WITT-LESS: A HISTORY AND ANALYSIS OF THE U.S. MILITARY'S FAILURE TO COMPLY WITH THE NINTH CIRCUIT'S DUE PROCESS STANDARD FOR 'DON'T ASK, DON'T TELL'

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I. Introduction

In its May 2008 ruling in *Witt v. Dep't of the Air Force*,[2] the Ninth Circuit Court of Appeals became the first court in the nation to subject Don't Ask, Don't Tell ("DADT") to a standard of "heightened scrutiny" and, more generally, to explicitly require more than deferential rational basis justification for "government attempts to intrude upon the personal and private lives of homosexuals[.]"[3] But *Witt* did more than simply articulate an abstract due process standard for subsequent gay rights cases. Surprisingly scant attention has been paid to the fact that, in applying heightened scrutiny to DADT, *Witt* mandated a new, significant, evidentiary burden shift against the military in discharging servicemembers for their sexual orientation. The *Witt*

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[2] 527 F.3d 806 (9th Cir. 2008).

[3] *Id.* at 819; *see also* Witt v. U. S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1145 (W.D. Wash. 2006) *aff'd in part, rev'd in part sub nom.* Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008) (observing that "every court, before and after *Lawrence* [*v. Texas*] ha[d] upheld the constitutionality of DADT under rational basis review.").

Court invalidated DADT's blanket, mandatory discharge policy in favor of a fact-specific standard requiring actual, individualized proof of military necessity in order to substantiate a servicemember's discharge under DADT. That decision, and the "Witt Standard" borne of it, should have been a watershed moment for gay rights in America because the Ninth Circuit Court afforded significantly expanded substantive due process protections to gay men and women within its jurisdiction.[4] The decision should also have had an immediate impact on gay servicemembers' right to serve openly in the U.S. Armed Forces. Although the military's highest ranking officials acknowledged the Witt Standard as binding and approvingly cited it in federal court cases, the military simply, absolutely, and unconstitutionally ignored the decision in practice.

Since its enactment in 1993, 10 U.S.C. § 654, commonly known as Don't Ask, Don't Tell, mandated that military commanders discharge all servicemembers who engaged in homosexual conduct, attempted to form a same-sex marriage, or evidenced a "propensity" to engage in homosexual conduct or relationships. Before *Witt*, that statute was upheld under rational basis review by every court that considered it.[5] The military's evidentiary burden in such discharges was extremely slight, and courts and military commands routinely (and rather absurdly) placed

[4] The United States Court of Appeals for the Ninth Circuit is the highest federal court, except for the U.S. Supreme Court, with appellate jurisdiction in the states of Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

[5] *Witt*, 444 F. Supp. 2d at 1145.

the burden on outed servicemembers to prove that they were not physically attracted to the same sex in order to qualify for continued military service.[6]

But in *Witt*, still three years before the military halted its enforcement of DADT,[7] the Ninth Circuit held that, in order to constitutionally discharge any servicemember for homosexual orientation or conduct, the military was required to first prove that the servicemember's discharge significantly furthered, and was necessary to further, the military's interests in maintaining morale, unit cohesion, and good order and discipline in the Armed Forces.[8] To

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[6] *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 262 (8th Cir. 1996) (upholding the discharge of outed military officer under DADT for failing to rebut legal presumption that he had "propensity" to engage in homosexual conduct, despite his promise to abstain from homosexual conduct, because under cross-examination he admitted to being physically attracted to the same sex).

[7] *See* Log Cabin Republicans v. United States, 716 F. Supp. 2d 884, 922 (C.D. Cal. 2010); Log Cabin Republicans v. United States, 2011 U.S. App. LEXIS 16134 (9th Cir. Jul. 6, 2011); Log Cabin Republicans v. United States, 2011 U.S. App. LEXIS 16310 at *5 (9th Cir. Jul. 22, 2011) ("The district court's judgment shall continue in effect insofar as it enjoins the government from investigating, penalizing, or discharging anyone from the military pursuant to the Don't Ask, Don't Tell policy."); *see also* Andrew Tilghman, *Pentagon Suspends DADT in Wake of Court Ruling*, ARMY TIMES (Jul. 8, 2011), http://www.armytimes.com/article/20110708/NEWS/107080319/Pentagon-suspends-DADT-in-wake-of-court-ruling, *archived at* http://perma.cc/F6DV-5LLJ.

[8] *Witt*, 527 F.3d at 819.

establish the discharge's necessity, military separation authorities also had to establish on the record, prior to separation, that the military could not likely "achieve substantially" the same goals through any "less intrusive means," such as transferring an outed servicemember to another unit.[9] In 2009, the Defense Department's attorneys acknowledged in federal court that *Witt* "made clear" that the legality of DADT discharges had to be evaluated in the Ninth Circuit "through an 'individualized balancing analysis' . . . tied 'specifically' to the circumstances of an individual."[10] The Secretary of Defense, the Department of Defense General Counsel, and multiple service secretaries all subsequently testified before Congress that *Witt* had changed the legal requirements for DADT discharges within the Ninth Circuit.

However, despite these public acknowledgements, the military and its service secretaries took no action and gave commanders no guidance to comply with the Ninth Circuit's Witt Standard in any way, shape, or form. In short, the military chose to ignore the U.S. Court of

[9] *Id.* ("In other words . . . a less intrusive means must be unlikely to achieve substantially the government's interest."); *see also* Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964) ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.").

[10] Defendants' Supplemental Brief Addressing Substantive Due Process at 6, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2009) (hereinafter *Log Cabin* Substantive Due Process Brief) (No. CV04-8425) (internal citation omitted).

Appeals. This was consistent with one author's observation that "[i]t doesn't appear that any decision of any court actually impacted the manner in which the military administered DADT."[11]

After the *Witt* ruling in May 2008, the military proceeded to enforce DADT as usual. It involuntarily discharged well over 1,000 more men and women from the Armed Forces, at a time of war and severe manning shortages, on the sole basis of their sexual orientation, before DADT was finally repealed and its enforcement enjoined by court order in July 2011.[12] The military

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[11] WALTER FRANK, LAW AND THE GAY RIGHTS STORY: THE LONG SEARCH FOR EQUAL JUSTICE IN A DIVIDED DEMOCRACY 131 (2014).

[12] More than 1,000 servicemembers were separated under DADT in 2008 and 2009. *See* THE WILLIAMS INSTITUTE, DISCHARGES UNDER THE DON'T ASK, DON'T TELL POLICY 1, 5 (2010), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Discharges2009-Military-Sept-2010.pdf, *archived at* http://perma.cc/H568-K9SS. Hundreds more were separated in 2010. *See* Andrea Stone, *Pentagon Discharged Hundreds of Service Members Under 'Don't Ask, Don't Tell' in Fiscal 2010: Report*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/2011/03/24/dont-ask-dont-tell-2010-discharges_n_840136.html, *archived at* http://perma.cc/H568-K9SS. Though the military has not reported any breakdown of its discharge numbers by installation or geographic area, a presumably large portion of these servicemembers could establish proper venue in judicial districts within the Ninth Circuit to avail themselves of the Ninth Circuit standard. In the case of Almy v. U.S. Department of Defense, (N.D. Cal. 2013) (No: 10-5627) (RS), the named plaintiff received a substantial monetary settlement with the Air Force on his claim for unlawful discharge under *Witt*, even though he was a resident of Washington, D.C. and had no evident ties to the Ninth Circuit states.

ended these honorable, otherwise qualified servicemembers' careers without meeting, or even attempting to meet, its constitutionally-required burden under the Ninth Circuit's Witt Standard. As a result of the military's failure to honor basic balance of powers principles and to afford servicemembers the individualized due process required by *Witt*, a large number of servicemembers were discharged from the Armed Forces between May 2008 and July 2011 in violation of rights protected by the U.S. Constitution. Surprisingly, little legal scholarship has been published about their rights and legal injuries under *Witt.*

This article will begin to fill that dearth of scholarship and analysis about the context and legal framework of the *Witt* decision and the consequences of the military's failure to comply. It will rebut the military's false rationales for non-compliance, including its bizarre theory of judicial inferiority in military matters and its baseless concerns about disruption to military operations. It will also discuss other ways in which the military has shown itself well-practiced at rendering individualized determinations of servicemembers' fitness for duty to demonstrate that the military reasonably could and should have complied with the Ninth Circuit's ruling without delay.

It is also intended that this Article and analysis will assist veterans' and gay rights advocates in developing cases seeking recovery and remuneration for the large number of servicemembers who were unconstitutionally discharged after and in violation of *Witt.* Four discharged servicemen successfully brought two such cases in federal district courts in recent years; one even included a named plaintiff with essentially no ties to the Ninth Circuit.[13] Both cases resulted

[13] *See* Fehrenbach v. Air Force, Case No. 10-00402 (D. Idaho 2010); Almy v. U.S. Dep't of Defense, Case No: cv 10-5627 (RS) (N.D. Cal. 2013).

in significant out-of-court settlements, which granted the plaintiffs requested relief of reinstatement on active duty, military retirement, or time-in-service credit with compensation for lost income and allowances.[14] These cases should be just the beginning. A broader, informed litigation strategy or legislative fix is necessary to redress the military's failure to comply with *Witt*, which has resulted in the arbitrary denial of discharged patriots' due process rights. As federal courts' and military correction boards' statutes of limitations foreclose more and more DADT discharge cases in coming years,[15] advocates and would-be plaintiffs must be mindful,

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[14] *See Breaking Update: U.S. Dept. of Justice, Air Force Reach Agreement with Lt. Col Fehrenbach*, OUTSERVE-SLDN (Aug. 16, 2010), http://www.sldn.org/news/archives/breaking-update-u.s.-dept.-of-justice-u.s.-air-force-reach-federal-cou/, *archived at* http://perma.cc/A8UJ-M32K [hereinafter Breaking Update: U.S. Dept. of Justice, Air Force Reach Agreement with Lt. Col Fehrenbach]; *OutServe-SLDN Announces Settlement for Almy*, OUTSERVE-SLDN (Mar. 15, 2013), at [Yana – there's inconsistency when including the hyperlink] http://www.sldn.org/news/archives/outserve-sldn-announces-settlement-for-almy/, *archived at* http://perma.cc/7AUM-R3VS.

[15] Under 10 U.S.C. § 1552(b) (2012), claims challenging the propriety or equity of a servicemember's discharge before intra-military administrative correction boards must be brought within three years after the servicemember "discovers the error or injustice." That statute of limitations may be waived at the administrative board's discretion if it would be "in the interest of justice" to do so. Cases seeking federal court review of these administrative boards' final decisions are also subject to a six-year statute of limitations. 28 U.S.C. § 2401(a); Lebrun v. England, 212 F. Supp. 2d 5, 16 (D.D.C 2002) (the right to obtain judicial review of a Board of

well-informed, and savvy about their rights and legal options. This article intends to assist in their just endeavor for redress.

II. Background: Major Witt and the Road to a Heightened Scrutiny Standard for Gay Rights in Military Discharges

A. Major Witt's Record of Exemplary Service and Suspension for Homosexuality

Air Force Major Margaret Witt was an accomplished, decorated, and by all accounts outstanding flight nurse throughout 19 years in military service.[16] She received superb performance evaluations and numerous high awards and honors in recognition of her superior career achievements. The Air Force made her a literal "poster child" in 1993, when it selected her to be prominently featured in its recruiting and promotional materials as the "model" Air

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Corrections' decision under the Administrative Procedures Act accrues at the time of the final agency decision rather than at the time when the underlying discharge occurred). If the servicemember wishes to bring suit under the Military Pay Act and seeks monetary damages in excess of $10,000, the "Big Tucker Act" applies and exclusive jurisdiction lies, with limited exceptions, with the U.S. Court of Federal Claims. See 28 U.S.C. § 1491(a)(1). In these cases, the Court of Federal Claims tolls the six-year statute of limitation from the date of the applicant's discharge or separation. 28 U.S.C. § 250. *See also* RAYMOND J. TONEY, MILITARY RECORD CORRECTION BOARDS AND THEIR JUDICIAL REVIEW (2010), http://www.texasbar.com/flashdrive/materials/military_law/militarylaw_toney_militaryrecord_finalarticle.pdf, *archived at* http://perma.cc/438J-JV3E.

[16] Witt v. Dep't of Air Force, 527 F.3d 806, 809–10 (9th Cir. 2008)

Force nurse.[17] Serving for most of her career in Aeromedical Evacuation Squadrons, Major Witt was responsible for providing inflight care and treatment of ill and injured servicemembers during transport aboard military aircraft.[18] She served in Europe in the 1990's, caring for ill and wounded in Bosnia, and in the Middle East, where she served on dozens of flight missions to rescue and treat soldiers fighting in Iraq.[19]

Recognition for her service included an Air Medal citation from President Bush commending her delivery of "outstanding medical care" to wounded servicemembers during Operation Enduring Freedom.[20] The citation noted that "her airmanship and courage directly contributed to the successful accomplishment of important missions under extremely hazardous conditions and demonstrate[d] her outstanding proficiency and steadfast devotion to duty."[21] She was named Air Force Officer of the Quarter in late 2003, receiving an award "given only to those individuals

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[17] *Id.* at 809.

[18] Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Preliminary Injunction Motion at 4, Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d at 1138 (W.D. Wash. 2006) (No. C06-5195 RBL) [hereinafter Plaintiff's Memorandum].

[19] *Id.*

[20] *ACLU Wins Reinstatement for Lesbian Air Force Major Discharged Under "Don't Ask, Don't Tell,"* ACLU (Sept. 24, 2010), https://www.aclu.org/lgbt-rights/aclu-wins-reinstatement-lesbian-air-force-major-discharged-under-dont-ask-dont-tell, *archived at* http://perma.cc/57RC-XKQ8.

[21] Plaintiff's Memorandum *supra* note 19, at 4.

who have demonstrated exceptional professionalism, leadership and service to our country . . . [as] recognition for superior dedication . . . ."[22]

Photos of this "poster child" flight nurse appeared in Air Force ads and literature for more than a decade,[23] even after her sudden involuntary suspension from the Air Force without pay in November 2004 pending investigation into an anonymous allegation that she was a lesbian.[24] During a formal investigation into her private sexual history lasting for nearly seventeen months, she was prohibited from participating in military duties or activities. Moreover, she was barred from earning pay, points toward promotion, and time-in-service credit toward her military retirement, even though she was less than one year short of earning that lifetime pension for her years of service.[25] In March 2006, Air Force officials finally informed Major Witt that they were initiating formal discharge proceedings against her—terminating her from the military—"on account of her homosexuality" based on evidence that she had "engaged in homosexual acts" in a private, committed 6-year relationship with a civilian woman.[26]

Regulations implementing Don't Ask, Don't Tell called for the mandatory discharge of all servicemembers who engaged in homosexual conduct, attempted to form a same-sex marriage, or indicated a "propensity" to engage in such acts or relationships, for instance, by making a

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[22] *Id.* at 4–5.

[23] *Id.* at 6.

[24] Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1141 (W.D. Wash. 2006).

[25] *Witt*, 527 F.3d at 810.

[26] *Id*.

"homosexual statement" indicating their sexual orientation.[27] Under these regulations, discharge was mandatory for all servicemembers in all of these circumstances except where the servicemember could demonstrate a predominantly heterosexual orientation.[28] Major Witt could not and did not attempt to deny her orientation or same-sex relationship.

In April 2006, Major Witt filed suit in the federal District Court for the Western District of Washington, seeking a preliminary injunction to enjoin the Air Force's discharge proceedings against her.[29] Though the DADT statute had to date been upheld by every court to consider it,[30] Major Witt argued that its application in her individual circumstances could not survive the "searching constitutional inquiry"[31] required by the Supreme Court's 2003 ruling in *Lawrence v. Texas*, in which the high Court held that "[Homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."[32] Major Witt argued that, in light of *Lawrence*, her discharge under DADT was an as-applied violation of the Fifth Amendment's guarantee of substantive due process.[33]

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[27] DOD Dir. 1332.14, Encl. 2, Definition G, Encl. 3 (1993) (repealed 2010).

[28] DOD Dir. 1304.26 Encl. C (1993) (repealed 2010).

[29] *Witt*, 527 F.3d at 810.

[30] *Witt*, 444 F. Supp. 2d at 1145.

[31] *Id*. at 1143 (quoting United States v. Marcum, 60 M.J. 198, 204 (C.A.A.F. 2004)).

[32] 539 U.S. 558, 578 (2003).

[33] U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law[.]"). Substantive due process protects those rights so fundamental as to be "implicit in the concept of ordered liberty." Palko v. Connecticut, 302 U.S. 319, 324–25 (1937).

B. The Military Prevails at the District Court Under Deferential Rational Basis Scrutiny

In July 2006, U.S. District Court Judge Ronald Leighton rejected Major Witt's plea for injunctive relief and granted the Government's motion to dismiss her case on summary judgment.[34] Judge Leighton's opinion acknowledged that he was "not unsympathetic to the situation in which Major Witt . . . [found] herself" based on the fact that "her colleagues value[d] her contribution to their unit and apparently want[ed] her back."[35] "[Major Witt] has served her

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In Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984), the Supreme Court wrote that under its substantive due process jurisprudence, "certain kinds of highly personal relationships" are entitled to "a substantial measure of sanctuary from unjustified interference by the State," and that such constitutional protection "safeguards the ability independently to define one's own identity that is central to any concept of liberty." Three years later, the Court unambiguously stated that the "freedom to enter into and carry on certain intimate or private relationships [is] *a fundamental element of liberty* protected by the Bill of Rights." Bd. of Dirs. v. Rotary Club, 481 U.S. 537, 545 (1987) (emphasis added). In *Lawrence v. Texas* in 2003, the Supreme Court held that "[Homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. 539 U.S. 558, 578 (2003). It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Id.*

[34] *Witt*, 444 F. Supp. 2d at 1138.

[35] *Id*. at 1144.

country faithfully and with distinction," he wrote, so "[i]t is tempting to accept [her] urging to apply DADT narrowly within the context of [her] individual circumstances."[36] But "this," he concluded, "the Court cannot do."[37]

Judge Leighton held that "Rational Basis review" was the appropriate standard of scrutiny for laws impinging gay rights, and concluded that such deferential scrutiny did "not allow for the kind of balancing test between government interest and interest of the individual advocated by [Major Witt]."[38] That was particularly true, he said, because of a nebulous tradition of judicial deference to the political branches in making and enforcing personnel rules for the military. As he explained, "Court review of Congressional enactments is especially deferential in the military context. "It is difficult to conceive of an area of governmental activity in which the courts have less competence."[39] "[E]very court," the Judge noted, "has upheld the constitutionality of DADT under rational basis review," and "[i]t is not for this Court, on rational basis review, to conduct a re-weighing of the evidence that was before the legislative decision-makers" who enacted that statute.[40]

Two months after Judge Leighton's decision, in September 2006, an Air Force administrative discharge board determined that Major Witt had engaged in homosexual acts and

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[36] *Id*.

[37] *Id*.

[38] *Id.* at 1145.

[39] *Id.* (citation omitted) (quoting Goldman v. Weinberger, 475 U.S. 503, 508 (1986) and Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

[40] *Id.*

had admitted to being homosexual in violation of DADT.[41] Acting on the board's recommendation, in July 2007, the Secretary of the Air Force ordered her to be discharged from the military.[42] She received no pension or benefits to show for her 19 years in service. Because she was discharged for "homosexuality," the military automatically reduced her severance pay by half.[43]

For discharged servicemembers like her, the stigma of involuntary discharge often became a life-long indignity. On separation documents commonly requested by civilian and government employers, the military clearly and permanently stamped reasons for separation like "Homosexual Act" or "Homosexual Statement," with negative "re-entry codes" indicating that these veterans were people the military would not take back under any circumstances. Those codes often rendered them ineligible for employment opportunities with law enforcement agencies and government contractors.[44] Many of these men and women received less than

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[41] *Witt*, 527 F.3d at 810.

[42] *Id.*

[43] *See* DOD Instr. 1332.39 § 4.3.2 (Aug. 2010). In 2013, as full settlement in a class action suit brought by the ACLU, servicemembers discharged under DADT on or after November 10, 2004 were finally awarded their full severance pay from the military. *See* Settlement Agreement at 5, *Collins v. United States*, Case No. 10-778C (Fed. CL. Jan, 7, 2013); *Deal Restores Severance Pay for U.S. Military Gays*, USA TODAY, Jan. 7, 2013, *archived at* http://perma.cc/T2N3-RM5Q.

[44] ABA COMM'N ON SEXUAL ORIENTATION AND GENDER IDENTITY, LGBT SERV. MEMBERS AND THE ARMED FORCES: ONE YEAR AFTER 'DON'T ASK, DON'T TELL' 6 (2012), *archived at* http://perma.cc/L2DM-5ATR.

honorable service characterizations too, which prevented them from accessing valuable benefits through the Department of Veterans Affairs, including funding for education and medical care, or the honor of burial in a veterans' cemetery.[45]

C. The Witt Standard is Born at the Ninth Circuit

On appeal before the Ninth Circuit Court of Appeals in May 2008, Major Witt won a staggering and unprecedented victory. In *Witt v. Dep't of the Air Force*, the Ninth Circuit ruled that the District Court had erred in granting the Government's motion to dismiss Major Witt's claim.[46] In so doing, the court articulated what has come to be called the "Witt Standard," which required heightened scrutiny and fact-specific, individualized justification for each individual's discharge under DADT. [47]

Applying heightened scrutiny in *Witt*, the Ninth Circuit invalidated the military's blanket application of DADT by holding that the Fifth Amendment's guarantee of substantive due process required consideration of each DADT discharge on its own facts.[48] The court shifted the

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[45] *Id.*

[46] *Witt*, 527 F.3d at 821–22 ("Taking direction from what the Supreme Court decided in *Lawrence* and *Sell*, we hold that DADT, after *Lawrence*, must satisfy an intermediate level of scrutiny under substantive due process. In light of the foregoing, we VACATE and REMAND the district court's judgment with regard to Major Witt's substantive due process claim and procedural due process claim[.]")

[47] *Id.* at 819.

[48] *Id.*

burden to the military to prove that each specific servicemember's discharge under DADT was "necessary" to maintain military cohesion, morale, and discipline within his or her specific unit,[49] and to prove that the military could not reasonably accomplish its goals by any "less intrusive means,"[50] like transferring outed servicemembers to another unit. While the Ninth Circuit's decision did not overrule DADT outright, it made clear that the evidentiary burden had significantly shifted against the military in DADT cases; the military would now have to make

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[49] *Id.*

[50] *Id.* at 821; see *also* Witt v. Dep't of the Air Force, 548 F.3d 1264, 1267 (9th Cir. 2008) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) ("The *Witt* opinion leaves no doubt about how fact-specific this inquiry is to be. The panel ordered the trial court on remand to determine 'whether the application of ['Don't Ask, Don't Tell'] *specifically to Major Witt* significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest.'" (citing *Witt,* 527 F.3d at 821); *Witt*, 739 F. Supp. 2d at 1315 ("The facts deemed worthy of mention by the Court of Appeals are inconsistent with the more deferential analysis advocated by the government. Rather, a complete review of the history of Major Witt's service, including her conduct as an officer, as well as her sexual orientation, must be evaluated within the context of the squadron in which she served, its mission, its personnel and its culture."); Defendants' Supplemental Brief Addressing Substantive Due Process at 6, Log Cabin Republicans v. United States, 716 F. Supp. 2d 884 (C.D. Cal. 2009) (No. CV04-8425) ("The Ninth Circuit [in *Witt*] made clear" that challenges to the DADT statute must be as-applied and conducted through an "individualized balancing analysis . . . tied specifically to the circumstances of an individual.") (quoting *Witt*, 527 F.3d at 821)).

individualized showings of necessity on record before it could lawfully discharge servicemembers for their sexual orientation within the Ninth Circuit's jurisdiction.[51]

Witt also made clear that the Ninth Circuit would grant the military little traditional deference. Though the Ninth Circuit acknowledged courts' traditional deference to Congress in matters concerning management of the military, it declared, "Notably, deference does not mean abdication . . . . Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs."[52] That language was a far cry from district Judge Leighton's more traditional, self-abasing posture in military personnel matters, where, as he wrote, courts have little "competence," even in cases with a constitutional dimension.[53]

As Major Witt had urged, the Ninth Circuit Court rooted its heightened scrutiny Witt Standard in the U.S. Supreme Court's decision five years earlier in *Lawrence v. Texas*,[54] in which the Supreme Court declared that due process, "as a general rule, should counsel against attempts by the State, or a court, to define the meaning of [an individual's personal] relationship or to set its boundaries *absent injury to a person or abuse of an institution* the law protects . . . . [Homosexuals'] right to liberty under the Due Process Clause gives them the full right to engage

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[51] *See* Press Release, ACLU, *supra* note 21.

[52] *Witt*, 527 F.3d at 821 (citation omitted).

[53] *See Witt*, 444 F. Supp. 2d at 1145 ("Court review of Congressional enactments is especially deferential in the military context. It is difficult to conceive of an area of governmental activity in which the courts have less competence.").

[54] 539 U.S. 558 (2003).

in their conduct without intervention of the government.[55] It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[56] The *Witt* Court interpreted these words from *Lawrence* to require that the military prove each individual servicemember's sexual orientation caused *actual* "injury" or "abuse" to the military, such that his or her involuntary discharge furthered, and was necessary to further, the military's interests. Otherwise, the military would be imposing indiscriminate, severe burdens on homosexual servicemembers' constitutionally protected "realm of liberty" and private lives.

The *Witt* Court also found the 2004 case of *United States v. Marcum*[57] particularly instructive.[58] In *Marcum*, the military's highest court, the Court of Appeals for the Armed Forces, had carefully considered whether *Lawrence*'s constitutional protections applied in the military context. The court considered whether *Lawrence* protected a defendant from criminal prosecution under the Uniform Code of Military Justice ("UCMJ") for homosexual acts with a subordinate. Though the court ultimately held against the defendant in that case on the grounds that the UCMJ prohibited sexual acts with a subordinate independent of sexual orientation, it explicitly rejected the argument that *Lawrence*'s due process protections did not apply in the military context.[59] The *Marcum* Court ruled that *Lawrence*'s constitutional protections had to be

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[55] *Witt*, 527 F.3d at 814 (quoting *Lawrence*, 539 U.S. at 567) (emphasis added).

[56] *Id.* (quoting *Lawrence*, 539 U.S. at 567) (internal citation omitted).

[57] 60 M.J. 198 (C.A.A.F. 2004).

[58] See *Witt*, 527 F.3d at 816.

[59] *Id.* at 205–06 ("The Supreme Court and this Court have long recognized that men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when

addressed in the context of each servicemember's specific case[60] and then undertook a detailed, fact-specific analysis, which, the Ninth Circuit Court concluded in *Witt*, "necessarily required more than hypothetical justification for the [military's homosexual conduct] policy" and "applied a heightened level of scrutiny."[61]

Applying "heightened scrutiny" to DADT in light of these precedents, the *Witt* Court ultimately ruled:

> 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 governmental interest, the intrusion must significantly further that interest, and the intrusion must be

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they enter military service. Our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes. As a result, this Court has consistently applied the Bill of Rights to members of the Armed Forces, except in cases where the express terms of the Constitution make such application inapposite . . . . Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable. Therefore, we consider the application of *Lawrence* to Appellant's conduct. However, we conclude that its application must be addressed in context." (internal citations omitted)).

[60] *Id*. at 206.

[61] 527 F.3d at 816.

> necessary to further that interest. In other words . . . a less intrusive means must be unlikely to achieve substantially the government's interest . . . .
>
> In addition, we hold that this heightened scrutiny analysis is as-applied rather than facial . . . . Under this review, we must determine not whether DADT has some hypothetical, posthoc rationalization in general, but whether a justification exists for the application of the policy as applied to Major Witt.[62]

The *Witt* Court then firmly rejected the military's generic, post-hoc justification for DADT discharges, writing:

> The Air Force attempts to justify the [DADT] 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.[63]

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[62] *Id.* at 819 (emphasis added) (internal citations omitted) (quoting Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964) ("Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved.")).

[63] *Id.* at 821 (emphasis added).

Applying this individualized balancing test, as the *Marcum* Court had done, the Ninth Circuit then noted that "Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even thenit was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion."[64]

D. A Different Tune from the District Court on Remand Suggests that the Military was Unlikely to Meet its Burden under *Witt* in Most Other DADT Discharge Cases

The Ninth Circuit remanded Major Witt's case to Judge Leighton at the district court level to apply the Ninth Circuit's new due process standard in her individual circumstances. But the Ninth Circuit's own language in *Witt* left little room for him—or other district courts—to justify almost any servicemember's discharge under DADT. At trial on remand, the Government called only one material witness to testify about the potential negative impacts that Major Witt's homosexuality posed to the military's interests. General Charles Stenner, head of the Air Force Reserves, testified that he had never met Major Witt and that he had never knowingly met any gay person in his life, but he "plead[ed] for uniformity and consistency in the administration of personnel policies" despite the Ninth Circuit's clear requirement of a non-uniform, individualized analysis for such discharge cases.[65]

Judge Leighton ultimately concluded:

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[64] *Id.* at 821 n.11.

[65] *Witt*, 739 F. Supp. 2d at 1314 (denial of rehearing *en banc*).

> The facts deemed worthy of mention by the Court of Appeals are inconsistent with the more deferential analysis advocated by the government . . . . The evidence produced at trial overwhelmingly supports the conclusion that the suspension and discharge of Margaret Witt did not significantly further the important government interest in advancing unit morale and cohesion. To the contrary, the actions taken against Major Witt had the opposite effect. . . . If DADT does not significantly further an important government interest . . . it cannot be necessary to further that interest . . . . Application of DADT therefore violates Major Witt's substantive due process rights under the Fifth Amendment to the United States Constitution. She should be reinstated at the earliest possible moment. [6667]

Perhaps helpful to future practitioners, Judge Leighton also rejected the Government's argument that an amalgamation of broader conjectural fears about "push back" from heterosexual servicemembers could justify the separation of a proven, qualified gay servicemember:

> The possibility of such push back is off-set by the known negative impact of DADT upon the military: the loss of highly skilled and trained military personnel once they have been

[66] *Witt*, 739 F. Supp. 2d at 1315–16.

> outed and the concomitant assault on unit morale and cohesion caused by their extraction from the military. In this regard, the Court notes the Army's policy of deploying openly gay or lesbian personnel if the discharge process has not yet begun when the order to deploy issues. In this time of war, the Army, at least, has decided that allowing openly gay service is preferable to going to war without a member of a particular unit.[68]

In light of these precedents, military officials in the Ninth Circuit would have to prove that DADT discharges were necessitated by fact-based determinations about the actual impacts of an individual's open service, without being able to lean on traditional judicial deference, Congressional findings, or conjectural "push back" fears. It seems clear that in the vast majority of such cases, the military could not meet its burden under *Witt* to prove the servicemember's discharge actually furthered and was necessary to further the military's interests.

III. Military Officials Publicly Acknowledged that *Witt* Placed Binding New Requirements on Military Commands in the Ninth Circuit to Conduct DADT Discharges "Through an Individualized Balancing Analysis"

After the *Witt* decision, the military's highest officials publicly acknowledged that the individualized Witt Standard was binding on military commands in the Ninth Circuit. In the 2009 case of *Log Cabin Republicans v. United States*, the Department of Defense's ("DOD") attorneys defended DADT against attempts to invalidate the law entirely by arguing that *Witt* was the appropriate standard for the separation of gay servicemembers in the Ninth Circuit. The

[68] *Id.* (internal citations omitted).

Government argued that *Witt* "made clear" that the legality of DADT discharges must be evaluated "through an 'individualized balancing analysis'. . . tied 'specifically' to the circumstances of an individual."[69] The Government's brief addressing due process had three headings, all of which cited to *Witt* and to no other case.[70] In a related case that same year, the U.S. Solicitor General, representing Defense Secretary Gates, cited *Witt* as binding precedent too, arguing that a facial challenge to DADT was not ripe for Supreme Court review based on the fact that *Witt* had only set binding rules governing DADT's "constitutional[ity] as applied."[71] When it suited the military's needs, apparently, the Government was all too happy to cite *Witt* as governing law permitting the separation of *some* gay servicemembers.

DOD's courtroom attorneys were not the only military figures to publicly acknowledge *Witt* as binding Ninth Circuit law. The Defense Department's General Counsel, Jeh Johnson, now serving as Homeland Security Secretary, testified before the House Armed Services Oversight and Investigations Subcommittee in May 2010:

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[69] *Log Cabin* Substantive Due Process Brief, *supra* note 10, at 6 (quoting *Witt*, 527 F.3d at 820); *see also* Letter from Eric Holder Att'y Gen. to Irving Nathan, House Gen. Counsel (Apr. 24, 2009) (on file with author) (declining to petition for certiorari in Witt).

[70] *See id.* at 5, 7–8 ("I. *Witt* Prohibits Facial Substantive Due Process Challenges to DADT"; "II. The *Witt* Analysis Makes Associational Standing Unavailable"; "III. [Plaintiff's] Facial Challenge Would Fail In Any Event After *Witt*").

[71] Brief for the Federal Respondents in Opposition to Petition for a Writ of Certiorari at 9, Pietrangelo v. Gates, 556 U.S. 1289 (2009) (No. 08-824).

> The decision in *Witt v. Department of the Air Force* in the Ninth Circuit creates what we lawyers call a split in the circuits. The rule of law there is different than the rule of law in all the other circuits. We and the Department of Justice have been very actively working through how that split in the circuits should be applied and implemented throughout the force . . . . [W]e continue to work through how to address whatever pending cases exist within the Ninth Circuit versus the other circuits.[72]

The Chairman of that House Committee, Rep. Vic Snyder, also asked Secretary of the Air Force, Michael Donley: "Has your legal team kept you up to speed on the fact that there is now a split of authority between the circuit Court[s] of Appeal with regard to . . . the *Witt* case? Are you aware that we have different standards now [for DADT discharges] in the different circuits of the country?" Secretary Donley declared simply, "Yes."[73]

Finally, in testimony before the Senate Armed Services Committee, Defense Secretary Robert Gates said plainly, "We have to devise new rules and procedures in light of the appeals

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[72] *Review of the DOD Process for Assessing the Requirements to Implement Repeal of Don't Ask, Don't Tell: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 111th Cong. 130 (2010) (testimony of Jeh Johnson, DOD Gen. Counsel), *archived at* http://perma.cc/4L5Q-QNPT.

[73] *Budget Request from the Dept. of the Air Force, National Defense Authorization Act for Fiscal Year 2011 and Oversight of Previously Authorized Programs: Hearing Before the H. Comm. on Armed Services*, 111th Cong. 123 (2010) (testimony of Michael Donley, Sec'y. of the Air Force).

court decision in *Witt v. Department of the Air Force* for the areas of the country covered by the [Ninth Circuit] appellate court."[74]

By that point in time, the military had already failed to devise *Witt*-compliant rules and procedures for *two years* and it had already been citing *Witt* in federal courts as settled, binding law for much of that time. Despite the military's public acknowledgements that it was bound to honor the Witt Standard, it did not even attempt to do so. The military never devised any new rules and never issued commanders any new guidance about *Witt*-compliant discharge procedures at any time. For large numbers of servicemembers discharged for their sexual orientation between May 2008 and July 2011, *Witt* might just as well never have existed.

IV. The DOD General Counsel Affirmed that the Military Took No Action to Comply with *Witt* Due to a Bizarre Balance of Powers Theory that the Military Needed to "Balance" the Ninth Circuit Court's Ruling Against the DADT Law as Written

Clues about why the military failed to comply with *Witt* after acknowledging its duty to do so may be found in the muddled additional testimony provided by DOD's General Counsel, Jeh Johnson, about the *Witt* case. In the same March 2010 hearing detailed above, Chairman Snyder pressed Mr. Johnson to clarify whether the military was planning to "send direction to commanders and legal authorities throughout [the Ninth Circuit] States that there is now a

[74] *Dept. of Defense Authorization for Appropriations for Fiscal Year 2011: Hearing Before the S. Comm. on Armed Services*, 111th Cong. 701, Pt. 1 (2010) (testimony of Robert Gates, Sec'y. of Defense), *archived at* http://perma.cc/Q3SC-U6BZ.

category of gay and lesbian servicemembers that . . . indeed can serve [openly]."[75] The alternative, the Chairman warned, would be to "take every [DADT] case to the courts and lose at the district court level who [would] cite the Ninth Circuit [*Witt* decision] over and over and over again."[76]

Mr. Johnson's response confirmed that the military favored a do-nothing approach grounded in a bizarre and false notion that the military had to engage in "a complex exercise" to determine when and whether to comply with federal court rulings.[77] Mr. Johnson responded:

> The *Witt* case requires an intermediate level of constitutional scrutiny to the [DADT] policy. 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 as possible. We have got to balance that against the rule of law that *Witt* has created for us in the Ninth Circuit. It is a complex exercise that we are working through right now. . . .[78]

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[75] *Review of the DOD Process for Assessing the Requirements to Implement Repeal of Don't Ask, Don't Tell: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 111th Cong. 130 (2010) (testimony of Jeh Johnson, DOD Gen. Counsel), *archived at* http://perma.cc/4L5Q-QNPT.

[76] *Id.*

[77] *Id.*

[78] *Id.*

In seeming disbelief, the Committee Chairman asked Mr. Johnson yet again to clarify whether "there [had] been no different directions given to base commanders, Judge Advocate General (JAG) officers, that in a certain number of cases meeting certain criteria, there is no reason to move ahead with those cases because they would be overturned in the Ninth Circuit."[79] Mr. Johnson responded that the military had not given any such direction to comply with *Witt*.[80]

That testimony from the military's chief lawyer encapsulated a tellingly bizarre and improper theory of judicial inferiority or insignificance in military affairs—a view that the military must balance binding court interpretations of the Constitution against the military's own interpretation of what the law is and requires. Those are and must be false choices.[81] In a civilian democracy as ours, with equal and balanced separation of powers, the military should face no legal conflict when federal courts hold that acts of Congress, or their method of application, are unconstitutional.[82] In *Witt*, the Ninth Circuit was clear enough: "All of Congress's laws must abide by the United States Constitution," the court declared,[83] as "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs. . .

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[79] *Id.*

[80] *See id.*

[81] *See* DIANE MAZUR, PALM CTR., *THE DEPARTMENT OF DEFENSE'S OBLIGATION TO COMPLY WITH THE CONSTITUTIONAL RULING IN* WITT V. DEPARTMENT OF THE AIR FORCE, 6 (2010), *archived at* http://perma.cc/W349-326Y.

[82] *Id.*

[83] *Id.* (quoting *Witt*, 527 F.3d at 821).

."[84] There should have been no dithering or balancing act and no "complex exercise" required to determine whether to comply with an Appeals Court's unambiguous ruling on a constitutional question. The military was required to provide individualized, *Witt*-compliant justification for each DADT discharge within the Ninth Circuit after its May 2008 *Witt* ruling. The military acknowledged its duty to comply with that requirement. At the command-level, the military was also, as discussed below, in fact well practiced at making such individualized determinations of fitness for duty. Given a clear and feasible court standard, the military had no legitimate rationale for its damaging, years-long failure to comply.

V. Contrary to Its Public Rationale for Non-Compliance, the Military Could Reasonably Have Implemented *Witt*-Compliant Discharge Procedures With Minimal Confusion or Delay

As a Supreme Court nominee in June 2010, Elena Kagan testified before the Senate Judiciary Committee about her role as Solicitor General in declining to appeal *Witt* to the Supreme Court. Her testimony suggested that that the Government believed it could essentially wait out the courts, assured that the district court's application of the Witt Standard to Major Witt on remand would prove unworkable and demonstrate that the Ninth Circuit's requirements were radical and

[84] *Id.* (quoting Weiss v. United States, 510 U.S. 163, 176 (1994)).

unreasonably disruptive in practice.[85] Over two years after the Ninth Circuit ruling, Ms. Kagan testified:

> [W]hat the Ninth Circuit was demanding that the government do was, in the government's view, and in particularly in DOD's view, a kind of strange thing where the government would have to show, in each particular case, that a particular separation caused the military harm, rather than to view it in general across the statute.
>
> And one reason we thought that the remand would actually strengthen the case in the Supreme Court was because the remand would enable us to show what this inquiry would look like, what . . . the inquiry that the Ninth Circuit demanded would look like, and to suggest to the Supreme Court, using the best evidence there was, how it was that this inquiry really would disrupt military operations.[86]

Essentially, Ms. Kagan suggested, the military delayed compliance with an unduly onerous Ninth Circuit ruling while it built the case against it. But the implication that *Witt* was a radically disruptive "strange thing" does not withstand scrutiny. First, Ms. Kagan implied another set of

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[85] *Senate Committee on the Judiciary Holds a Hearing on the Elena Kagan Nomination*, 111th Cong. 130 (2010) (testimony of Elena Kagan, Solic. Gen.), *available at* http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY3.pdf, *archived at* http://perma.cc/L7PT-2SLJ.

[86] *Id.*

false choices to justify the military's do-nothing approach. If the military feared the disruptive administrative burdens of individual DADT trials, it had all the more reason to issue *Witt*-compliant rules and guidance to commanders and military attorneys in the Ninth Circuit states while *Witt* remained good law in that Circuit. Ignoring the dictates of a federal appeals court is a very curious way to discourage disruptive litigation under that court's precedents. As Chairman Snyder repeatedly warned in congressional hearings with DOD's General Counsel, the military's true choice was whether to issue *Witt*-compliant regulatory guidance or, in the alternative, to "take every [DADT] case to the courts and lose at the district court level who [would] cite the Ninth Circuit [*Witt* decision] over and over and over again."[87]

Second, Ms. Kagan's characterization of *Witt*'s individualized justification requirement as novel "strange thing" does not withstand scrutiny either. Though *Witt* created a significantly heightened due process standard for DADT discharges, its requirement of individual justification was hardly radical or burdensome. Military separation authorities were and are well practiced at making individualized determinations concerning servicemembers' fitness for service.[88]

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[87] *Review of the DOD Process for Assessing the Requirements to Implement Repeal of Don't Ask, Don't Tell: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 111th Cong. 130 (2010) (testimony of Jeh Johnson, DOD Gen. Counsel), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57127/pdf/CHRG-111hhrg57127.pdf., *archived at* http://perma.cc/4L5Q-QNPT.

[88] *See, e.g.*, UCMJ, Art. 134 (1951) (The provision of the Uniform Code of Military Justice prohibiting conduct "to the prejudice of good order and discipline," Article 134, requires

Commanders regularly make contextual, nuanced decisions regarding whether a servicemember's misconduct should result in his or her discharge from the military. With advice from Staff Judge Advocate (JAG) attorneys, these commanders are trusted to weigh the individual servicemember's conduct and the actual impact on the military mission against his or her performance record and potential for rehabilitation to productive service.

In the pre-DADT era, the military's anti-gay regulations had also expressly permitted commanders to make "exceptions" in individual cases when they determined that retention of specific openly gay servicemembers was in the military's best interests.[89] The military retained numerous openly gay soldiers under this standard and explicitly determined that these members served honorably and productively without negative impact on their unit's performance, morale, or discipline.[90] A "kind of strange thing," *Witt* was not: commanders had previously been permitted to conduct the same sort of individualized balancing analysis in considering the same sort of "homosexuality discharges."

In fact, the Witt Standard merely required commanders to make the same case-by-case determination in DADT discharges that the military already *permitted* them to make in discharging proven child molesters. Air Force Instruction 36-3208, for instance, afforded proven child molesters the opportunity to prove on a case-by-case basis that their presence in a specific

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individualized proof that a servicemember's conduct actually prejudiced good order and discipline.).

[89] *See* DIANE MAZUR, *supra* note 81 at 7, (citing Watkins v. United States Army, 875 F.2d 699, 702 (9th Cir. 1989) (en banc)).

[90] *Id.*

unit was not disruptive, while irrationally denying homosexuals the same opportunity.[91] That regulation stated that Air Force commanders "may" discharge airmen who committed "indecent acts with or assault on a child,"[92] while mandating that commanders "shall" discharge those with a mere "propensity" to engage in constitutionally protected same-sex relations with a consenting adult.[93] It is difficult to conceive of a class of servicemembers whose presence is more likely to have a degrading effect upon military cohesion, morale, and discipline than proven child abusers. Yet their exclusion from military service was not mandatory, as it was for gays and lesbians. Somehow, commanders were able to make individualized determinations in those cases without disrupting military operations.

Major Witt's trial brief at the district court on remand also pointed out that despite the military's insistence that a non-uniform rule would disrupt military operations, "the Armed Forces no longer even ha[d] a 'uniform' rule about uniforms . . . . The Army recently decided to allow a devout Sikh doctor to wear a turban instead of the usual Army headgear . . . follow[ing] a longstanding practice of deciding such requests on a case-by case basis . . . . [T]he Army had weighed [the individual servicemember's] request against factors such as 'unit cohesion, morale, discipline, safety, and/or health.'"[94]

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[91] Air Force, Office of Secretary, API 36-208, Administrative Separation of Airmen (2014).

[92] *Id.*

[93] *Id.*

[94] Plaintiff's Trial Memorandum at 8, Witt v. United States Dep't of the Air Force, 739 F. Supp. 2d 1308 (W.D. Wash. 2010) (internal citations omitted).

The military clearly appreciated the value of substantiating servicemembers' quality, character, and discharges on an individualized basis and its commanders were evidently readily capable of making such case-by-case determinations. *Witt* required commanders to do so in DADT cases and to prove that no less burdensome alternative, short of discharge, could reasonably accomplish the military's objectives. That was a high but familiar burden with clear requirements, which the military simply and unacceptably ignored. The fact that military leadership failed to devise a simple rule informing commanders of their obligation to substantiate the necessity of each DADT discharge on a case-by-case basis or to conduct the same "individualized balancing analysis" it already permitted in child molester discharge cases should not have absolved the military of its duty to honor the Constitution and comply with the Ninth Circuit's ruling without delay.

This indicates that the Government chose not to comply with *Witt* for political reasons, not ones rationally related to national defense. In every federal case brought under the Witt Standard, the military proved unable to cite actual, individualized proof that gay servicemembers' discharges were justified by military necessity.[95] The military was unable to present any such evidence in Major Witt's case, instead calling in a solitary witness who had never met Major Witt or any other gay person to plead for uniformity in a case about individualized due process analysis.[96] When one of the plaintiff servicemembers in *Almy* invoked the Witt Standard prior to

[95] *See Witt*, 739 F. Supp. 2d at 1314 (denial of rehearing en banc); Fehrenbach v. Dep't of Air Force, Case No: CIV 10-402-S-EJL (D. Idaho 2010); Almy v. U.S. Dep't of Defense, Case No: cv 10-5627 (RS) (N.D. Cal. 2013).

[96] *Witt*, 739 F. Supp. 2d at 1314 (denial of rehearing en banc).

his discharge, his command specifically refused to provide individualized justification for his discharge.[97]

It appears then that the sole military operation truly disrupted by *Witt*-compliance would be the military's bizarre, archaic, and corrosive process of discarding qualified servicemembers for their sexual orientation. Rather than face down the incoherence and baselessness of that policy as applied in the vast majority of individual cases, the military appears to have punted and dithered, ignoring *Witt*'s requirements for years while awaiting DADT's ultimate legislative repeal.

Whatever the merits of that strategy, non-compliance inflicted legal injury on a large and foreseeable scale: at least hundreds of dedicated men and women in uniform fell through the gaps and lost their military careers without any actual or individualized justification and in violation of their due process rights protected by the U.S. Constitution. Those men and women must be informed and savvy about their legal injuries and rights to redress.

VI. A Post-*Witt* DADT Case Study[98]

In September 2009, just two years before DADT faded into the history books, Air Force officials pulled 20 year-old airman Jason Garcia from his security detail in Iraq, raided his

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[97] Plaintiff's Motion for Partial Summary Judgment at 8, 16, Almy v. U.S. Dep't of Defense, Case No: cv 10-5627 (RS) (N.D. Cal. 2013).

[98] Mr. Garcia's name has been changed for the purposes of this article. All other facts and details in his case are cited from affidavits submitted on his behalf to the Air Force Board for Correction of Military Records. The author represented Mr. Garcia to challenge the circumstances of his discharge as a pro bono attorney with the Military Law Institute in Orange, California.

bedroom and belongings, and interrogated him for hours. They transferred him thousands of miles to his stateside commanders in Washington State, who then abruptly ended his military career with a stigmatizing discharge based on a two-sentence Commander's Report concluding that Mr. Garcia had "made a statement that he was homosexual in violation of [DADT's implementing regulations]." After spending almost his entire adulthood on the front lines in Iraq, Mr. Garcia lost his career in a matter of days after posting a comment for homework credit in an online civilian psychology course about struggling with self-acceptance as a gay man. To substantiate his discharge for "homosexual conduct (statement)," his stateside command produced an Investigator's Report with just two exhibits: 1) his psychology course posting and 2) a page torn from a confiscated high school diary in which he had, as a teen, privately written about a same-sex crush. Mr. Garcia was a well-liked, honorable airman committed to military and his mission. His discharge senselessly deprived his unit of a valued asset and a good man.

The military's actions in his case were also blatantly unlawful. Mr. Garcia's commanders in Washington State, within the Ninth Circuit, did not meet or even attempt to meet the constitutionally-required due process standard the Ninth Circuit had demanded in *Witt* a full 19 months prior. The military provided absolutely no individualized justification for his discharge and did not attempt in any way to link it to military necessity. His commanders concluded his online statement indicated a "propensity" to engage in homosexual conduct—namely a sexual orientation—and that was the end of their inquiry. Mr. Garcia's cursory, abusive, and baseless discharge seems to be the exact sort of situation *Witt* was intended to prevent. But in his discharge action, the Witt Standard might as well have been non-existent although it was already nearly two years old.

Well over 1,000 men and women were, like Mr. Garcia, discharged under DADT on the sole basis of their sexual orientation between May 2008, the date of the Ninth Circuit's *Witt* ruling, and July 2011, when DADT was finally enjoined by court order.[99] It is doubtful that many of those discharges could meet, or ever attempted to meet, the Ninth Circuit's high burden of proof. Military commanders and attorneys, after all, received no guidance or instruction to comply with *Witt* in any form, as DOD's General Counsel, Jeh Johnson, conceded to Congress.[100] And the military's failure to provide any individualized basis for applying DADT to qualified servicemembers like Major Witt also suggested it simply could not do so for the vast majority of DADT discharges. As a result of the military's non-compliance, commanders within Ninth Circuit states continued, as they had before, to justify involuntary terminations of these dedicated servicemembers based entirely on evidence—like Mr. Garcia's high school diary entry—that they were gay. Mr. Garcia's statements about his sexual orientation in an online civilian psychology class did not, and could not, so threaten morale, discipline, or cohesion in his unit that his separation from duty was *necessary* and the least intrusive means of accomplishing the military mission. In fact, because no one in Mr. Garcia's unit was aware of his online statement until his sudden separation from duty, it highly doubtful that the military could have cogently

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[99] *See* THE WILLIAMS INSTITUTE *supra* note 12.

[100] *Review of the DOD Process for Assessing the Requirements to Implement Repeal of Don't Ask, Don't Tell: Hearing Before the Subcomm. on Military Personnel of the H. Comm. on Armed Services*, 111th Cong. 130 (2010) (testimony of Jeh Johnson, DOD Gen. Counsel), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg57127/pdf/CHRG-111hhrg57127.pdf, *archived at* http://perma.cc/4L5Q-QNPT.

argued that his sexual orientation caused negative impacts in his individual circumstances. As in Major Witt's case, it was his separation from duty and sudden involuntary departure from his unit in Iraq that truly threatened the morale, discipline, cohesion, and safety of his fellow servicemembers, and not his sexual orientation.

Federal courts treat a military discharge as wrongful and "void," even if the military "could have validly discharged [the servicemember] at the time it did so invalidly."[101] Therefore, where military separation authorities within the Ninth Circuit's jurisdiction failed to provide *Witt*-compliant due process after May 2008, discharged servicemembers like Mr. Garcia should have a strong case for wrongful termination from military service.

Judicial relief for military servicemembers who have been wrongfully discharged is premised on the central principle of making the injured servicemembers "whole."[102] A court's remedy aims to return these servicemembers to the position they would have occupied "but for" their illegal or invalid release from duty.[103] To make these discharged men and women even partially "whole" again, they must be reinstated on active duty or else receive recovery of the active duty pay and allowances they lost through the time their term of enlistment ordinarily would have expired, but for the military's unlawful actions.[104]

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[101] Clackum v. United States, 148 Ct. Cl. 404, 410 (1960). *See also* Sofranoff v. United States, 165 Ct. Cl. 470, 478 (1964).

[102] Dilley v. Alexander, 627 F.2d 407, 413 (D.C. Cir. 1980).

[103] *Id.*

[104] Clackum v. United States, 161 Ct. Cl. 34, 35 (1963) ("Where a service person serving a fixed term of enlistment is wrongfully discharged, recovery is for the active duty pay and allowances

In two cases brought within the Ninth Circuit based on the military's failure to comply with *Witt—Fehrenbach v. Department of the Air Force*[105] in 2010 and *Almy v. U.S. Department of Defense*[106] in 2013—the military settled out of court by granting reinstatement, retirement, or lost pay and allowances with interest to four gay servicemembers discharged after *Witt* without *Witt*-compliant due process.[107] Though those full settlements represent huge victories for those individuals, those cases' out of court settlements prevented federal courts from weighing in, applying *Witt*, and building a clear precedential consensus that servicemembers discharged without *Witt*-compliant due process should receive redress. As a result, there is to date no published precedent from any federal court or from the services' respective (and powerful)

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lost up to the time the term of enlistment would have expired even though the active duty call-up might have expired earlier. The allowances include allowances for clothing, quarters, rations, mustering-out pay, travel, and amounts attributable to leave; *see also* Smith v. United States, 155 Ct. Cl. 682, 691 (1961); Murray v. United States, 154 Ct. Cl. 185, 186 (1961) ("[A wrongfully discharged servicemember] is also entitled to recover all of his enlistment bonus including the allegedly unearned portion thereof.").

[105] Fehrenbach v. Dep't of Air Force, Case No: CIV 10-402-S-EJL (D. Idaho 2010).

[106] Almy v. U.S. Dep't of Defense, Case No: cv 10-5627 (RS) (N.D. Cal. 2013).

[107] *See Breaking Update: U.S. Dept. of Justice, Air Force Reach Agreement with Lt. Col Fehrenbach*, *supra* note 13, and *OutServe-SLDN Announces Settlement for Almy*, OUTSERVE-SLDN (Mar. 15, 2013), *available* at http://www.sldn.org/news/archives/outserve-sldn-announces-settlement-for-almy/, *archived at* http://perma.cc/7AUM-R3VS.

boards for correction of military records ruling one way or another on a discharged servicemember's claim for redress under *Witt*. That must change.

VII. Conclusion

Because essentially no legal scholarship has been published concerning the military's failure to comply with *Witt*, very few servicemembers are likely to know that they should have received significantly heightened due process during their discharges. If they sought legal counsel, particularly from military JAG attorneys, it is doubtful that they would have been accurately informed and equipped to invoke their constitutional rights under *Witt.* When a plaintiff in the *Almy* case attempted to do so prior to his discharge, his command explicitly declined to provide *Witt*-compliant justification.[108] Therefore, veterans and gay rights advocates must be savvy about the post-*Witt* legal landscape and help identify discharged servicemembers who were unknowingly wronged by the military's non-compliance. The military made a choice to ignore a federal court's constitutional due process standard and it must be held accountable for the legal injuries resulting from that choice.

To prevent the military from clogging federal courts with hundreds of duplicative cases re-litigating its failure to comply with *Witt*, Congress should also step in to take appropriate legislative action to compensate those discharged under DADT in violation of *Witt* after May 2008. A case-by-case review of these discharges would also be appropriate and hardly

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[108] Plaintiff's Motion for Partial Summary Judgment at 8, 16, Almy v. U.S. Dep't of Defense, Case No: cv 10-5627 (RS) (N.D. Cal. 2013).

unprecedented. Section 530B of H.R. 1960, The 2014 National Defense Authorization Act similarly required the DOD Inspector General to "review the cases of all members who, since January 1, 2002, were separated after making an unrestricted report of sexual assault," to ensure those servicemembers' due process rights were validly protected throughout the discharge process. A similar review of post-*Witt* DADT discharges would be administratively feasible and much less timely and costly than duplicative litigation in federal court. At the very least, DOD should instruct the respective services' boards for correction of military records to normally grant claims for lost pay and allowances where the record indicates the servicemember was discharged under DADT after May 2008 without any aggravating factors supporting his or her discharge. DOD guidance memoranda have, since September 2011, instructed these powerful intra-military administrative boards to "normally" grant requests from those discharged under DADT to upgrade their service characterization to fully Honorable, absent these aggravating circumstances.[109] Extension of that guidance to remedy the military's non-compliance with *Witt* should be administratively uncomplicated and equitable and cannot come too soon.

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[109] Memorandum from Clifford L. Stanley, Under Sec'y of Def., to Sec'ys of the Military Dep'ts, on Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code (Sept. 20, 2011), http://sldn.3cdn.net/8b5bfaa11d5854c9e5_k2m6b382s.pdf, *available at* http://perma.cc/MP8D-B8HX. (directing Service Discharge Review Boards to "normally grant requests to re-characterize [an applicant's] discharge to honorable when," as in this case, "the following conditions are met: (1) The original discharge was based solely on DADT or a similar policy in place prior to enactment of DADT; and (2) There were no aggravating factors in the record, such as misconduct.").