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UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

LIEUTENANT COLONEL VICTOR J. FEHRENBACH, Plaintiff, v. DEPARTMENT OF THE AIR FORCE; ROBERT M. GATES, Secretary of Defense; MICHAEL B. DONLEY, Secretary, Department of the Air Force; LT. GENERAL GLENN SPEARS, Twelfth Air Force Commander, and COL. RONALD BUCKLEY, 366th Fighter Wing Commander, Defendants.	Case No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPLICATION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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I. INTRODUCTION

The United States is currently engaged in a multi-front war, simultaneously fighting in both Iraq and Afghanistan. Plaintiff Lt. Col. Victor J. Fehrenbach is a highly-decorated veteran of both conflicts, flying as a Weapons Systems Officer in the F-15E "Strike Eagle." In addition to his numerous medals and commendations, he is a decorated hero, recognized by the Air Force for saving advancing coalition troops from enemy ambush while evading constant hostile fire during the opening days of Operation IRAQI FREEDOM. Throughout his nearly 19-year career in the Air Force, Lt. Col. Fehrenbach consistently has been praised by his commanders who have described him as a "Superstar," the "best I've seen," "My #1 officer/aviator," and "[a] War Hero." He has been recognized by commanders and peers alike for his superior skill, leadership and excellence at building morale and cohesion.

Despite those facts, the United States Air Force now seeks to terminate Lt. Col. Fehrenbach's distinguished service under Air Force Instruction (AFI) 36-3206, which implements 10 U.S.C. § 654, or the law commonly referred to as "Don't Ask, Don't Tell" ("DADT").[1] The proceedings that culminated in that recommendation were riddled with violations of Lt. Col. Fehrenbach's rights, as well as applicable Air Force and Department of Defense regulations. The Air Force intends to immediately discharge him for engaging in a single consensual sexual act with a civilian adult in the privacy of his home—60 miles from where he is stationed. Unless defendants' actions are enjoined immediately, Lt. Col. Fehrenbach

[1] On August 4, 2010, counsel for Lt. Col. Fehrenbach was informed that the Air Force Personnel Board (AFPB) had met and made a recommendation to Secretary Donley's designee, Mr. Joe Lineberger. (Declaration of M. Andrew Woodmansee in Support of Application for Temporary Restraining Order and Preliminary Injunction at ¶ 13.) Pursuant to AFI 36-3206 Chapter 6.10, a recommendation by the AFPB that Lt. Col. Victor Fehrenbach should be retained would not need to go to the Secretary or his designee for further action. Under Air Force regulations, further action by the Secretary or his designee is required if the AFPB recommended discharge. Woodmansee Decl. at ¶ 13.

will suffer irreparable constitutional injury. Lt. Col. Fehrenbach also will experience non-compensable monetary loss and be denied valuable property rights (including losing his pension and some insurance benefits) resulting from his inability to complete 20 years of service. And just as importantly, Lt. Col. Fehrenbach's involuntary discharge from the military threatens to taint him with a stigma that will affect nearly every facet of his life, including his quest to secure future employment.

Lt. Col Fehrenbach therefore requests that this Court enter an order pursuant to Federal Rule of Civil Procedure 65 temporarily enjoining the Air Force from separating him from active duty until such time that the Court can hold a hearing on his motion for a preliminary injunction.

II. STATEMENT OF FACTS

A. Lt. Col. Fehrenbach's Outstanding Record of Service

Lt. Col. Fehrenbach is a highly decorated, active duty Air Force officer assigned to the 366th Fighter Wing at Mountain Home Air Force Base, Idaho. (Declaration of Victor J. Fehrenbach in Support of Application for Temporary Restraining Order and Preliminary Injunction ("Fehrenbach Decl.") ¶¶ 1, 8-9.) He is a trained Fighter Weapons Systems Officer, flying the F-15E Strike Eagle. (*Id.* ¶ 3.) Lt. Col. Fehrenbach has received numerous military awards and decorations for his exemplary service, including nine USAF Air Medals, five USAF Commendation Medals, one Navy and Marine Corps Commendation Medal, and several other Meritorious Service and Achievement Medals. (*Id.* ¶ 8.) He has deployed to major combat operations six times. (*Id.* ¶ 6.) His many achievements include earning a USAF Air Medal in 2003 for heroism for destroying enemy ambush targets under heavy enemy fire during Operation IRAQI FREEDOM. (*Id.* ¶ 9.)

Lt. Col. Fehrenbach has consistently earned high praise for his exemplary performance in the Air Force. His annual performance evaluations both before and after the discharge

proceedings (and as recently as February 2010) are replete with praise for his aptitude for team-building, proven skills in leadership, instruction and mentoring, as well as his exceptional performance under pressure. (*See id.* ¶ 7, Exs. 1-15.) The citations accompanying Lt. Col. Fehrenbach's numerous military awards and medals contain similarly high praise for his outstanding service. (*See id.,* Exs. 16-24.)

B. The Air Force Investigates Lt. Col. Fehrenbach's Private Life

On May 16, 2008, Lt. Col. Fehrenbach's commander escorted him to the Air Force Office of Special Investigations ("AFOSI") at Mountain Home Air Force Base. (*Id.* ¶ 10.) The commander had been told by AFOSI not to divulge to Lt. Col. Fehrenbach the reason he had been summoned to AFOSI headquarters. (*Id.*, Ex. 26 at 172:12-19.) Unbeknownst to Lt. Col. Fehrenbach, AFOSI agents had requested that a Boise Police Department ("BPD") detective come to AFOSI's office to interrogate Lt. Col. Fehrenbach. (*Id.* at 145:15-20.) The AFOSI and the BPD had earlier initiated an investigation of Lt. Col. Fehrenbach in connection with a false claim of sexual assault made by a male civilian. (*Id.* at 118:13-121:22.) Although Lt. Col. Fehrenbach and the civilian had engaged in consensual sexual relations at Lt. Col. Fehrenbach's private residence, the civilian had falsely told the AFOSI and the BPD that the sex was non-consensual. The civilian was already known by both the AFOSI and the BPD to have made similar false accusations against others in the past and to be unreliable and untrustworthy. (*Id.* at 146:1-7.)

At no time before or during the interrogation did anyone read Lt. Col. Fehrenbach his rights under Article 31 of the Uniform Code of Military Justice ("Article 31"), or advise him of the "DoD policy on homosexual conduct", as required by AFI 36-3206. Although Lt. Col. Fehrenbach requested to consult an attorney on two separate occasions, his requests were ignored. (*Id.* ¶¶ 14-15.) Lt. Col. Fehrenbach never was informed that the interrogation was

being observed by AFOSI agents, or that the interrogation was being recorded by the BPD detective and later would be shared with AFOSI investigators. (*Id.*, Ex. 26 at 121:17-122:11.) The BPD detective interrogated Lt. Col. Fehrenbach about his encounter with the civilian and questioned him about sexual conduct that was outside the scope of the accusations. (*Id*.) Ultimately, the Ada County Prosecutor's Office declined to pursue criminal charges against Lt. Col. Fehrenbach. (*Id.* at 120:12-16.)

C. Separation Proceedings by the Board of Inquiry

On December 8, 2008, the Air Force ordered that Board of Inquiry ("BOI") be convened to recommend whether Lt. Col. Fehrenbach should be retained on active duty. (Declaration of M. Drew Woodmansee in Support of Application for Temporary Restraining Order and Preliminary Injunction ("Woodmansee Decl."), Ex. 1 at 1(f).) Lt. Col. Fehrenbach filed a motion for declaratory judgment with the legal advisor presiding over the BOI proceeding on the ground that the discharge action violated his substantive due process rights because the discharge was initiated contrary to the standard established by the Ninth Circuit in *Witt v. Department of the Air Force*, 527 F.3d 806 (9th Cir. 2008). (Woodmansee Decl., Ex. 1 at 1(g).) The motion was denied. On April 15, 2009, the members of the BOI recommended that Lt. Col. Fehrenbach be discharged.[2]

D. Recent Changes to the DADT Instruction

On April 2, 2010, the Air Force distributed a Guidance Memorandum announcing immediate changes to AFI 36-3206 ("Revised Instruction"). The Revised Instruction implemented changes to the Air Force's rules implementing DADT "and shall apply to all fact

[2] During voir dire of the board members, four out of five of the members responded affirmatively when asked, "Does any member have any moral or religious convictions that make you believe homosexual conduct is wrong?" (Fehrenbach Decl., Ex. 26 at 76:9-12.)

finding inquiries and separation proceedings open on or initiated on or after 25 March 2010."[3]

The Revised Instruction includes guidelines for initiating investigations and describes with greater detail what constitutes "credible information" and a "reliable person" sufficient to initiate a DADT inquiry. During a press conference announcing the changes, Defendant Gates explained that the guidelines would place "special scrutiny on third parties who may be motivated to harm the service member."[4]

E. Imminent Discharge of Lt. Col. Fehrenbach

Nearly two years after the Air Force initiated discharge proceedings and more than one year after the BOI recommended that he be discharged from the Air Force, Lt. Col. Fehrenbach continues to serve on active duty at Mountain Home Air Force Base. Absent an order of this Court, the Air Force now intends to discharge Lt. Col. Fehrenbach. (*Supra* at p. 1, n. 1.)

III. LEGAL STANDARD

The Court may issue a TRO to prevent "immediate and irreparable injury, loss, or damage [that] will result to the movant before the adverse party can be heard" at a hearing. Fed. R. Civ. Pro. 65(b); *see Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974) (the purpose of a temporary restraining order is "preserving the status quo"). A preliminary injunction also acts to preserve the status quo pending a hearing on the merits. *L.A. Mem'l Coliseum Comm'n v. Nat'l. Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). For both a TRO and a Preliminary Injunction, the movant must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary

[3] Lt. Col. Fehrenbach's separation proceedings were still open on March 25, 2010 because the Secretary of the Air Force had not yet ordered his separation.

[4] (Woodmansee Decl., Exs. 2-3.) Press Statement, Don't Ask, Don't Tell, Remarks Prepared for Delivery by Secretary of Defense Robert M. Gates, Pentagon (March 25, 2010), *available at* http://www.defense.gov/speeches/speech.aspx?speechid=1436.

relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 374 (2008) (reciting legal standard for preliminary injunctions); *see Affiliates, Inc. v. Armstrong*, No. CV-09-149-BLW, 2009 U.S. Dist. LEXIS 37136, at *7-8 (D. Idaho Apr. 30, 2009) ("The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction").

IV. LT. COL. FEHRENBACH WILL SUCCEED ON THE MERITS

A. Lt. Col. Fehrenbach Will Succeed on the Merits of His Substantive Due Process Claim

In *Witt*, the Ninth Circuit ruled that, in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), a discharge under DADT is constitutional only if it survives a heightened scrutiny analysis as applied specifically to the particular service member.[5] Discharging a service member is thus unconstitutional unless: (1) the government advances "an *important* governmental interest;" (2) the government shows the intrusion "upon the personal and private li[fe]" of that service member "*significantly furthers* that interest;" and (3) the government shows the intrusion is "*necessary* to further that interest," *i.e*. "a less intrusive means must be unlikely to achieve substantially the government's interest." 527 F.3d at 819 (emphasis added). With regard to the latter two requirements, the government must make its showing "as applied"—that is, "whether the application of DADT *specifically* to [the service member] significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest." *Id*. (emphasis added). Because defendants are unable to meet their burden, an injunction is warranted.

[5] *Witt* is controlling case law, and Lt. Col. Fehrenbach can prevail under *Witt*. Lt. Col. Fehrenbach asserts, and he does not waive his right to argue, that DADT and the regulations implementing it are facially unconstitutional and, thus, void in all circumstances; that strict scrutiny should apply as a matter of substantive due process or equal protection; or that the interests advanced by the government are never sufficient to meet heightened scrutiny.

1. Although the interest proffered by the government may be important, it alone cannot satisfy the demands of substantive due process

Under the first prong of the *Witt* standard, the government must demonstrate "an important governmental interest." *Witt*, 527 F.3d at 819. The Ninth Circuit in *Witt* held that maintaining "military capability" was an important government interest. *Id*. at 818 n.5, 821. *Witt* further suggested that Congress's finding that maintaining "morale, good order and discipline, and unit cohesion" was "the essence of military capability," 10 U.S.C. § 654(a)(14), was entitled to deference. *Witt* cautioned, however, that "deference does not mean abdication." 527 F.3d at 821 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).[6]

2. The Air Force did not—and cannot—establish that discharging Lt. Col. Fehrenbach under DADT significantly furthers morale, good order and discipline, and unit cohesion

DADT is unconstitutional as applied to Lt. Col. Fehrenbach because the government did not offer any evidence before the BOI establishing that discharging Lt. Col. Fehrenbach for engaging in consensual sexual relations with a civilian of the same sex in the privacy of his off-base home significantly furthers the goal of maintaining discipline, good order, morale and unit cohesion. *Witt*, 527 F.3d at 819.

a. Lt. Col. Fehrenbach's outstanding service in the Air Force since September 12, 2008 establishes that his continued service is not detrimental to morale, good order and discipline, or unit cohesion

Lt. Col. Fehrenbach continues to serve on active duty and has been recognized as a first-rate and brilliant officer. In a draft promotion recommendation dated September 11, 2008, Lt. Col. Fehrenbach's commanders described him as a "Superstar! . . . [the] 'best I've seen' . . . 'My #1 officer/aviator' . . . [a] War Hero, leader, 11 on a scale of 10." (Fehrenbach Decl., Ex. 15.)

[6] The House of Representatives and the Senate Armed Services Committee have approved legislation that lead to the repeal of DADT. These actions significantly undermine the *Witt* finding that DADT is related in any way to any important governmental interest.

Even now that the reason for his pending discharge is widely known in his unit, Lt. Col. Fehrenbach works without detriment to the Air Force. (*Id.* ¶ 20.)

The Air Force's evidence was insufficient to meet its heavy burden of establishing that Lt. Col. Fehrenbach's discharge under DADT "significantly furthers" the goal of maintaining discipline, good order, morale and unit cohesion. The Air Force failed to present any evidence at the BOI to support its claim that Lt. Col. Fehrenbach's continued service on active duty would hinder those goals. On the contrary, the evidence establishes that *discharging* Lt. Col. Fehrenbach would, in fact, be detrimental to morale, good order and discipline, and unit cohesion. (*See e.g., id.*, Exs. 1-14.) His commanders wrote **in his 2010 performance evaluation** that he is a "[p]roven leader/warrior; [who] handles every task w[ith] steady, professional focus," and a "[d]ynamic [officer]; [who] maintained infallible professionalism/attitude despite huge personal challenges." (*Id.*, Ex. 14.) The 2010 performance evaluation explicitly recognizes that Lt. Col. Fehrenbach "***raised morale***." (*Id.* (emphasis added).)

The evidence from the BOI establishes that discharging Lt. Col. Fehrenbach would harm his unit, the Air Force, and this nation's security. During the hearing a member of Lt. Col. Fehrenbach's unit, Major Michael B. Casey, testified "I think it's a crime on the Air Force that we are even going through this especially with a war hero. He's been in for 18 years and is two years shy of retirement, and **is loved by the people in his squadron**." (*Id.*, Ex. 26 at 161:1-3 (emphasis added).) And numerous witnesses testified during the BOI regarding "critically low" staffing levels of "rated" Air Force personnel (including F-15E Weapons Systems Officers). (*Id.* at 171:1-6; 176:4-19; 184:8-185:3.) To date, Lt. Col. Fehrenbach's colleagues have remained professional and respectful towards him because he works hard to accomplish the mission at

hand. (*Id.* ¶ 20.) To the extent there has been any disruption to Lt. Col. Fehrenbach's unit, it has been caused exclusively by Air Force authorities who chose to investigate his private life and then to discharge him under DADT.

b. There is no evidence, even in the abstract, that enforcing DADT significantly furthers morale, good order and discipline, and unit cohesion in the military

The highest leaders in the U.S. military acknowledge that there is no evidence demonstrating that enforcing DADT furthers morale, good order and discipline, and unit cohesion. In February 2010, the Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, testified before the Senate Armed Services Committee that he was unaware of any evidence suggesting that repeal of DADT would undermine unit cohesion.[7] At the same hearing, Defendant Secretary of Defense, Robert M. Gates, testified that the assertion that allowing openly gay or lesbian service members would negatively affect unit cohesion has "no basis in fact." (*Id*. at 59.) Even those who support DADT agree. On March 18, 2010, the former commander of NATO forces, Gen. John Sheehan, U.S. Marine Corp. (ret.) testified before the Senate Committee on Armed Services, that he is not aware of any proof that DADT increases military effectiveness. *Department of Defense Hearing to Receive Testimony Relating to the "Don't Ask Don't Tell" Policy, Before the S. Comm. on Armed Services*, 111th Cong. 33 (2010).

That enforcing DADT does not further morale, good order and discipline, and unit cohesion is evidenced also by the experience of U.S. allies which do not ban openly gay and

[7] *Department of Defense Authorization For Appropriations For Fiscal Year 2011, and to Receive Testimony Relating to the "Don't Ask Don't Tell" Policy, Hearing Before the S. Comm. on Armed Services*, 111th Cong. 69 (2010) [hereinafter Woodmansee Decl., Ex. 4] (testimony of Adm. Mullen, Chairman of the Joint Chiefs of Staff). In September 2009, Air Force Colonel Om Prakash published an article—which won the Secretary of Defense National Security Essay Competition for 2009—concluding that "the stated premise of the law—to protect unit cohesion and combat effectiveness—is not supported by any scientific studies." (Woodmansee Decl., Ex. 5, Col. Om Prakash, *The Efficacy of "Don't Ask, Don't Tell"*, 55 JOINT FORCES Q. 4th Quarter 2009, at 89.)

lesbian individuals from serving in their militaries. Adm. Mullen testified in February 2010 that he had spoken to his counterparts in countries that allowed openly gay and lesbian individuals to serve in their militaries and that his counterparts informed him there had been "no impact on military effectiveness" as a result.[8] (Woodmansee Decl., Ex. 4 at 69.) There is no evidence that enforcing DADT furthers morale, good order and discipline, and unit cohesion, let alone any evidence that enforcing DADT against Lt. Col. Fehrenbach does so.

3. The Air Force did not—and cannot—establish that discharging Lt. Col. Fehrenbach is *necessary* to further morale, good order and discipline, and unit cohesion in the Air Force

DADT is unconstitutional as applied to Lt. Col. Fehrenbach because the government has not established that the intrusion he experienced is *necessary* to further the stated governmental interest, *i.e.*, a less intrusive means must be unlikely to achieve substantially the government's interest. *Witt*, 527 F.3d at 819. DADT was applied to him for off-base, off-duty conduct with a civilian. This unlimited intrusion into the private life of Lt. Col. Fehrenbach is not necessary to further morale, good order and discipline and unit cohesion. Less intrusive means are available to achieve substantially the government's asserted interest. Lt. Col. Fehrenbach engaged in consensual sexual conduct with a civilian who was not otherwise associated with his unit. The Air Force already has established rules in AFI 36-2909 governing interpersonal relationships that may "erode good order, discipline, respect for authority, unit cohesion and, ultimately, mission accomplishment." (Woodmansee Decl., Ex. 8 at 36-2909 ¶ 1.) Because a less intrusive rule

[8] The United States military continues to serve effectively alongside the militaries of its allies, including those which permit gay and lesbian individuals to serve openly. Similarly, U.S. service members work closely with personnel from other agencies, such as the United States Central Intelligence Agency, National Security Agency, and Federal Bureau of Investigation, all of which prohibit discrimination on the basis of sexual orientation. In a 1993 study *commissioned by the Secretary of Defense*, RAND reported that U.S. police and fire departments (domestic analogs to the military) integrated gays and lesbians and witnessed improved effectiveness and unit cohesion after doing so. (Woodmansee Decl., Ex. 7 at 121-154.)

(that only punishes a service member for engaging in inappropriate conduct with a person in the service member's chain of command or immediate unit) already exists, DADT is not necessary to meet the government's asserted interest.

Defendants cannot establish that enforcing DADT against Lt. Col. Fehrenbach *is necessary* to further their interest. Because the government has not met its burden, Lt. Col. Fehrenbach is likely to succeed on the merits of his claims.

B. Lt. Col. Fehrenbach Will Succeed on His APA and Procedural Due Process Claims Because Defendants Denied Him Multiple Procedural Safeguards Governing the Air Force

The Administrative Procedure Act provides that a court "shall … hold unlawful and set aside agency action" made "without observance of procedure required by law" or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. As the Supreme Court has explained, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974); *accord Alcaraz v. INS*, 384 F.3d 1150, 1162 (9th Cir. 2004). Military discharge decisions "are subject to review, and can be judicially held invalid, on the ground that the Secretary [of the Air Force] has failed to follow his own valid regulations." *Denton v. Secretary of the Air Force*, 483 F.2d 21, 25 (9th Cir. 1973).

The Air Force's imminent discharge of Lt. Col. Fehrenbach was made in disregard of procedural safeguards established by statute, regulation, and binding Air Force Instructions. Defendants' failure to follow these safeguards warrants setting aside the decision under the APA and under the Constitution. *See Konn v. Laird*, 460 F.2d 1318, 1319 (7th Cir. 1972) (where Army suspended reservist from active duty without following procedural requirements set forth in Army's own administrative rules, Army violated reservist's due process rights).

1. Defendants failed to follow the requirements of AFI 36-3206 for initiating an inquiry under DADT because they lacked credible information that there was a basis for discharge

The Air Force Instruction in effect on September 12, 2008, stated that "a commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge." (Woodmansee Decl., Ex. 9 at A2.3.1.) In determining whether information is "credible," a commander is to "consider[] its source and the surrounding circumstances." (*Id*.) All examples of "credible information" set forth in the Instruction included the requirement that the information be from "a reliable person." (*Id*. at A2.3.4.) These requirements were clarified and strengthened in the recent revision of the Instruction (implemented April 2, 2010) that now defines a "reliable person" as "someone who would be expected, under the circumstances, to provide accurate information." (*Id*. at A2.3.5.) The revised Instruction further states that an example of an unreliable person is "[a] person with a prior history of untruthfulness or unreliability." (*Id*. at A2.3.5.1.)

The sole source of information the Air Force used to initiate the investigation into Lt. Col. Fehrenbach's private sexual conduct did not come from a "reliable person." The information was exclusively derived from the statement of an individual whom AFOSI previously described as "unreliable" and having "a history of false reporting."[9] The BPD lead investigator also agreed that the civilian was "not a credible witness." (Feherenbach Decl., Ex. 26 at 146:6-7.) Because the civilian was not a "reliable person," and because he was known to the Air Force as having a "history of untruthfulness [and] unreliability," his statements were

[9] After interviewing him in a previous, unrelated matter, AFOSI decided not to use the civilian as a confidential informant. (*See* Fehrenbach Decl., Ex. 26 at 115:9-12; Woodmansee Decl. Ex. 10.) Bruce Rolfsen, *They asked, he told, but he might get to stay*, Military Times (Oct. 24, 2009) (quoting Linda Card, AFOSI's chief of public affairs), *available at* www.militarytimes.com/news/2009/10/airforce_fehrenbach_102109w/)

barred under both then-existing and current Air Force regulations from serving as the basis to investigate Lt. Col. Fehrenbach's private life. Absent those statements, no inquiry would have been initiated and no discharge would have been ordered.

2. The defendants failed to follow procedures mandated under AFI 36-3206, 10 U.S.C. § 831 and Military Rule of Evidence 305(d), all of which were required for initiating an inquiry under DADT

The statements resulting from the interrogation of Lt. Col. Fehrenbach were obtained in violation of the procedures established by Congress and the Air Force. They therefore could not serve as the basis to discharge him.

Pursuant to the Air Force Instruction in effect on September 12, 2008 (Woodmansee Decl., Ex. 9 at A2.4.4), Lt. Col. Fehrenbach was entitled to be advised of his "Article 31" rights prior to his interrogation. Article 31, 10 U.S.C. § 831(b), provides that no person subject to Title 10 "may interrogate, or request any statement from … a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." At no time, however, did anyone read Lt. Col. Fehrenbach his Article 31 rights. (Fehrenbach Decl., Ex. 26 at 144:12-145:9.) Similarly, Lt. Col. Fehrenbach was not advised of his right to consult counsel and to have military counsel provided (without cost) during his interrogation, as required by Military Rule of Evidence 305(d). (*See id.*) To the contrary, Lt. Col. Fehrenbach requested an attorney prior to and during the interrogation, yet was not provided with one. (*Id.* ¶15.)

Although the BPD detective asked the questions, he was doing so at AFOSI's bidding on Air Force grounds in a unified investigation. Lt. Col. Fehrenbach's Commanding Officer escorted him to the interrogation at AFOSI's offices. (*Id.* ¶ 10.) Although Lt. Col. Fehrenbach repeatedly asked the BPD detective about how his cooperation in the investigation would

implicate his career and whether it would be shared with Air Force authorities, he was never told that the AFOSI already was involved in the investigation and was observing the interrogation. (*Id.* ¶ 16.) Given the military's integral involvement in the investigation and interrogation of Lt. Col. Fehrenbach, the interrogation was subject to the requirements of Article 31 and AFI 36-3206. *See United States v. Baird*, 851 F.2d 376, 383 (D.C. Cir. 1988) (civilian investigators must give Article 31 warning when they act as the military's instrument).[10]

Lt. Col. Fehrenbach was not able to make a knowing and voluntary decision to waive his rights under Article 31 and/or the Fifth Amendment because he was not aware of facts that were in the sole possession of the detective and the defendants, including that his accuser had a history of false reporting and that the AFOSI was a moving force in the investigation. And, contrary to Air Force Instructions, he was not "*first* …advised of the DoD policy on homosexual conduct" before being asked if he engaged in homosexual conduct. (Woodmansee Decl., Ex. 9 at A2.4.4 (emphasis added).) This combination of factors made his statements involuntary. *See Moran v. Burbine*, 475 U.S. 412, 423-424 (1986) (interrogator simply withholding information is "relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them"). It was thus arbitrary, capricious and not in accordance with law for the defendants to rely on the statements in the discharge proceedings. *See Choy v. Barbe*r, 279 F.2d 642, 647 (9th Cir. 1960) (due process violated by reliance in civil administrative proceeding on involuntary statement).

Moreover, compelled to exonerate himself from false allegations, Lt. Col. Fehrenbach

[10] *See also U.S. v. Kellam*, 2 M.J. 338 (1976) (holding that civilian law enforcement authorities acting in furtherance of a military investigation or as an instrument of the military must advise a service member of his Article 31 rights during an interrogation); *accord U.S. v. Grisham*, 4 U.S.C.M.A. 694 (1954).

made statements to a civilian law enforcement officer which the Air Force then used to trigger his discharge. Honest statements made to civilian law enforcement by a service member—the type of statements that are in the public interest and are consistent with the Air Force's core values—should not serve as the basis for discharge.

The numerous violations of the defendants' own policies surrounding the initiation and investigation of Lt. Col. Fehrenbach establish that Lt. Col. Fehrenbach is likely to succeed on the merits of his APA and procedural due process claims.

V. LT. COL. FEHRENBACH WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF PRELIMINARY RELIEF

The harm that Lt. Col. Fehrenbach faces, if allowed to occur, could not be fully redressed by a later decision of this Court.[11] These harms include violations of his Constitutional rights (including equal protection and due process), losing the privilege of serving his country during a time of war, and the stigma of being involuntarily separated from the armed forces. These harms are imminent. Without the intervention of this Court, the AFPB has recommended that he be discharged. *See McVeigh v. Cohen*, 983 F. Supp. 215, 221 (D.D.C. 1998).

A. Lt. Col. Fehrenbach Will Suffer Violations of his Constitutional Rights, Which Cannot Later Be Remedied, If the Air Force is Not Enjoined

Lt. Col. Fehrenbach will suffer irreparable harm—namely, violations of his Constitutional rights—as a result of his pending discharge. The Ninth Circuit has recognized that an alleged constitutional infringement, by itself, can constitute irreparable harm. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). District courts across the country have

[11] In order to prevail on a request for temporary or preliminary injunctive relief, a movant must show that he is likely to suffer harm that does not have an adequate remedy at law. *N. Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306 (1984). Harm that is definite, but difficult to measure or calculate, is irreparable by its very nature. *See Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 423 (9th Cir. 1991).

preliminarily enjoined the discharge of service members that would have resulted in violations of their constitutional rights. *See, e.g., Elzie v. Aspin*, 841 F. Supp. 439, 443 (D. D.C. 1993) (issuing injunction after finding that a gay Marine who was being discharged would suffer irreparable harm); *Cooney v. Dalton*, 877 F. Supp. 508, 510, 513 (D. Haw. 1995) (entering injunction and recognizing that military cannot discharge a service member in violation of due process); *May v. Gray*, 708 F. Supp. 716, 721-22 (E.D. N.C. 1988) ("due process does require that if the secretary…prescribes certain regulations under which Army personnel can be discharged, those regulations must be complied with").

Lt. Col. Fehrenbach faces imminent dismissal even though the Air Force failed to meet the substantive requirements of *Witt* and failed to follow required procedures set forth in military regulations governing DADT.

B. Due to the Special Privilege of Being Able to Serve the Country and the Nature of Lt. Col. Fehrenbach's Role in the United States Air Force, the Harm of Discharge is Far Greater than the Average Employment Case

Lt. Col. Fehrenbach does not just work for the United States Air Force; he is a proud service member. Lt. Col. Fehrenbach attended the University of Notre Dame on an Air Force ROTC scholarship, and realized his life's dream when he was commissioned as an Air Force officer. He considers it an honor to have served his country for the past eighteen years. (Fehrenbach Decl. ¶¶ 1-5.)

While it is true that one does not have a Constitutional right to serve in the armed forces, courts have recognized that service members have some rights associated with continued employment. *See May*, 708 F. Supp. at 724. Discharging Lt. Col. Fehrenbach from his duties and depriving him of this honor will cause him unquantifiable harm. Monetary damages cannot adequately compensate Lt. Col. Fehrenbach for losing the privilege of serving his country, particularly when that privilege is about to be denied him based on violations of his

constitutional rights. Moreover, Lt. Col. Fehrenbach has a highly specialized set of skills as an F-15E Weapons' Systems Officer that cannot be fully utilized anywhere in the civilian world. *See Chalk v. United States*, 840 F.2d 701, 709 (9th Cir. 1988).

C. Should Lt. Col. Fehrenbach be Discharged, He Will Suffer From a Stigma that Constitutes Irreparable Harm

Courts have held that the "stigma" of being discharged for violating military policies and regulations provides sufficient irreparable harm to warrant injunctive relief. *See McVeigh*, 983 F. Supp. at 221; *Elzie*, 841 F. Supp. at 443. In *May*, the court acknowledged the stigma of being involuntarily discharged from the military and wrote: "The truth of the matter is that military separation codes are known, understood and available to the part of society that count -- i.e., prospective employers…The court concludes that the stigma which will attach to plaintiff's record if the separation is completed implicates plaintiff's liberty interests." 708 F. Supp. at 722 (internal citations omitted). This logic applies equally to Lt. Col. Fehrenbach. (*See* Fehrenbach Decl. ¶¶ 24-26.) If the Air Force is allowed to discharge Lt. Col. Fehrenbach without regard for its own regulations and his constitutional rights, the circumstances of his separation will taint him indefinitely, including in his search for civilian employment. (*Id.*) Moreover, the *McVeigh* court wrote:

> Having served honorably for the last seventeen years, Plaintiff will be separated from a position which is central to his life on the sole ground that he has been labeled a "homosexual," and thus by definition unfit for service. The stigma that attaches to such an accusation without substantiation is significant enough that this Court believes it must grant the injunctive relief sought.

Id. The same rationale applies equally to Lt. Col. Fehrenbach.

VI. THE BALANCE OF HARDSHIPS TIPS SHARPLY IN LT. COL. FEHRENBACH'S FAVOR

When faced with a request for injunctive relief, courts must "balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the

requested relief." *Winter*, 129 S. Ct. at 376 (citation omitted). Lt. Col. Fehrenbach has served for more than one year since the BOI recommended his discharge, yet there is no evidence that his continued presence poses any hardship to the Air Force. The cost to Lt. Col. Fehrenbach, should he be discharged, is far more extreme.

Faced with similar situations, several district courts have recognized that the balance of hardships tips toward service members who face imminent discharge under DADT. The United States District Court for the District of Columbia recognized in *McVeigh*, "the Navy will only be enhanced by being able to retain the Plaintiff's seventeen years of service experience." 983 F. Supp. at 221.

Like anyone who has been fired from his or her job, Lt. Col. Fehrenbach will suffer great stigma. The degree of that stigma will be enhanced in his case because the basis for his involuntary discharge involves alleged violations of Air Force regulations. Any claim by the Air Force of "hardship" is belied by the fact that Lt. Col. Fehrenbach continues to serve on active duty—nearly two years since discharge proceedings commenced and more than one year since the BOI recommended that he be discharged—and continues to receive stellar reviews.

Lt. Col. Fehrenbach has raised a number of serious issues regarding the legal insufficiency of the investigation against him and defendants' efforts to tread upon his constitutional rights, including those recognized by the Ninth Circuit in *Witt*. In light of these issues, the balance of hardships tips sharply in favor of Lt. Col. Fehrenbach.

VII. A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ARE IN THE PUBLIC INTEREST

The requested TRO serves the public interest in numerous important ways. Preventing the Air Force from discharging Lt. Col. Fehrenbach until the Court can rule on Lt. Col. Fehrenbach's motion for a preliminary injunction would, among other things: (1) strengthen

public confidence in the military and the rule of law, (2) prevent unnecessary costs to the public, and (3) safeguard national security interests.

A. Holding the Military Accountable to its Own Regulations and the Constitution Strengthens the Public's Trust in the Military

The public has "a strong interest in having a military that conducts itself fairly and according to its stated regulations and policies." *Cooney*, 877 F. Supp. at 515 (granting injunction and noting that when "the military misapplies its own rules and unfairly discharges and stigmatizes a serviceman without giving him the constitutional consideration he is due, this erodes trust in the military"). The public also has an interest in having a military that conducts itself in accordance with the Constitution. *See*, *e.g., McVeigh*, 983 F. Supp. at 221-22. The Air Force failed to apply its own regulations by wrongly investigating Lt. Col. Fehrenbach's private life based on non-credible information that the Air Force knew was from an unreliable source, and then discharged him in violation of substantive and procedural due process constitutional guarantees. Restraining the defendants from discharging Lt. Col. Fehrenbach until his case can be heard thus supports the public interest by increasing trust in the military.

B. Preventing the Discharge of Lt. Col. Fehrenbach Would Prevent Unnecessary Costs to the Public

The Air Force has spent millions of dollars to train Lt. Col. Fehrenbach over nearly nineteen years, and the public is entitled to enjoy its return on that investment. According to estimates, Navigator and WSO training is valued at $2 million and F-15E FTU training is valued at $2.5 million. Lt. Col. Fehrenbach has accrued more than 1,200 total flight training hours in the F-15E (estimated to cost $13,500 per hour) at a cost of more than $15.6 million. (Fehrenbach Decl., Ex. 26 at 176:20-178:3.) That training alone totals more than $20 million. More importantly, the value of his actual combat experience cannot be measured, and it can scarcely be replaced. Lt. Col. Fehrenbach cannot estimate the exact costs because the information

necessary to make this evaluation is exclusively within the knowledge of the Air Force. Preventing the premature discharge of Lt. Col. Fehrenbach would ensure that the United States enjoys the benefits of those substantial expenditures.

C. Preventing the Discharge of Lt. Col. Fehrenbach Advances National Security Interests

The public is harmed by a reduction in military capability whenever the military separates distinguished officers like Lt. Col. Fehrenbach from its ranks for a reason completely unrelated to his ability to defend and protect the country. *See Elzie*, 841 F. Supp. at 443-44 ("to deprive our armed forces of the intellectual and physical prowess of some extraordinarily talented individuals strictly because of their sexual orientation would be doing a great disservice to this nation"). The Commander-in-Chief of the armed forces, President Obama, echoed this sentiment in remarks at the White House on June 29, 2009 stating, "I believe 'Don't Ask, Don't Tell' doesn't contribute to our national security. In fact, I believe preventing patriotic Americans from serving their country weakens our national security." (Woodmansee Decl., Ex. 11 at 2.)

Lt. Col. Fehrenbach is a true war hero, and one of the Air Force's top Weapons Systems Officers. The discharge of a skilled and experienced patriot like Lt. Col. Fehrenbach not only directly harms military capability, but also does so indirectly by contributing to the military's current personnel shortage problems related to recruitment and retention. (*See* Fehrenbach Decl., Ex. 26 at 171:1-6; 176:6-19; 184:8-185:3.) Enjoining Lt. Col. Fehrenbach's imminent discharge under DADT therefore serves the public interest during our current time of war.

VIII. CONCLUSION

For the reasons above, Lt. Col. Fehrenbach respectfully requests that the Court grant his Application for a Temporary Restraining Order, and requests that the Court set a briefing schedule and hearing date for his request for a preliminary injunction.

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