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THE DEPARTMENT OF DEFENSE'S OBLIGATION TO COMPLY WITH THE CONSTITUTIONAL RULING IN WITT V. DEPARTMENT OF THE AIR FORCE

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I. Summary

Compliance with a federal court ruling is not merely a technicality for the military. It is an obligation of constitutional dimension demanded in a system of civilian control of the military. Whatever one's position on repeal of "don't ask, don't tell," the military cannot ignore federal courts or disregard the Constitution. If the Air Force separates Lt. Col. Victor Fehrenbach without providing the constitutional protections of the recent *Witt* decision, it will violate the law.

II. Understanding *Witt v. Department of the Air Force*

On May 21, 2008, the Ninth Circuit Court of Appeals issued an opinion in *Witt v. Department of the Air Force*, 527 F.3d 806 (2008), establishing a new constitutional standard for enforcing "don't ask, don't tell." The Ninth Circuit was required to reassess the constitutionality of the policy in light of the United States Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Supreme Court held that the Constitution protects the liberty of all persons, gay and straight, to enter into private, intimate relationships without interference of the government, unless there is sufficient justification for government regulation.

"Don't ask, don't tell" clearly burdens the ability of gay persons in the military to enter into private, intimate relationships, and in *Witt*, the Ninth Circuit had to determine whether Congress had a sufficiently important reason for intruding on personal liberty protected by the Fifth Amendment's Due Process Clause in a military context. *Witt* concluded that "don't ask, don't tell" might not meet the heightened standard of review used in cases involving constitutionally protected liberties. It did not invalidate "don't ask, don't tell," but it established a new rule requiring the military to make a much better showing of why it needed to prohibit gay persons in the military from entering into the same kind of private, intimate relationships that were encouraged for straight service members.

Under the law as enacted by Congress and as implemented by the military, gay service members could be separated from the military for making prohibited statements or engaging in prohibited conduct—either saying they were gay or entering into the private, intimate relationships at issue in *Lawrence*—regardless of whether the statements or conduct affected good order and discipline in the service member's unit. The law allowed the military to rely on a general, hypothetical assumption that the presence of known gay service members automatically undermined military effectiveness, regardless of whether that actually occurred in any specific case.

Witt concluded that *Lawrence* required more. The military could continue to enforce "don't ask, don't tell," but only if it could meet a higher standard of proof:

> We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important

> government interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.

The first factor is easy for the government to demonstrate, because preserving an effective military is always an important government interest. It will be more difficult, however, for the government to demonstrate that "don't ask, don't tell" meets the second and third factors. Under the rule announced in *Witt*, the military could no longer rely on the generalized congressional findings enacted as part of the law in 1993:

> The Air Force attempts to justify the policy by relying on congressional findings regarding "unit cohesion" and the like, but that does not go to whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest.

In short, the military would first have to show that Maj. Margaret Witt's conduct undermined good order and discipline in her unit. It could not simply argue that knowledge of gay service members could hypothetically undermine good order and discipline. Next, the military would need to show that the only way to preserve good order and discipline was to separate Maj. Witt, and that no lesser remedy, such as a single standard of appropriate conduct for gay and straight servicemembers, could satisfy the military's needs. The Ninth Circuit remanded Maj. Witt's case to the trial court to develop the facts necessary to apply the new standard. It expressed doubt, however, that the military could meet this standard in her case, because the facts tended to show it was Maj. Witt's discharge that undermined military effectiveness, not Maj. Witt herself.

A standard requiring the military to prove individualized harm to good order and discipline in a specific case is standard fare in military law. In *Witt*, the civilian Ninth Circuit borrowed its reasoning in part from the way the military's highest court, the Court of Appeals for the Armed Forces, has interpreted *Lawrence* in the context of sexual behavior in the military. See *United States v. Marcum*, 60 M.J. 198 (C.A.A.F. 2004). Similarly, the provision of the Uniform Code of Military Justice prohibiting conduct "to the prejudice of good order and discipline" (Article 134) requires individualized proof that a service member's conduct did actually prejudice good order and discipline. Although *Marcum* and the UCMJ involve criminal proceedings and "don't ask, don't tell" involves an administrative, non-criminal proceeding, the important point is that it is not unusual, or overly burdensome, for the military to consider individual circumstances in assessing harm to good order and discipline. In that sense, *Witt's* perspective on "don't ask, don't tell" is more "military" in focus than Congress's reliance on hypothetical assumptions.

III. The Effect of *Witt* on "Don't Ask, Don't Tell" Proceedings Within the Jurisdiction of the Ninth Circuit

All federal agencies, including the Department of Defense, are obligated to comply with the rulings of federal courts on constitutional issues. Because the United States Supreme Court has yet to rule on the constitutionality of "don't ask, don't tell," the rulings of the next lower level of federal courts, the circuit courts of appeal, control how the military may constitutionally enforce the policy. This is nothing new. In *Witt* itself, the government argued that the claims should be governed by an earlier Ninth Circuit case upholding "don't ask, don't tell." However, the case favored by the government was decided prior to *Lawrence v. Texas*, and *Witt* concluded that the constitutional landscape had changed, making the earlier decision inapplicable.

The jurisdiction of the Ninth Circuit Court of Appeals covers federal proceedings conducted within the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. Unless appealed, its rulings serve as mandatory authority for other litigants within the jurisdiction. On April 29, 2009, Eric Holder, the United States Attorney General, notified Congress by letter that the government would not appeal the ruling in *Witt*. The effect of that decision was to leave the ruling and reasoning of *Witt* in place unless displaced by a later decision of the United States Supreme Court. Attorney General Holder stated that he made the decision "after extensive consultation" with the Department of Defense, which advised him that the military would benefit from the development of a fuller factual record.

A recent challenge to the constitutionality of "don't ask, don't tell," *Log Cabin Republicans v. United States*, was heard in a California federal district court, and the trial judge issued an order on July 6, 2010 adopting the *Witt* standard as the controlling law for the case. The government conceded that *Witt* was the appropriate standard for the separation of individual service members within the Ninth Circuit. In the *Log Cabin* case, it only argued that *Witt* did not apply to broad attempts to invalidate the entire policy, but the trial judge denied that motion as well, applying *Witt* to all constitutional challenges against "don't ask, don't tell" within the Ninth Circuit.

The Department of Defense understands it is now required by law to enforce "don't ask, don't tell" within the jurisdiction of the Ninth Circuit under the heightened standard of *Witt*, and that it must modify its separation proceedings to require individualized proof of harm to military effectiveness. More than two years later, however, it has still not changed its procedures to comply with the constitutional ruling in *Witt*. The military continues to discharge service members stationed within the jurisdiction of the Ninth Circuit in a manner that a federal court has found unconstitutional. In short, the Department of Defense has ignored *Witt* and its constitutional requirements.

Little public attention was given to *Witt* until February 2, 2010, when Secretary of Defense Robert Gates announced his intention to review the regulations for implementing "don't ask, don't tell" with an eye toward enforcing the policy "in a fairer manner." (This was already more than 20 months after *Witt*.) He conceded that part of his responsibility was to develop procedures that complied with the Constitution and *Witt*:

> Overall, we can reduce the instances in which a servicemember who is trying to serve the country honorably is outed by a third person with a motive to harm the servicemember. And we also have to devise new rules and procedures in light of the appeals court decision in *Witt versus the Department of the Air Force* for the areas of the country covered by the appellate court. So I would say all of these matters are those that will be reviewed within this 45-day period.

When Secretary Gates announced changes to the regulations implementing "don't ask, don't tell" in March 2010, however, they did not include any changes directed toward compliance with *Witt*, despite Gates's commitment to do so. Over the following weeks, the Department of Defense deflected inquiries about compliance with *Witt* with comments about the issue being too complex or difficult to answer. Navy Secretary Ray Mabus testified before Congress that "we do understand the split of decisions between the two circuits right now" and that "we are proceeding to follow the law as written." Air Force Secretary Michael Donley testified: "I'll just say that the legal community is aware of the difference between the two circuits and assessing all that very, very carefully."

The most extensive discussion of *Witt* came from the testimony of Jeh Johnson, the Department of Defense General Counsel, before the House Armed Services Committee on March 3, 2010. Like Secretary Gates, he conceded that the law of "don't ask, don't tell" was now different within the jurisdiction of the Ninth Circuit, and that it was DOD's responsibility to conduct its administrative separation proceedings in accordance with the Constitution and *Witt*. General Counsel Johnson was asked directly what the military was now doing differently within the Ninth Circuit. His answer was that the military was still "looking at" the issue:

> We continue to work through how to address whatever pending cases exist with the 9th Circuit versus the other circuit. So it's something we are actively looking at right now within the Department of Justice.

General Counsel Johnson then shifted into what seemed to be an argument that federal courts might not have the power to find laws, or specific applications of laws, unconstitutional, or at least that the military might not have an obligation to obey courts when they do. He offered the extremely misleading suggestion that when federal courts hold that an act of Congress is unconstitutional, the military must then "balance" the options of 1) ignoring a court ruling and continuing to follow an unconstitutional law; or 2) complying with the court ruling, but therefore disobeying federal law:

> We have to balance that against applying the law as the Congress has given it to us. We say consistently within the Department of Defense that we apply the law, we faithfully implement the law in as fair and as balanced a way possible. We've got to balance that against the rule of law that Witt has created for us in the 9th Circuit. It's a complex exercise that we are working through right now with the Department of Justice. I've had

discussions with them as recently as yesterday on this very topic.

These are false choices. The military faces no legal conflict when courts hold that acts of Congress are unconstitutional—or unconstitutional in specific application, as in *Witt*. There is no obligation to continue to act unconstitutionally, and the obligation is in fact the opposite. The Department of Defense is required to amend its procedures to ensure that the military discharges service members in compliance with the Constitution. The Ninth Circuit was clear on this point. It wrote in *Witt*: "All of Congress's laws must abide by the United States Constitution."

When asked whether he had given any direction to commanders or to JAG officers that they should reassess their separation procedures in light of *Witt*, General Counsel Johnson said: "Not right now in any formal way. But it's something I'm actively thinking about." As of the date of this memo, another six months have passed without the military taking action to comply with the Constitution and the May 21, 2008 decision in *Witt*.

IV. Application of *Witt* to Lt. Col. Victor Fehrenbach's Separation Proceedings

Lt. Col. Victor Fehrenbach is another officer who, like Maj. Witt, was subjected to administrative separation proceedings within the jurisdiction of the Ninth Circuit, at Mountain Home Air Force Base, Idaho. According to an extensive report published in the Air Force Times, an administrative discharge board recommended Lt. Col. Fehrenbach be separated under "don't ask, don't tell" on April 15, 2009, almost a year after the decision in *Witt*. Given the later statements of the Secretary of Defense and the DOD General Counsel in 2010, however, it seems clear that the Air Force did not comply with the Constitution and with *Witt* in recommending Fehrenbach's discharge. See http://www.airforcetimes.com/news/2009/10/airforce_fehrenbach_102109w/

Like in *Witt*, moreover, it is unlikely the Air Force would be able to demonstrate that Fehrenbach's statements undermined good order and discipline or affected military readiness. The statements that were the basis of his administrative hearing were not public statements. Fehrenbach revealed his sexual orientation to investigators only in response to false accusations made by a civilian with no connection to the Air Force, and he spoke in public about his case only after the board recommended discharge. At the time of writing, Fehrenbach is still awaiting review of his case by the Secretary of the Air Force, the final step in an officer's separation proceeding.

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