bolstered the argument for the statute's constitutionality because there was no indication that legal sodomy was “deeply rooted in this Nation's history and tradition or implicit in the concept of ordered liberty.” *Id.* at 194 (internal quotations omitted). Thus, a more liberal reading of *Bowers* suggests that the Court may have been willing to accept of an across-the-board ban on sodomy, irrespective of sexual preference.

In its discussion of the standard of review applicable to sodomy statutes, the Court stated that it was attempting “to identify the nature of the rights qualifying for heightened judicial protection.” *Id.* at 191. The Court explained that, in identifying these rights, it must “assure itself and the public that announcing rights not readily identifiable in the Constitution's text involve[d] much more than the imposition of the Justices' own choice of values on the States and the Federal Government.” *Id.* Further, the Court demonstrated reticence in taking “a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause.” *Id.* at 194.

In addition, the Court addressed the issue of the location of the conduct. It stated that it does not matter if the conduct was carried out in private or in public because “illegal conduct is not always immunized whenever it occurs in the home.” *Id.* at 195. The Court further justified this position by arguing that if sodomy were legal, it would be difficult to justify criminal sanctions against “adultery, incest, and other sexual crimes even though they are committed in the home. . . . [The Court stated that it was] unwilling to start down that road.” *Id.* at 196.

CAAF's decisions upholding Article 125's constitutionality in the 1990s.<sup>59</sup>

Although homosexuality and homosexual sodomy have consistently been considered in opposition to military standards, the CAAF, interpreting *Bowers*, held that heterosexual sodomy was also impermissible under Article 125. In the companion cases of *United States v. Fagg* and *United States v. Henderson*, the CAAF held that Article 125 unmistakably prohibited sodomy between adults—whether homosexual or heterosexual.<sup>60</sup> In *Fagg*, the primary appellate court “recognize[d] a constitutional zone of privacy for heterosexual, noncommercial, private acts of oral sex between consenting adults[, and] [s]ince that right to privacy [wa]s not outweighed by any compelling governmental interest,” overturned the convictions for sodomy.<sup>61</sup> In direct conflict with *Fagg*, the primary appellate court in *Henderson* found no such constitutional zone of privacy.<sup>62</sup>

To correct the split among the military branch appellate courts, the CAAF upheld the convictions for consensual sodomy.<sup>63</sup> Citing *Bowers* as controlling precedent, the CAAF held that there was no reason to assume that the military ban on sodomy was constitutionally impermissible.<sup>64</sup> The court stated that, absent an “indication from the Supreme Court which permits us to override the intent of Congress,” the military ban on sodomy must be upheld.<sup>65</sup>

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59. See, e.g., *United States v. Henderson*, 34 M.J. 174, 177 (C.A.A.F. 1992) (noting that the *Bowers* Court “found no fundamental right of homosexuals to engage in acts of consensual sodomy”) (internal quotations omitted).

60. *Fagg*, 34 M.J. at 180; *Henderson*, 34 M.J. at 178.

61. *United States v. Fagg*, 33 M.J. 618, 619 (A.F.C.M.R. 1992), *rev'd*, *Fagg*, 34 M.J. at 180.

62. *United States v. Henderson*, 32 M.J. 941 (N-M.C.M.R. 1991), *aff'd*, *Henderson*, 34 M.J. at 178. The Navy-Marine Court of Military Review held that Article 125's proscription of heterosexual sodomy was neither unconstitutionally vague nor impermissible in light of *Bowers*. *Id.*

63. *Fagg*, 34 M.J. at 180; *Henderson*, 34 M.J. at 178.

64. *Henderson*, 34 M.J. at 178 (finding no reason to “invalidate” the charge of sodomy as unconstitutional).

65. *Fagg*, 34 M.J. at 180. In *Henderson*, the CAAF reviewed *Bowers* at length, given that the cases on review involved consensual, heterosexual sodomy rather than consensual, homosexual sodomy. *Henderson*, 34 M.J. at 177–78. The CAAF, while noting that the Supreme Court left open the question of whether heterosexual sodomy should be legal, was reticent to

While the CAAF has consistently upheld Article 125's ban on sodomy, these decisions are not without their detractors. In a 2001 report on the UCMJ, Honorable Walter Cox, former Chief Judge of the CAAF, and four other commissioners (the "Cox Commission") argued that the military's categorical ban on sodomy should be removed from the UCMJ.<sup>66</sup> The Cox Commission noted that sodomy prosecution by the military had been "treated in an arbitrary, even vindictive, manner" and should be replaced with criminal codes more similar to the Model Penal Code or to Title 18 of the United States Code.<sup>67</sup> These recommendations are especially interesting because,

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find a substantive right where none had before been recognized. *Id.* at 177. The court went further to explain:

The Legislative Branch, of course, is free to modify its statute if it chooses, and the Executive could limit prosecution. As a court, however, we are not involved in the merits of the policy. We interpret statutes; and we can strike them down only when they violate the Constitution. We perceive no such basis to invalidate this charge.

*Id.* at 178.

66. REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE § III(d) (2001), available at [http://www.badc.org/html/militarylaw\\_cox.html](http://www.badc.org/html/militarylaw_cox.html) [hereinafter COX COMMISSION].

67. *Id.* The Commission noted that the "well-known fact that most adulterous or sodomitical acts committed by consenting and often married (to each other) military personnel are not prosecuted at court-martial creates [this] powerful perception." *Id.* Some commentators argue that this observation lacks justification. See, e.g., Lt. Col. Theodore Essex & Maj. Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001): "The Cox Commission,"* 52 A.F. L. REV. 233, 259 (2002). Essex and Pickle suggest that the sodomy ban is not applied arbitrarily; rather, they argue that any perception of arbitrary, vindictive application is due to well orchestrated media campaigns. *Id.* Modification of the UMJC based only on these misperceptions, they argue, "may well result in a system that is less responsive to good order and discipline and casts even more discredit upon the military by demonstrating that we no longer hold our members to the high standard of morality and ethics the American people expect of their military." *Id.* at 259-60.

The Model Penal Code (MPC) provision on sodomy provides:

- (2) "Sexual intercourse" includes intercourse per os or per anum, with some penetration however slight; emission is not required;
- (3) "Deviate sexual intercourse" means sexual intercourse per os or per anum between human beings who are not husband and wife, and any form of sexual intercourse with an animal.

MODEL PENAL CODE § 213.0 (1962).

- (1) A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the second degree if:

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(a) he compels the other person to participate by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone; or

(b) he has substantially impaired the other person's power to appraise or control his conduct, by administering or employing without the knowledge of the other person drugs, intoxicants or other means for the purpose of preventing resistance; or

(c) the other person is unconscious; or

(d) the other person is less than 10 years old.

(2) *By Other Imposition.* A person who engages in deviate sexual intercourse with another person, or who causes another to engage in deviate sexual intercourse, commits a felony of the third degree if:

(a) he compels the other person to participate by any threat that would prevent resistance by a person of ordinary resolution; or

(b) he knows that the other person suffers from a mental disease or defect which renders him incapable of appraising the nature of his conduct; or

(c) he knows that the other person submits because he is unaware that a sexual act is being committed upon him.

*Id.* § 213.2.

The relevant sections of Title 18 provide:

(a) Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) *By other means.* Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby—

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 2241 (2005).

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

during his tenure as Chief Judge of the CAAF, Judge Cox upheld the categorical ban on sodomy, writing both the *Henderson* and *Fagg* opinions.<sup>68</sup>

Relatively little scholarly analysis has been done of Article 125 and the military ban on sodomy. However, post-*Bowers*, one military scholar, Major Eugene E. Baime, discussed the ban on sodomy and found that there is minimal justification for the sodomy statute as applied to individuals engaged in such acts in the privacy of their homes.<sup>69</sup> Arguing that military personnel have a right to privacy, Major Baime reasoned that there is no justification for proscribing private, consensual sodomy.<sup>70</sup> Further, even in light of the uniqueness of the military environment, there are no compelling reasons to

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(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title, imprisoned not more than 20 years, or both.

*Id.* § 2242.

(2) [T]he term “sexual act” means—

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

*Id.* § 2246.

68. See *United States v. Gates*, 40 M.J. 354, 354 (C.M.A. 1994) (opinion by C.J. Cox) (“[W]e are no more free now than we were 2 years ago to reject the clear proscription of Congress in Article 125.”); *Fagg*, 34 M.J. at 180 (opinion by C.J. Cox); *Henderson*, 34 M.J. at 178 (opinion by C.J. Cox).

69. See Major Eugene E. Baime, *Private Consensual Sodomy Should Be Constitutionally Protected in the Military by the Right to Privacy*, 171 MIL. L. REV. 91 (2002). Maj. Baime argues that “[s]ervice members have a constitutional right to privacy, which protects their ability to engage in private consensual sodomy with another adult.” *Id.* at 133.

70. *Id.*

uphold the ban.<sup>71</sup> After surveying military history, Major Baime concluded that “[i]t is disingenuous to argue that private consensual sodomy is prejudicial to good order and discipline or service discrediting,” because consensual, private sodomy “causes no harm to anyone or any military unit [and does not] compel other[s] to look with disfavor upon the military.”<sup>72</sup>

#### IV. THE ADVENT OF *LAWRENCE* AND CHALLENGES TO CATEGORICAL SODOMY BANS

##### A. *Finding a Right to Privacy in Intimacy Between Consenting Adults*

In 2003, the Supreme Court significantly hindered the ability of states and the federal government to outlaw private, consensual sexual acts between adults. In *Lawrence*, the Supreme Court overturned a Texas statute prohibiting same-sex individuals from engaging in sodomy.<sup>73</sup> The Court, instead of focusing only on the homosexual nature of the conduct,<sup>74</sup> cast the question as “whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment.”<sup>75</sup> Explicitly overruling *Bowers*,<sup>76</sup> the Court

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71. *Id.* at 129–32. This argument was based on the CAAF’s own acknowledgement that “Congress made no findings as to the possible harmful consequences of privately performed sexual acts upon the military community.” *Id.* at 95 n.30 (citing *United States v. Scoby*, 5 M.J. 160, 165 (C.M.A. 1978)).

72. *Id.* at 131.

73. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

74. The majority opinion, in reference to the *Bowers* Court’s characterization of the question at issue as the right of homosexuals to engage in sodomy, argued:

That statement . . . discloses the Court’s own failure to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

*Id.* at 567.

75. *Id.* at 564. The Court maintained that its decision was applicable to homosexual and

held that individuals have a fundamental privacy interest in consensual relationships engaged in while not in public.<sup>77</sup>

The standard of review employed by the *Lawrence* Court in overruling the Texas statute has led to differing interpretations of the protection that the decision offers. The Court explicitly stated that it was ruling on due process grounds.<sup>78</sup> In addition, the Court considered the result to be part of the right to privacy and a line of cases utilizing the strict scrutiny standard of review to invalidate state laws that violate this right.<sup>79</sup> However, the Court noted that there may be exceptions to this general liberty interest, and it identified categories of sodomy that may still be subject to criminal laws.<sup>80</sup> The

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heterosexual conduct. In admonishing the *Bowers* Court for limiting its inquiry to whether homosexuals possess the fundamental right to engage in sodomy, the majority argued that the real issue was whether “[t]he statutes . . . seek to control a personal relationship that . . . is within the liberty of persons to choose.” *Id.* at 567. The Court noted that sodomy laws had their historical roots in English criminal law, where they “include[d] relations between men and women as well as relations between men and men,” and that American law has been read to include both groups. *Id.* at 568. As a result, the Court couched its decision in terms of due process rather than equal protection, because under the “Equal Protection Clause some might question whether a prohibition would be valid if drawn . . . to prohibit the conduct between same-sex and different-sex partners.” *Id.* at 575.

76. “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.” *Id.* at 578.

77. The Court held:

The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

*Id.*

78. *Id.* at 575.

79. *Id.* at 567. The Court placed the *Lawrence* decision in line with *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating a state law that prohibited the use of drugs or contraception and counseling as to the use of contraceptives), *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (invalidating a law that prohibited the distribution of contraceptives to unmarried persons), and *Roe v. Wade*, 410 U.S. 113 (1973) (invalidating a law that prohibited abortions). *Lawrence*, 539 U.S. at 564–65. In addition, the Court noted that, post-*Bowers*, it upheld through the Due Process Clause other privacy interests because “[a]t the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe.” *Id.* at 574 (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)).

80. The Court stated that sodomy convictions generally resulted from situations of “predatory acts against those who could not or did not consent.” *Lawrence*, 539 U.S. at 569. The Court noted that the case before it “[did] not involve minors. It [did] not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It [did] not involve public conduct or prostitution.” *Id.* at 578.



Court also indicated that it may favor rational basis review in future challenges to sodomy laws. For example, by claiming that the “Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual,”<sup>81</sup> the Court employed language more consistent with rational basis review than strict scrutiny.<sup>82</sup>

### *B. Applying the Lawrence Decision in the Military Context*

Because the CAAF used the Supreme Court's decision in *Bowers* to uphold Article 125, the *Lawrence* decision placed this rationale into jeopardy. *Marcum* and *Stirewalt* provided the CAAF with its first opportunities to determine how *Lawrence* would affect the validity of Article 125 as applied to consenting adults. The CAAF rejected the notion that military courts should employ strict scrutiny when evaluating the constitutionality of Article 125, noting that “the [Supreme] Court did not expressly identify the liberty interest [in *Lawrence*] as a fundamental right.”<sup>83</sup> Thus, the court determined that a “searching constitutional inquiry,” which looks beyond simply whether the conduct fell within the *Lawrence* liberty interest, is required.<sup>84</sup>

The CAAF's evaluation was influenced by the nature of the military environment. The CAAF is charged with the “general practice of addressing constitutional questions on an as applied basis where national security and constitutional rights are both paramount interests,”<sup>85</sup> so it considers challenges on an “as applied, case-by-case basis.”<sup>86</sup> The CAAF also held that because both consensual and forcible sodomy were proscribed by Article 125, a facial challenge

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81. *Id.*

82. *Id.* at 586 (Scalia, J., dissenting). In *Marcum*, the government argued that the Court intended for a rational-basis standard of review to apply to constitutional challenges to the military sodomy law. *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

83. *Marcum*, 60 M.J. at 205 (“[W]e will not presume the existence of such a fundamental right in the military environment when the Supreme Court declined in the civilian context to expressly identify such a fundamental right.”). This argument is similar to the one utilized by the CAAF in both *Fagg* and *Henderson*, in which where the court refused to find a right to heterosexual sodomy absent Supreme Court direction. *See supra* note 67.

84. *Marcum*, 60 M.J. at 205.

85. *Id.* at 206.

86. *United States v. Stirewalt*, 60 M.J. 297, 304 (C.A.A.F. 2004).

would be inappropriate.<sup>87</sup> This analysis demonstrates that the CAAF considers sodomy in the military, even when consensual, to have an effect on national security.<sup>88</sup> However, the CAAF never addressed or evaluated this claim; instead, it accepted the government's contention that the ban on sodomy was necessary without question.<sup>89</sup>

The relationship between Article 125 and national security suggested to the court that strict scrutiny was inappropriate. The CAAF admitted that, under strict scrutiny, Article 125 may be

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87. *Marcum*, 60 M.J. at 206 (“Article 125 addresses both forcible and non-forcible sodomy, [so] a facial challenge reaches too far. Clearly, the *Lawrence* analysis is not at issue with respect to forcible sodomy.”).

88. The CAAF's analysis is supported by Justice O'Connor's concurring opinion in *Lawrence*, in which she stated that national security may be a legitimate purpose for banning sodomy. *Lawrence*, 539 U.S. at 585 (O'Connor, J., concurring). Justice O'Connor considered the statute to be invalid under the Equal Protection Clause, not the Due Process Clause, and found that Texas did not have a compelling reason to ban homosexual sodomy. *Id.* at 583. She stated that “[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause.” *Id.* If Texas, however, could find an interest “such as national security or preserving the traditional institution of marriage,” the ban may be permissible. *Id.* at 585. By claiming that a legitimate interest may exist that could justify banning homosexual sodomy, such as “national security,” Justice O'Connor acknowledged that a legitimate state interest exists that would permit a categorical ban on sodomy. *Id.* This would also satisfy the *Lawrence* majority's requirement of a rational basis to proscribe sodomy. *Id.* at 578 (“The Texas statute furthers no *legitimate state interest* which can justify its intrusion into the personal and private life of the individual.”) (emphasis added).

89. In discussing the interests of the government, the CAAF stated that amici argued that the relationship between Article 125 and military interests may be tenuous. The Court noted:

[T]he amici do not “dispute that the interests in good order and discipline, and in national security, are important. But the importance of those interests is irrelevant, because there is simply no basis to conclude that they are even rationally related to Article 125, let alone sufficiently advanced by that law to justify its onerous burdens on the ‘full right’ to engage in ‘conduct protected by the substantive guarantee of liberty.’” Under both arguments, the amici maintain that the government has no legitimate or compelling military interest in regulating Appellant's private conduct.

*Marcum*, 60 M.J. at 202. The government countered that Article 125 “criminalizes conduct that ‘create[s] an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion, within the military as recognized by Congress in 10 U.S.C. § 654(a)(15).’” *Id.* (brackets in original). The CAAF agreed with the government's contention and did not question the relationship between Article 125 conduct and its professed military goals.

However, the government's contentions and the decision in *Stirewalt* are irreconcilable. 10 U.S.C. § 654 (2005), commonly referred to as “Don't Ask, Don't Tell,” addresses only homosexual conduct. If “Don't Ask, Don't Tell” is necessary to promote morale, order, discipline, and unit cohesion, Article 125 reaches too far by proscribing heterosexual conduct. See *infra* Part V.C.

invalidated and should be avoided.<sup>90</sup> Instead, the court assumed that so long as a military reason could be premised, a conviction under Article 125 could be upheld.

## V. HOW THE CAAF MISINTERPRETED *LAWRENCE*

### A. *Lawrence Calls for Strict Scrutiny Review*

The CAAF incorrectly interpreted *Lawrence* and should have invalidated Article 125 under strict scrutiny review. Foremost, the CAAF disregarded the Supreme Court's framing of the issue in *Lawrence*. The Court specifically stated that it misconstrued the question before it in *Bowers* as only questioning the fundamental right to homosexual sodomy. Consequently, the *Lawrence* Court cast the question as an issue of a relationship within the "liberty of persons to choose without being punished as criminals."<sup>91</sup> The Court's failure to state that the liberty interest was fundamental was not because the "'liberty at stake' was *less* than fundamental, but rather because . . . [the Court] had *understated* its basic character."<sup>92</sup> The liberty interest, firmly rooted in the right to privacy, is fundamental.<sup>93</sup>

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90. *Marcum*, 60 M.J. at 204 ("On the one hand, the interests in military readiness, combat effectiveness, or national security arguably would qualify as either rational or compelling governmental interests. On the other hand, it is less certain that Article 125 is narrowly tailored to accomplish these interests.").

91. *Lawrence*, 539 U.S. at 567.

92. Brief of ACLU et al. as Amici Curiae in Support of Appellant at 11, *Marcum*, 60 M.J. 198, available at [http://www.aclu.org/FilesPDFs/marcum%20final%20\(filed\).pdf](http://www.aclu.org/FilesPDFs/marcum%20final%20(filed).pdf) [hereinafter ACLU Brief].

93. The CAAF was correct in stating that the Supreme Court did not identify a *new* fundamental right; however, the CAAF failed to recognize that the Supreme Court merely restated an already identified right. To formulate the majority decision, the *Lawrence* Court found that "the most pertinent beginning point" in analyzing anti-sodomy statutes was their "decision in *Griswold v. Connecticut*." *Lawrence*, 539 U.S. at 564. *Griswold* invalidated a Connecticut statute that forbid married individuals from using contraception because it violated a "zone of privacy" guaranteed by the Fourth and Fourteenth Amendments. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). The *Lawrence* Court explained, however, that "the right to make certain decisions regarding sexual conduct extends beyond the marital relationship," and that the *Griswold* decision stood for the "fundamental proposition that the law impaired the exercise of their personal rights." *Lawrence*, 539 U.S. at 565. Citing *Eisenstadt v. Baird* and *Roe v. Wade*, the Court found that the "protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." *Id.* The

The *Lawrence* majority, by specifically placing its decision within the context of a long line of cases dealing with the fundamental right of privacy, requires that the Court employ strict scrutiny to review sodomy statutes.<sup>94</sup> Moreover, restating precedent that called for strict scrutiny would have been “superfluous” if the Court was merely calling for rational basis review.<sup>95</sup> When a law burdens a fundamental right, the Supreme Court has stated that the government must show that the infringing law is “precisely tailored” to a “compelling governmental interest.”<sup>96</sup>

Justice Scalia’s dissenting argument that the majority called for rational basis review by the use of “legitimate interest” language is misplaced.<sup>97</sup> Other language clearly states that “[the] right to liberty under the Due Process Clause” prevents the government from

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Court also quoted at length its decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), stating that “[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). Consequently, proscriptions on sodomy deny individuals this liberty. The Court then concluded that “adults may choose to enter upon this relationship [e.g., sodomy] in the confines of their homes and their own private lives and still retain their dignity as free persons.” *Id.* at 567. Thus, the appellants in the case had the “full right to engage in their conduct without intervention of the government.” *Id.* at 578. The Court’s holding was therefore premised on the fundamental right to privacy.

94. See *supra* note 93.

95. ACLU Brief, *supra* note 92, at 13. The majority stated that “[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.” *Lawrence*, 539 U.S. at 578. This was not a call for rational basis review. Rather, these hypothetical situations are either actions involving force or actions committed on individuals unable to give consent. The CAAF misconstrued these as indicating that a categorical ban may be possible because sodomy itself is in some way different from other sexual situations. These categories were, however, illustrative of the history of sodomy prosecution. Moreover, when a sodomitical act is committed under these circumstances, most state laws typically proscribe the actions under other statutes (e.g., forcible sexual assault or rape).

The *Lawrence* Court noted that consensual sodomy charges were rarely brought. *Id.* at 596. In addition, the Court pointed out that history showed “a substantial number of sodomy prosecutions and convictions for which there are surviving records were for predatory acts against those who could not or did not consent.” *Id.* at 569. Thus, the Supreme Court did not attempt to justify rational basis review; rather, the Court indicated that the breadth of historical bans was to ensure that “there would be no lack of coverage if a predator committed a sexual assault that did not constitute rape as defined by the criminal law.” *Id.*

96. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

97. *Lawrence*, 539 U.S. at 578.

interfering with an individual's private sexual conduct.<sup>98</sup> This language is indicative of that used to describe a fundamental right in the cases cited by the majority. Further, the majority's declaration that the interests asserted by Texas were "not even legitimate" merely indicates that "they were [also] not compelling"; consequently, the law would not have survived increased scrutiny.<sup>99</sup> Therefore, it is unmistakable that the *Lawrence* majority used strict scrutiny to review a law that affected the fundamental right of privacy.

*B. The Constitution also Protects Military Personnel from Governmental Intrusion into Their Privacy*

While the CAAF believes that "servicemembers . . . do not share the same autonomy as civilians,"<sup>100</sup> it has also stated that "men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service."<sup>101</sup> Congress is therefore not "free to disregard the Constitution when it acts in the area of military affairs. In that area, as in any other, Congress remains subject to the limitations of the Due Process Clause."<sup>102</sup> Thus, Congress and the military must show that the regulation of sodomy is related to some substantial governmental interest. Neither Congress nor the military can merely invoke "the phrase 'war power' . . . as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. Even the war power does not remove constitutional limitations safeguarding essential liberties."<sup>103</sup> The Supreme Court and the CAAF agree that military personnel are afforded Due Process rights in court-martial proceedings.<sup>104</sup> In addition, military courts apply

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98. *Id.*

99. ACLU Brief, *supra* note 92, at 13.

100. *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004).

101. *United States v. Mitchell*, 39 M.J. 131, 135 (C.M.A. 1994).

102. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981).

103. *United States v. Robel*, 389 U.S. 258, 263-64 (1967) (brackets and second internal quotation omitted).

104. *See, e.g., Weiss v. United States*, 510 U.S. 163, 176 (1994) ("Congress, of course, is subject to the Due Process Clause when legislating in the area of military affairs."); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (noting that servicemembers are "entitled to the due process of law guaranteed by the Fifth Amendment"); *United States v. Graf*, 35 M.J. 450, 460 (C.M.A. 1992) ("A servicemember at a general court-martial is entitled to the protection of the due

heightened scrutiny to congressional laws regulating the military environment.<sup>105</sup>

The result of this balancing of interests is that, using strict scrutiny review of Article 125, the government must demonstrate that the criminal sanction is “precisely tailored” to a “compelling governmental interest.”<sup>106</sup> In its analysis of Article 125, the CAAF accepted the government’s argument that Article 125 relates to “high standards of morale, good order and discipline, and unit cohesion,” and therefore affects “national security.”<sup>107</sup> Moreover, it is undisputed that the government’s “interests in military readiness, combat effectiveness, or national security arguably would qualify as either rational or compelling” interests.<sup>108</sup> However, the government failed to demonstrate how Article 125 relates to these interests. The Supreme Court has stated that courts should “not . . . accept at face value assertions of legislative purposes, when an examination . . . demonstrates that the asserted purpose could not have been a goal of the legislation.”<sup>109</sup> Further, while there is a general preference for “deference to legislative and executive judgments in the area of military affairs,” this does not mean complete “abdication” to the provided explanations.<sup>110</sup> Therefore, the government was required to show how Article 125 relates to the military interests as it claimed.<sup>111</sup>

### *C. The Necessity of Article 125 Is Further Undermined by the Lack of Congressional Findings Regarding Its Purpose*

Congress included no findings in the military anti-sodomy provision; thus, the government’s asserted interests are merely post-hoc rationalizations of Article 125. The CAAF noted that “the range

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process of law guaranteed by the Fifth Amendment.”).

105. See, e.g., *United States v. Bygrave*, 46 M.J. 491, 497 (C.A.A.F. 1997) (utilizing “compelling interest” language in upholding a congressional military regulation); *United States v. McFarlin*, 19 M.J. 790, 792 (C.M.A. 1985) (noting that a “fundamental necessity for discipline can be” a sufficient reason to limit the privacy rights of servicemembers).

106. *Plyler v. Doe*, 457 U.S. 202, 217 (1982).

107. *United States v. Marcum*, 60 M.J. 198, 202, 206 (C.A.A.F. 2004).

108. *Id.* at 204.

109. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975).

110. *Rostker v. Goldberg*, 453 U.S. 57, 66, 67 (1981).

111. See *supra* note 90.

of conduct proscribed by Article 125(a) is consistent with the then-existing laws of Maryland.”<sup>112</sup> However, Congress made “no findings as to the possible harmful consequences [of sodomy] upon the military community.”<sup>113</sup> Given that no sodomy statute proscribing consensual sodomy is permissible under *Lawrence*, a statute based on antiquated sodomy proscriptions and whose relationship to military interests is unclear should be invalidated.

Merely reciting that Congress renounced homosexual behavior with its “Don’t Ask, Don’t Tell” legislation does not explain its ban on sodomy.<sup>114</sup> Such a statement misstates the full implications of Article 125—a complete ban on *homosexual* and *heterosexual* sodomy.<sup>115</sup> Because “Don’t Ask, Don’t Tell” does not proscribe heterosexual conduct, it cannot be used as an indication of congressional intent. Moreover, violations of Article 125 and “Don’t Ask, Don’t Tell” have vastly different consequences. First, “Don’t Ask, Don’t Tell” is applicable only to homosexual, not heterosexual, sodomy.<sup>116</sup> In addition, while servicemembers who violate “Don’t Ask, Don’t Tell” can only suffer discharge from the military,<sup>117</sup> a violation of Article 125 can result in significantly more severe punishment.<sup>118</sup>

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112. *United States v. Henderson*, 34 M.J. 174, 176 (C.A.A.F. 1992).

113. *United States v. Scoby*, 5 M.J. 160, 165 (C.M.A. 1978).

114. *Marcum*, 60 M.J. at 206.

115. *See supra* note 89. In *Marcum*, the government argued that “Don’t Ask, Don’t Tell” demonstrates that Congress considers sodomy to be antithetical to morale, good order, discipline, and unit cohesion. *Marcum*, 60 M.J. at 202. If the CAAF accepted this argument, its decision in *Stirewalt* would be inconsistent with *Marcum*, because heterosexual sodomy is not included under “Don’t Ask, Don’t Tell.”

116. *See supra* note 89. Moreover, if “Don’t Ask, Don’t Tell” was an indication of continued congressional intent to ban sodomy, Congress would have likely reaffirmed this in the statute’s history. *See* S. REP. NO. 103-113, at 293 (1993) (indicating that congressional findings were meant only to serve as the “basis for the policy” on discharges implemented by “Don’t Ask, Don’t Tell”).

117. *See* 10 U.S.C. § 654(b) (2005). The statute only calls for a member to be “separated from the armed forces” and does not proscribe any additional punishments for violation. *Id.*

118. Conviction under Article 125 can result in “[d]ishonorable discharge, forfeiture of all pay and allowances, and confinement for 5 years.” COURT MARTIAL MANUAL, *supra* note 14, Pt. IV-79, ¶ 51.e.(4). This punishment is more severe than that given for negligent homicide, extortion, assault on a child under sixteen, or aggravated assault other than with a loaded firearm. *See id.* at Pt. IV-110, ¶ 85.e.; Pt. IV-81, ¶ 53.e.; Pt. IV-85, ¶ 54.3.(7), (8).

*D. Article 125 Fails to Advance and May Be Adverse to Military Interests*

Article 125 fails to advance, nor is it even related to, “high standards of morale, good order and discipline, and unit cohesion,” and it may actually be adverse to these interests.<sup>119</sup> Social science data suggests, “based on general population estimates, that a majority of both married and unmarried military personnel engage in oral [sodomy], at least occasionally.”<sup>120</sup> Because acts of sodomy are pervasive in both civilian and military contexts, servicemembers who engage in sodomy have no demonstrable effect on morale, good order or discipline. In addition, “no studies suggest that prohibition of sodomy is necessary for preserving or developing unit cohesion, or that decriminalizing sodomy would undermine cohesion.”<sup>121</sup>

Criminalization of sodomy may, in fact, be detrimental to morale, good order and discipline. The Cox Commission recommended the repeal of Article 125’s prohibition on consensual sodomy and its replacement with a statute more in line with federal statutes proscribing aggravated sexual conduct, because most sodomitical acts are consensual and prosecutions are often arbitrary or vindictive.<sup>122</sup> Moreover, Article 125 may undermine morale and discipline by encouraging servicemembers to be secretive about their sex lives.<sup>123</sup>

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119. *Marcum*, 60 M.J. at 202.

120. NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 58 (1993). These conclusions are based on general population studies that found that “most Americans evidently consider [oral sex] a ‘normal’ sexual variation.” *Id.* at 57. These studies concluded that “88 percent of men and 87 percent of women rated oral sex as ‘very normal’ or ‘all right,’ versus ‘unusual’ or ‘kinky.’” *Id.* In its study of sodomy per-anum, the Institute described the data as having problems of “underreporting,” because seventy-one percent of men and seventy-six percent of women described the act as “‘unusual’ or ‘kinky,’” which makes self-reporting more unlikely. *Id.* at 60. Thus, it is difficult to know the true prevalence in any population of anal sodomy. *Id.* at 60–62.

121. Brief of Social Scientists and Military Experts as Amici Curiae Supporting Appellant at 7, *Marcum*, 60 M.J. 198, available at [http://www.sldn.org/binary-data/SLDN\\_ARTICLES/pdf\\_file/1173.pdf](http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1173.pdf) (emphasis in original) [hereinafter Social Scientists Brief].

122. COX COMMISSION, *supra* note 66, § 111(D).

123. ACLU Brief, *supra* note 92, at 15. Moreover, as a matter of law, “[c]onduct can harm good order and discipline as a matter of law only if it is illegal in the civilian context.” *Id.* at 16. The only time that the CAAF found that sodomy hindered morale was when it was illegal in the civilian context as well, and the court concluded this without comment or explanation. *See United States v. McFarlin*, 19 M.J. 790, 792 (A.C.M.R. 1985).



There are far less restrictive means than a categorical ban on sodomy by which to advance military interests. In both *Marcum* and *Stirewalt*, the CAAF was reticent to find the defendants' conduct permissible because they engaged in the proscribed act with servicemembers in their chain-of-command. Any sexual activity could potentially affect morale and discipline, so the military and Congress could still ban sodomy as it bans other sexual behaviors within the military.<sup>124</sup> For instance, in cases such as *Marcum* and *Stirewalt*, the military could have proceeded under Article 134,<sup>125</sup> which prohibits superior-subordinate relationships, or under Article 92.<sup>126</sup> These alternatives mean that any sexual relationship could still be prosecuted.<sup>127</sup>

*E. Lower Military Appellate Courts Have Indicated that Article 125 Does Not Prohibit Sodomy Committed by a Servicemember and a Civilian*

The Army Court of Military Review (ACMR) ruled in November, 2004, that, under *Marcum*, certain proscriptions on sodomy by the military are unconstitutional.<sup>128</sup> In *United States v. Bullock*, the

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124. Social Scientists Brief, *supra* note 121, at 8–9.

125. 10 U.S.C. § 934 (2005).

126. *Id.* § 892. In *Marcum*, the CAAF noted:

Among other things, Appellant was convicted of non-forcible sodomy with a subordinate airman within his chain of command. An Air Force instruction prohibits such sexual conduct between servicemembers in differing pay-grades and within the same chain of command. This instruction provides for potential criminal sanctions through operation of Article 92. This instruction evidences that Senior Airman H[arrison], Appellant's subordinate, was in a military position where "consent might not easily be refused."

*Marcum*, 60 M.J. at 200 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). Likewise, in *Stirewalt*, the CAAF referred to the Coast Guard regulation prohibiting fraternization. Thus, both TSgt *Marcum* and HST *Stirewalt* could have been prosecuted for violating an order under Article 92.

127. The limitation of Article 134 is that the military must show that some harm came from the relationship to proscribe fraternization. Article 134 requires that a court martial find that, "under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces." COURT MARTIAL MANUAL, *supra* note 14, at Pt. IV-109, ¶ 83.b.

128. *United States v. Bullock*, ARMY 20030534, at \*5 (A.C.M.R. 2004) ("Appellant described conduct with a civilian, with no military connection other than that it occurred in a barracks room. Appellant did not admit any facts during the providence inquiry which

defendant was accused of engaging in sodomy with a civilian while in his barracks room.<sup>129</sup> The ACMR held that the defendant's guilty plea could not be accepted because Article 125, as applied, was unconstitutional.<sup>130</sup> In analyzing the conduct under *Marcum*, the court determined that, because the sodomy involved a servicemember and a civilian, there was no "military necessity" that would require the proscription of the conduct.<sup>131</sup> Consequently, Article 125, as applied to the defendant, was unconstitutional.<sup>132</sup>

The ACMR's decision demonstrates the shortcomings of the CAAF's post-*Lawrence* interpretation of Article 125. The only factual difference between *Bullock* and *Marcum* or *Stirewalt* is the status of the individuals who engaged in the sodomy at issue. The court has failed to elaborate why sodomy, in and of itself, is adverse to the military environment. Placing *Bullock* in the context of the most recent decisions on Article 125 demonstrates that the only military objection is that servicemembers should not engage in private, sexual activity with one another. There is not an independent explanation why sodomy is adverse to "high standards of morale, good order and discipline, or unit cohesion."<sup>133</sup>

#### F. Redefining the Military Ban on Sodomy

It is undisputed that forcible acts of sodomy are antithetical to the military environment and to the general public. Therefore, to preserve a military ban on forcible sodomy while protecting the liberty interest guaranteed by *Lawrence*, Congress need only make slight changes to Article 125. Major Baime, writing before *Lawrence*, argued that, to protect an inherent right to privacy, Article 125 should be revised to read:

- (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person by force, with

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demonstrated any military necessity to circumscribe his liberty interest in engaging in private, consensual behavior with another adult.").

129. *Id.* at \*2.

130. *Id.* at \*4.

131. *Id.* at \*5.

132. *Id.*

133. *Marcum*, 60 M.J. at 202.

an individual under the age of 16, 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.<sup>134</sup>

This revision would preserve a sufficient balance between the military need to proscribe forcible sodomy and the liberty interests of individual servicemembers.

In the alternative, Congress could adopt the changes to the UCMJ advocated by the Cox Commission.<sup>135</sup> This would essentially place the military proscription on sodomy in line with civilian law concerning sexual conduct.<sup>136</sup> The resulting provision would preserve the liberty interests of individuals while providing a comprehensive statute for the military.

#### CONCLUSION

The CAAF failed to correctly analyze *Lawrence* and should have held Article 125 unconstitutional. The military does not have any legitimate reason to ban private, consensual sodomy. Thus, Congress should remove the categorical ban on sodomy and replace it with a directed ban on only forcible sexual activity.

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134. Baime, *supra* note 69. Maj. Baime argues that this

proposed language specifically removes the phrase “with another person of the same or opposite sex,” to acknowledge the constitutionally protected status of consensual oral and anal sodomy committed in private. There is no specific language added concerning marital status or sexual orientation because the right to privacy applies equally to all individuals. Also, the phrase “unnatural carnal copulation . . . with an animal” remains to address bestiality, which should remain prohibited due to compelling state interests. Therefore, the net effect of the change is to eliminate private consensual sodomy as a crime under the UCMJ, and thus protect the constitutional right to privacy.

*Id.*

135. *See supra* note 66.

136. *See supra* note 67.

## EPILOGUE

In Spring, 2005, several news reports indicated that the Pentagon had asked Congress to alter Article 125 and possibly decriminalize consensual sodomy. These reports, however, have proven to be incorrect. Instead, it appears that the pentagon only wanted to reclassify consensual sodomy as a separate offense.<sup>137</sup>

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137. *Sodomy to Remain a Crime: Pentagon*, HERALD SUN (Melbourne, Austl.), Apr. 22, 2005.