The Honorable Ronald B. Leighton

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MAJOR MARGARET WITT,

Plaintiff,

vs.

UNITED STATES DEPARTMENT OF THE AIR FORCE, et al.,

Defendants.

NO. C06-5195 RBL

MOTION FOR PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT OF MOTION

Note for Motion: May 12, 2006
Oral Argument Requested

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I. RELIEF REQUESTED

Plaintiff, Major Margaret Witt, moves this Court pursuant to Fed. R. Civ. P. 65 for a preliminary injunction restraining the defendants from: (a) discharging the Plaintiff from the United States Air Force; and (b) barring the Plaintiff from earning pay and points from the United States Air Force and prohibiting them from withholding her pay, or in any other way penalizing her as a result of allegations that she engaged in homosexual conduct.

II. CRITERIA FOR ISSUING PRELIMINARY INJUNCTION

Rule 65 authorizes the granting of a temporary restraining order and a preliminary injunction in appropriate circumstances. Under the traditional formulation utilized by the Ninth Circuit, this Court should consider:

> (1) the likelihood of the moving party's success on the merits; (2) the possibility of irreparable injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships favors the respective parties; and (4) in certain cases, whether the public interest will be advanced by granting the preliminary relief.

Miller ex rel. NLRB v. Cal. Pac. Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994) (en banc). Pursuant to this test the moving party must show either (1) probable success on the merits and the possibility of irreparable harm or (2) the existence of serious questions going to the merits, the balance of hardships tipping sharply toward the party requesting the preliminary relief, and at least a fair chance of success on the merits. Id. These alternative formulations are not separate tests but represent "two points on a sliding scale in which the required

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degree of irreparable harm increases as the probability of success decreases." Id., *quoting* United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987).

District courts commonly grant requests for injunctive relief and to stay military discharge proceedings in similar cases where homosexual service members have filed suit to prevent their discharge. See, e.g., Pruitt v. Cheney, 963 F.2d 1160, 1161 (9th Cir. 1992)("The district court denied the Army's motion to dismiss without prejudice and stayed the action pending completion by the Army of its administrative investigation."); Watkins v. U.S. Army, 837 F.2d 1428, 1431 (9th Cir. 1987), aff'd on other grounds, 875 F.2d 699 (9th Cir. 1989)(en banc) ("[T]he district court enjoined the Army from discharging Watkins on the basis of his statements admitting his homosexuality."); Meinhold v. U.S. Department of Defense, 34 F.3d 1469 (9th Cir. 1994) (affirming injunction against discharge); Thomasson v. Perry, 80 F.3d 915, 921 (4th Cir. 1996) ("The district court preliminarily enjoined Thomasson's discharge pending resolution of his claims."); Able v. United States, 44 F.3d 128, 132 (2d Cir. 1995).

As demonstrated in this memorandum, issuance of a temporary restraining order and/or preliminary injunction is necessary and appropriate in this case under either of the above formulation of the Miller test set forth above.

III. EVIDENCE RELIED UPON

1. Declaration of Major Margaret Witt.
2. Affidavit of Major Faith M. Mueller.
3. Declaration of Stacey Julian.

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4. Declaration of James Schaffer.

5. Declaration of Julia Scott.

6. Declaration of Major Sue Schindler.

7. Declaration of Sharon Carlson.

8. Declaration of Master Sergeant Jill Brinks.

9. Declaration of Major Annie Thomas

10. Declaration of Major Vince Oda

11. Declaration of Professor Elizabeth Kier.

IV. STATEMENT OF THE CASE

A. MAJOR WITT HAS HAD AN EXEMPLARY MILITARY CAREER AS THE "POSTER CHILD" OF AN AIR FORCE NURSE.

Major Margaret Witt entered the United States Air Force on March 27, 1987 when she began officer training. *Declaration of Major Margaret Witt*, ¶ *2.* She was commissioned as a Second Lieutenant on April 11, 1987, and was subsequently promoted to First Lieutenant on April 11, 1989; to Captain on April 11, 1991; and to Major on October 1, 1999. *Id.* On October 1, 2003 she became eligible for promotion to Lieutenant Colonel. *Id.* During her career, she has been stationed at Castle Air Force Base in California; Wiesbaden, Germany; Scott Air Force Base in Illinois; Seeb Air Force Base in Oman; and since 1995 as a reserve officer recently at McChord Air Force Base outside Tacoma, Washington. *Id.* at ¶¶ 3-4. Major Witt went onto reserve status in order to obtain additional degrees in physical therapy. As a reservist, she lived primarily in

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Spokane but reported to McChord for reserve duty approximately 3-5 days each month. On some occasions since moving to Spokane she has been activated to full-time service as required by military need.

Most of her career has been spent in Aeromedical Evacuation Squadrons, which are responsible for inflight management and care of ill and injured patients transported by military aircraft. *Id.* Major Witt served in Europe, caring for ill and wounded soldiers in Bosnia during the 1990s. Her most recent foreign service was in Oman in 2003, where she went on dozens of missions to care for soldiers fighting the current war in Iraq. On May 14, 2003, President Bush awarded her an Air Medal citation in recognition of her "meritorious achievement while participating in sustained aerial flight as Medical Crew Director" for the 320th Air Expeditionary Aeromedical Evacuation Squadron. *Id.* ¶ 6. The citation noted how "her airmanship and courage directly contributed to the successful accomplishment of important missions under extremely hazardous conditions and demonstrated her outstanding proficiency and steadfast devotion to duty." *Id.* She received an Air Force Commendation medal in December 2003 for saving the life of a Department of Defense employee who collapsed aboard a commercial flight. *Id.* ¶ 7.[1]

Among the honors she received in 2003 was being named Officer of the Quarter Award for the 2003 Third Quarter. *Id.* ¶ 9. That award states, "The Officer of the Quarter

[1] Over the course of her 18+ years with the Air Force, she received the following medals: Meritorious Service Medal, Air Medal, Aerial Achievement Medal, Air Force Commendation Medal, Air Force Achievement Medal, Air Force Outstanding Unit Award, Combat Readiness Medal, National Defense Service Medal, Armed Forces Expeditionary Medal, Air Force Overseas Ribbon Long, Air Force Longevity Service, Armed Forces Reserve Medal, Small Arms Marksmanship Ribbon, and Air Force Training Medal. *Id.*, ¶ 5.

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Award is given only to those individuals who have demonstrated exceptional professionalism, leadership and service to our country. This Award is recognition for superior dedication not only to the United States Air Force, but to the civilian community as well." *Id.*

These honors are fully consistent with her outstanding record of military service. She routinely received glowing performance evaluations from her superiors. Her most recent performance evaluation praised her for "excellent organizational and management skills"; for being an "excellent mentor" who is "often sought out by peers for advice"; for taking on new responsibilities; for being an "outstanding squadron and Air Force representative" who had been "hand picked to coordinate humanitarian mission and patient transport with multiple civilian, military, government and DOD agencies"; and for being a "recognized leader" both among her peers and her superiors. *Id.* ¶ 8.

As of April 4, 2004, Major Witt became Standards and Evaluations Flight Commander for the 446th. *Id.* ¶ 4. This assignment gave her management responsibility for over 200 flight nurses and medical technicians. As described by a colleague:

> It is important to recognize how significant it is that Major Witt was selected to be the chief of Standards and Evaluations for the 446th AES. The person selected to be the head of StanEval has to be "the best of the best." That is why they are selected for that position. The person who evaluates the performance of others has to be extremely highly regarded by the rest of the unit in order to perform the evaluation job successfully. That is why Major Witt was selected for the position – because she is so uniformly highly regarded by everyone in the unit.

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Declaration of James Schaffer, ¶¶ 19.

Because of her outstanding record of achievement and service, Major Witt was picked to be a "poster child" for the Air Force Nurse Corps recruitment in 1993. *Declaration of Witt*, ¶10. Her photo appears on many recruiting posters, brochures, and similar materials. Her colleagues agree that she makes a fine representative for the Air Force. *E.g., Declaration of Master Sergeant Jill Brinks*, ¶ 10. ("I have seen the recruiting posters which feature Major Witt and also personally believe that Major Witt exemplifies the qualities that makes [sic] one a good and valuable member of the U.S. Air Force"). Ironically enough, these recruitment materials continued to be used, even after the Air Force began the process of involuntarily discharging Major Witt from the service.

B. THE AIR FORCE SEEKS TO DISCHARGE MAJOR WITT BASED ON ALLEGATIONS OF A CONSENSUAL SEXUAL RELATIONSHIP WITH A CIVILIAN WOMAN THAT OCCURRED OFF OF AIR FORCE PROPERTY IN THE PRIVACY OF MAJOR WITT'S HOME.

During the summer of 2004 Major Witt learned that on behalf of the Department of the Air Force, Major Adam Torem had begun investigating an allegation that Major Witt had engaged in homosexual acts with a civilian woman. *Decl. of Witt,* ¶12. The allegation is true: Major Witt was engaged in a committed and loving long term relationship with a civilian woman from July 1997 through August of 2003.

Major Witt met her partner while attending physical therapy school. *Id.* ¶13. The woman was never a member of the United States Air Force, or of any other branch of the armed forces, and was never a civilian employee of any branch of the armed forces. *Id.*

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The relationship ended in August of 2003. *Id.* ¶ 4. While they were together, Major Witt and her partner engaged in sexual relations with each other in the privacy of their home in Spokane, Washington. *Id.* Major Witt has never engaged in sexual relations with a woman while on duty, nor has she ever engaged in sexual relations with a woman on the grounds of any Air Force base. *Id.* ¶15.

Major Witt understands that Major Torem made a final report in which he correctly concluded that she had engaged in sexual relations with the civilian woman. *Id.* ¶ 19. However, this conclusion was not based on any statements or admissions from Major Witt, who never made any disclosures about her sexual orientation or about any sexual acts during the course of the investigation. *Id.* ¶ 18.

C. MAJOR WITT KEPT HER SEXUAL ORIENTATION PRIVATE AND DID NOT VIOLATE THE AIR FORCE'S "DON'T TELL" REGULATIONS; NONETHELESS, FELLOW SERVICE MEMBERS ASSUMED SHE WAS A LESBIAN AND HAD NO OBJECTIONS TO SERVING WITH HER.

Major Witt kept her sexual orientation and her relationship private. *Id.* ¶16-17. She did not consider it to be anyone else's business, and she knew that Air Force regulations could cause her to be separated from the service if she told others in the military that she was homosexual. *Id.* To the best of Major Witt's knowledge, no one at McChord Air Force Base knew that she was a homosexual until the summer of 2004 when news of the investigation began to spread. *Id.* ¶ 18. (The only possible exception was Senior Master Sergeant James Schaffer, who was Major Witt's neighbor and fellow volunteer firefighter in Spokane. While on their way to firefighting training, Schaffer

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once asked Witt how long she and her civilian partner had been together, and she told him how many years it had been. *Id.* Sgt. Schaffer initiated the conversation, and Major Witt did not introduce the topic to an unwilling listener.)

Despite her discretion, a large number of service members suspected or assumed that Major Witt was a lesbian. None of them cared. Typical is this statement from Major Faith Mueller:

> I was recently told by a friend of Major Witt's that she believes Major Witt is being discharged because she is accused of being a lesbian. Before I was told this, I suspected Major Witt was a lesbian. I can say without reservation that this fact makes absolutely no difference to me. In my opinion, if command were to announce to everyone on base that Major Witt was a lesbian and that she was remaining in the service, her continued presence in the Air Force would not have any negative impact upon our squadron's morale, discipline, or combat readiness, and no negative effect whatsoever on me personally. It would still be my strong desire to have her remain in the service and to continue to work with her.

Affidavit of Major Faith M. Mueller, ¶¶ 13-14. *See also Declaration of Major Sue Schindler*, ¶ 11-12; *Declaration of Major Sharon Carlson*, ¶ 12, 15; *Declaration Sgt. James Schaffer*, ¶ 14; *Declaration Major Julia Scott*, ¶ 14; *Declaration Sgt. Jill Brinks,* ¶ 12; *Declaration Major Annie Thomas*, ¶ 13.

Female service members, who the military presumably wishes to shield from being in close proximity to a lesbian colleague, report that they have no problems sharing living and bathing space with Major Witt:

> I have shared sleeping quarters with Major Witt. In October of 2003 during a mission to New Zealand I shared a room with her. There were no problems. I did not feel my privacy was infringed upon, and I would have no reservations about sharing living quarters with her again. I have

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always found Major Witt to be strong, professional and disciplined military officer. I felt fortunate to serve with her and I would welcome the opportunity to serve with her again.

Decl. Scott, ¶ *9. See also Decl. Brinks,* ¶ 19; *Decl. Carlson*, ¶ 10; *Decl. Mueller*, ¶ 10.

Male colleagues also share a high opinion of her:

In 2003 I was deployed to Seeb Air Force Base in Oman as part of a real world deployment. This was during the buildup of forces prior to the start of Operation Iraqi Freedom. During my tour of duty in Oman, I was assigned to Maj. Witt's flight crew where I flew with Major Witt on real world missions, many of which were flights to pick up and transport armed forces personnel injured in Afghanistan and Kuwait in the build up prior to OIF. We flew many urgent missions in the theater of operations taking critically-wounded, injured and ill U.S. service members out of those areas. As a result of this flight experience with Major Witt, I am extremely familiar with her abilities, knowledge, military skills, and leadership capabilities.

I have always known major Witt to be highly professional, skilled and disciplined. I have the utmost trust and confidence in her abilities as a member of the U.S. Air Force and am honored to serve with her as a member of the 446th AES.

I believe that Major Witt is a highly valuable, well-liked and well-respected member of our Unit. She also plays an important role in ensuring the good order, morale and cohesion of our Unit. She is highly skilled at managing people under her command, and knows how to be inclusive when she leads.

Based on my personal observations of Major Witt I can say with confidence that her presence in the Air Force greatly enhances our Unit's combat efficiency and readiness.

Decl. Schaffer, ¶¶ 6-9.

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In short, the Air Force personnel were not bothered by what they assumed to be Major Witt's lesbian sexual orientation. Instead, they respected her for her knowledge, skills, and leadership abilities:

> I know Major Witt very well. I have worked closely with her. She has an immense amount of knowledge that she can impart to new service members who receive training from her. She is very militarily professional, and very respectful of the chain of command. She knows her job backwards and forwards, and is incredibly knowledgeable. She is highly regarded within the unit. People go to her with problems because she solves them. In the field of aeromedical evacuation you have to be able to think quickly and to deal with rapidly changing critical situations. She has these qualities. The bottom line is that people like Major Witt save lives.

Declaration of Major Julia Scott, ¶ 3. See also, *Affidavit of Major Faith M. Mueller*, ¶¶ 5-7.

D. DISCHARGING MAJOR WITT WILL HAVE A SERIOUS ADVERSE IMPACT ON THE MILITARY READINESS, MORALE, AND ORDER OF HER UNIT.

On November 4, 2004 Major Witt was ordered to report to the commander's conference room by Lieutenant Colonel Jan Moore-Harbert. *Witt Decl.* ¶ 20. Col. Moore-Harbert informed Major Witt that Colonel Mary Walker would be initiating separation proceedings against Major Witt on grounds of her having committed homosexual acts. *Id.* Colonel Moore-Harbert described this separation action as "the hardest thing she ever had to do in the Air Force," and she cried when she received the order. *Schaffer*, ¶ 12. Major Verna Madison, who was also present for this meeting, said that "she was so upset about Colonel Walker's decision that she felt like taking off her uniform." *Id.* ¶ 13.

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As one might expect from the sudden departure of a highly decorated and well regarded officer, Major Witt's abrupt absence from the base has caused considerable adverse effects on morale and cohesion. As described above, Major Mueller believes that returning Major Witt to duty -- even if accompanied by a declaration that she is homosexual -- would be better for unit morale and cohesion than her discharge:

> I firmly believe that discharging Major Witt from the U.S. Air Force would be detrimental. Moreover, I believe that our Unit's morale, cohesion and good order would be severely jeopardized if Major Witt is discharged.

Affidavit of Major Mueller, ¶ 14; *Decl. Schaffer*, ¶ 20; *Decl. Julian*, ¶ 19; *Decl. Schindler*, ¶ 13; *Decl. Carlson*, ¶ 14; *Decl. Brinks*, ¶ 13; *Decl. Thomas*, ¶ 14.

Making matters worse is the fact that Major Witt's discharge occurs at a time when the Air Force Reserve's area of greatest need is for flight nurses. *Decl. Witt*, ¶ 29. At the rank of Major, as of April 4, 2006 the Air Force Reserve had 121 vacancies for flight nurses. *Id.* This is the largest number of vacancies for *any* duty assignment for officers in the Air Force Reserve. *Id.* But for the fact that Major Witt was separated from the 446th AES in November of 2004, she would be deployed and would now be serving as a flight nurse either stateside or overseas in Qatar, Iraq or Germany. *Id.* As noted by Sgt. Schaffer: "[I]t would be downright stupid to discharge such a skilled and knowledgeable officer, especially in a time of war when people with her level of military skill and professionalism are so badly needed, and in such short supply." *Decl. Schaffer*, ¶ 20.

Major Mueller's prediction that Major Witt's discharge would harm unit morale is borne out by the declaration of Technical Sergeant Stacey Julian, who served with Major

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Witt in Oman as well as at McChord AFB. He reports that everyone he has talked to in the 446th Aeromedical Evacuation Squadron is very upset that Major Witt is being discharged:

> I have talked to many other people in the 446th AES about the decision to initiate separation proceedings against Major Witt, and in general they have reacted with shock, confusion and amazement. I have never heard any service member say that they approved of the decision, and in general everyone has responded by asking, "Why?" Our squadron has always had gays and lesbians in it, and their presence is widely known, but until this decision to seek a discharge against Major Witt it has never been an issue. We had two openly gay service members who retired (voluntarily) many years ago and no one ever sought to question their presence in the Air Force.
>
> In my opinion the Commander's decision to initiate an administrative discharge proceeding against Major Witt has seriously hurt unit morale, and that morale would be further harmed if the Air Force went ahead and actually discharged her. The incident has been seriously deflating to everybody in the 446th AES. Everyone who has discussed it in my presence has said they think the decision was a bad one.
>
> I have been in the Air Force over 20 years. I recently decided that I would apply for retirement. The Air Force's decision to initiate separation proceedings against Major Witt was a factor which contributed to my decision to apply for retirement from the service. I no longer want to serve in an organization which mistreats people in the way the Air Force is mistreating her.

Declaration of Stacey Julian, ¶¶ 13-15, 19.

E. THE AIR FORCE DID NOT PROVIDE MAJOR WITT WITH A PROMPT POST-DEPRIVATION HEARING.

On November 4, 2004, Colonel Mary L. Walker informed Major Witt (through Col. Moore-Harbert) that the Air Force would be initiating administrative separation proceedings against her. On November 9, 2004 Major Witt received by certified mail a

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letter stating that pursuant to AFI 36-3209 Colonel Walker had initiated an administrative separation proceeding, and that Major Witt "may not participate in any pay or point activity pending resolution of separation action."[2] Major Witt has been deprived of her position since that time.

Even though Major Witt has been placed on suspension, no hearing has been provided in the interim. Indeed, the next formal action taken regarding the discharge was the issuance of a letter on March 6, 2006, fully sixteen months after her suspension from duty. The March 6 letter was a "notification of initiation of action" from the Air Force explaining that Major Witt could request a hearing before an administrative discharge board at Fort Robins AFB in Georgia if she wished to contest her discharge. Major Witt promptly requested a board hearing, but no date for that hearing has yet been set, and in fact, to date there has been no written response from the Air Force to her request. It is unknown how many more months may elapse before the Air Force chooses to give Major Witt a hearing.

V. LIKELIHOOD OF SUCCESS ON THE MERITS

In the interest of judicial efficiency, this preliminary injunction motion will limit its discussion to Major Witt's substantive and procedural due process claims. By doing so, she does not waive her claims based on equal protection or free speech theories.

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[2] By denying her any "point activity" the Air Force ceased to credit any time after November 9, 2004 towards the 20 years of service that an Air Force officer needs in order to be entitled to a military retirement pension. Thus, if Major Witt is ultimately discharged by the Air Force, by virtue of the November 9, 2004 order depriving her of either pay or point activity, she will not be entitled to a retirement pension, because she did not have 20 years of service on the date that order was issued.

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A. DISCHARGING MAJOR WITT WOULD VIOLATE SUBSTANTIVE DUE PROCESS.

1. *Lawrence v. Texas* Established that the Right to Engage in Consensual Sexual Acts with An Adult (Including An Adult of the Same Sex) Is an Aspect of Liberty Protected By the Due Process Clause.

In June 2003 the U.S. Supreme Court overruled its prior decision in Bowers v. Hardwick, 478 U.S. 186 (1986) and held that the freedom to engage in consensual sexual acts – even with a partner of the same sex – is a substantive aspect of liberty protected by the Due Process Clause. Lawrence v. Texas, 539 U.S. 558, 567 (2003). "[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." Id. at 572. The Court reversed the convictions of John Lawrence and Tyron Garner, and struck down Texas' statute which made it a criminal offense for them to engage in a consensual act of sodomy:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. ***Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.*** "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." [Citations]. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Lawrence, 539 U.S. at 578, (bold italics added), *citing* Planned Parenthood v. Casey, 505 U.S. 833, 847, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

Relying on cases that recognized a constitutionally protected autonomy to make personal sexual decisions (like Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973)), Lawrence noted

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how "the protection of liberty under the Due Process Clause has a substantive dimension of fundamental significance in defining the rights of the person." 539 U.S. at 565. The freedom to enter into an intimate relationship with another consenting adult shares that fundamental significance.

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

Id. at 567.

The five-justice majority opinion in Lawrence recognized that its substantive due process analysis was not wholly separate from equality decisions like Romer v. Evans, 517 U.S. 620 (1996) (invalidating a Colorado law that discriminated on the basis of sexual orientation). One of the Court's concerns was to ensure that the lives of homosexual persons are not "demeaned" by government-imposed "stigma" that would be "an invitation to subject homosexual persons to discrimination both in the public and in the private spheres." 539 U.S. at 575. So while the majority opinion relied upon substantive due process theory, it recognized that discrimination against gay people was itself a serious constitutional harm to be avoided.

Lawrence cited with approval to a decision of the European Court of Human Rights ("ECHR") invalidating a sodomy law of Northern Ireland. Lawrence, 539 U.S. at 573, citing Dudgeon v. United Kingdom, 45 Eur.Ct.H.R. (1981) & ¶ 52. Fifteen years after

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Dudgeon, the ECHR held that the United Kingdom's policy of discharging homosexuals from its armed forces violated Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). Lustig-Prean & Beckett v. The United Kingdom, ECHR Nos. 31417/96 and 32377/96. Both Lawrence and Lustig-Prean are premised upon the same fundamental principle. The Lawrence Court held: "The petitioners are entitled to respect for their private lives," 539 U.S. at 578, and the ECHR based its decision on Article 8(1) of the Convention, which states: "Everyone has the right to respect for his private . . . life."

The petitioners in Lustig-Prean were military service members who were discharged from the Royal Navy because, like Major Witt, they had engaged in a private sexual relationship with a civilian partner. The United Kingdom admitted it had interfered with their right to "respect for their private lives," but contended that such interference was justified and legally permissible under Article 8(2) which allows exceptions "in accordance with the law [where] necessary in a democratic society in the interests of national security, [or] . . . for the prevention of disorder . . ." The ECHR considered the UK's contention that to maintain "national security" the discharge of these homosexual service members was "necessary in a democratic society." The standard employed by the ECHR for Article 8 analysis is quite similar to the constitutional standard for determining whether a law infringes upon the substantive due process right of respect for one's private life. "[R]egulations imposing a burden on [such rights] may be justified only by compelling state

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interests, and must be narrowly drawn to express only those interests." Carey v. Population Services, 431 U.S. 678, 686 (1977).

The ECHR concluded that the UK had failed to meet its Article 8 burden of showing that exclusion of homosexuals from the military was necessary in a democratic society: "[T]he Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness." Lustig-Prean, at p. 34, ¶ 80. "[W]hen the restrictions concern 'a most intimate part of an individual's private life", there must exist "particularly serious reasons' before such interferences can satisfy the requirements of Article 8 § 2 of the Convention." Id. at p. 34, ¶ 82. Recognizing that the UK's "core argument" was that "the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces," the ECHR rejected this argument, noting that it was founded upon private prejudice against homosexuals, which could not be considered to amount to sufficient justification "any more than similar negative attitudes towards those of a different race, origin or colour." Id. at p. 37, ¶ 90. In this respect the decision of the ECHR is virtually synonymous with the decisions of the U.S. Supreme Court which hold that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidotti, 466 U.S. 429, 433 (1984). Accord City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 448 (1985).

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2. The Air Force Must Present Actual Evidence to Support Its Contentions, and Cannot Simply Demand That The Courts Defer to the Speculative Judgment of Military Professionals.

Like any constitutional decision announcing fundamental rights, Lawrence applies to the military. While courts afford a substantial degree of deference to military decision-making, "Congress, of course, is subject to the requirements of the Due Process Clause [even] when legislating in the area of military affairs." Weiss v. United States, 510 U.S. 163, 176 (1994). Congress is not "free to disregard the Constitution when it acts in the area of military affairs. In that area, as any other, Congress remains subject to the limitations of the Due Process Clause." Rostker v. Goldberg, 453 U.S. 57, 67 (1981). "Our citizens may not be stripped of basic rights simply because they have doffed their civilian clothes." Chappel v. Wallace, 462 U.S. 296, 304 (1983).

The Ninth Circuit has similarly noted that military judgments are not to be lightly overruled by the judiciary, but that does not mean that courts are to simply accept all military assertions in the absence of any supporting evidence. "[T]here is not now and must never be a 'military exception' to the Constitution." Cammermeyer v. Aspin, 850 F.Supp.910, 915 (W.D. Wash. 1994), *aff'd sub nom.* Cammermeyer v. Perry, 97 F.3d 1235 (9th Cir. 1996). To defer to military judgment "in the absence of any supporting factual record . . . would come close to denying reviewability at all," and the Ninth Circuit has

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expressly held that military judgments regarding the presence of homosexuals in the armed forces *are* subject to judicial review. Pruitt v. Cheney, 963 F.2d at 1166-67.[3]

3. In Its Post-Lawrence Decisions, The Court of Appeals for the Armed Forces Has Held It Is Appropriate to Review A Military Law Burdening Freedom of Sexual Conduct To Determine Whether It Is Constitutional "As Applied".

Major Witt respectfully submits that it would be appropriate to rule that 10 U.S.C. § 654 and AFI 36-3209 are facially unconstitutional and void in all respects. At the same time, however, she acknowledges that there is an alternative approach that would afford her relief without requiring this Court to interfere to such an extent with the judgment of another branch of government. In a series of post-Lawrence decisions, the Court of Appeals for the Armed Forces has expressly concluded that Lawrence applies to service members and that this application demands a "searching constitutional inquiry." United States v. Marcum, 60 M.J. 198, 205 (C.A.A.F. 2004). Marcum recognized that service members retain the right to form intimate sexual relationships under Lawrence, and that any military incursion on that right must be justified in light of a strong governmental interest in military readiness, combat effectiveness, or national security *and* that the rule be "narrowly tailored to accomplish these interests." Id. at 204-05. As a result, court martials for sodomy (whether homosexual or heterosexual) require careful examination of

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[3] The ECHR employed the same approach in Lustig-Prean, and expressly "note[d] the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in policy would entail," pointing out that the lower court "found that there was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces . . ." Lustig-Prean, at p. 37, ¶ 92. On the contrary, the evidence relating to the acceptance of open homosexuals into the military forces of several countries demonstrated that there was no such damaging effect. Id. at p. 39, ¶¶ 97-98.

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the facts and context to see how the interests of the military balance against the rights of the service member in the particular case. Such cases call for "contextual, as applied analysis, rather than facial review," and "[t]his is particularly apparent in the military context." Id. at 205. For example, where the sodomy occurs between superiors and subordinates, as was the case in Marcum and United States v. Stirewalt, 60 M.J. 297, 304 (C.M.A. 2004), then the right does not resemble the right to consensual sexual intimacy recognized in Lawrence and the military rule may be constitutionally applied.

This analysis clearly contemplates that in some cases it will be unconstitutional for the military to apply a rule in derogation of a service member's constitutional right to sexual intimacy. Indeed, Major Witt submits that the military's policy against homosexual conduct and statements of homosexual orientation cannot ever be constitutionally applied in cases like hers that raise no concerns about intra-military fraternization. But at the very least, the constitution does not permit the discharge in the present case for the reasons that follow.

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4. Major Witt's Conduct Enjoyed Constitutional Protection and Cannot Give Rise To The Harms The Discharge Is Purportedly Trying To Avoid; Hence The Air Force Cannot Meet Its Burden.

The stated purpose of the policy against homosexuals in the military is that their presence "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(15); AFI 36-3209 ¶ 1.15.15. The record reflects that Major Witt's conduct poses no risk to these important ends. If anything it is her discharge that will hurt morale, good order and discipline, and unit cohesion.

a. Major Witt's Conduct Did Not Adversely Affect The Unit.

As discussed further below, the rationales for the rule against homosexual conduct in the military are insubstantial in general, but they are unquestionably outweighed by the factors present in this case. Among the more relevant facts are the following:

1. Civilian Partner. Major Witt's sexual partner was not a member of the armed forces. Such sexual conduct posed no danger of coercion and no impediment to military discipline or morale as was the case in Marcum and Stirewalt.

2. Committed Relationship. Major Witt's sexual conduct occurred within the context of a years-long committed relationship. This poses less risk that she would make unwelcome advances on persons within the military. (Of course, even if she did, it would properly be remedied through the military's policies on sexual harassment, a problem known to arise among heterosexual service members.) Lawrence protected sexual expression not

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just for its own sake, but because of its role in expressing and deepening committed relationships, 539 U.S. at 567, so its application is especially strong here.

3. Not on Military Property. No sexual conduct occurred on any Air Force premises.

4. Geographically Remote. Major Witt and her partner lived in Spokane, hundreds of miles across the state from McChord AFB. Major Witt's colleagues were not in a position to learn about or observe – and therefore take offense at – her relationship with a civilian partner.

5. Private Home. Major Witt's sexual conduct occurred in her own home. Lawrence gave special weight to the right of adults to "choose to enter upon this [intimate] relationship ***in the confines of their homes and their own private lives*** and still retain their dignity as free persons." 539 U.S. at 567 (bold italics added). This observation is in keeping with other decisions giving special respect to the home as a protected place in our society for sexual expression. See Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home").

6. Reservist. During her relationship with her civilian partner, Major Witt was on reserve status. For most of her days, she was taking courses at Eastern Washington University, working as a physical therapist, volunteering as a firefighter, and pursuing other civilian activities. She was present at the base only a few days per month.

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Whatever adverse impact a lesbian Air Force officer might have on her unit is lessened when she is for most days completely absent from that unit.

7. No Voluntary Disclosure. Major Witt adhered to the "Don't Tell" provisions of the Air Force policy. She kept her private life private, and did not force any unwanted or unwelcome disclosures about her sexual orientation on her colleagues.

8. Widespread Assumptions. Despite her silence on the topic, it was widely believed that Major Witt was a lesbian. The rule against homosexuals serving in the military is premised on the notion that disruption will occur if their sexual orientation becomes widely known. Here, Major Witt's sexual orientation was widely known (albeit through no words or conduct of her own), but no disruption of any sort resulted. Her colleagues have submitted declarations saying that they believed that she was a lesbian, but did not care. Further, they said that she would be welcomed back to duty even if she made an official announcement that she was lesbian (so that no speculation was required). In this way, her case closely resembles Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989) (en banc), which issued an injunction forbidding discharge of an openly gay service member because his orientation had been widely known for years with no adverse effects on his unit.

9. Affirmative Harm from Discharge. The record contains multiple corroborated testimony that Major Witt's discharge is hurting morale. At least one officer testified that the threatened discharge of Major Witt contributed to his decision to resign after decades of service, saying that "I no longer want to serve in an organization which

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mistreats people in the way the Air Force is mistreating [Major Witt]." *Decl. Julian* ¶ 19. Another officer said "she was so upset about Colonel Walker's decision that she felt like taking off her uniform." *Decl. Schaffer.* ¶ 13. The declarants are unanimous in explaining that the discharge proceedings to date have injured morale and unit cohesion, and that a final discharge would injure it even further. *Affid. Mueller*, ¶ 14; *Decl. Schaffer*, ¶ 20; *Decl. Julian*, ¶ 19; *Decl. Schindler,* ¶ 13; *Decl. Carlson*, ¶ 14; *Decl. Brinks,* ¶ 13; *Decl. Thomas*, ¶ 14.

b. <u>The Air Force Cannot Justify Discharge</u>.

In contrast to these facts of record, the Air Force has no evidence to demonstrate that Major Witt poses a problem for the military that outweighs her right to autonomy in forming intimate personal relationships. As Professor Kier's declaration attests, several of our allies permit homosexuals to serve in their armed forces without noticing any adverse effect whatsoever on the ability to function efficiently and smoothly.

> Several studies have analyzed the effects of lifting restrictions on gay and lesbian service in the armed forces of other countries. Each study concludes that the open integration of homosexuals has no negative effect on military effectiveness. For example, following a Canadian judicial decision prohibiting discrimination on the basis of sexual orientation in the military, gays and lesbians have served openly in the Canadian armed forces. A 2000 study concluded that this change in policy has not hurt military performance:
>
> > CF officials, military scholars, involved non-governmental and political leaders, and gay soldiers have all concurred that the removal of the ban has had, to their knowledge, no perceivable negative effect on the military. The issue of gay and lesbian soldiers in the Canadian Forces has all but disappeared from public and internal military debates.

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Declaration of Professor Elizabeth Kier, ¶ 11, quoting A. Belkin and J. McNichol, *Effect of the 1992 Lifting of Restrictions on Gay and Lesbian Service in the Canadian Forces: Appraising the Evidence*, University of California at Santa Barbara, Publications (April, 2000). Similar studies on the effects of allowing homosexuals to serve openly in the armed forces of Israel, the United Kingdom, and Australia, reached the same conclusion. *Kier Declaration,* ¶ ¶ 12-15.

This observation is not limited to foreign armies. American military forces have served overseas with integrated military forces without problems. *Kier,* ¶ 17. In addition, there are quite a few known instances of gay service members serving in the American military without causing difficulties. *Id.* ¶ 32. Thus, the actual American experience belies the blanket generalization behind the Air Force policy.

Moreover, there is a scholarly consensus that the assumptions upon which the present policy of excluding homosexuals from the armed forces are incorrect and unsupported by any evidence:

> The current policy of excluding open gays and lesbians from the U.S. armed forces is based on two propositions:
>
> (a) primary group cohesion enhances military effectiveness, and
>
> (b) openly gay and lesbian personnel would disrupt unit cohesion and thus military performance.
>
> Both of these propositions are *wrong*. They do not reflect what social science research and experience have shown about the relationship between cohesion and performance and whether the integration of previously excluded groups affects primary group cohesion.

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Kier Declaration, ¶ 19.

The same dire predictions were made by military authorities opposed to the integration of blacks and women into the armed forces, and yet they were proved wrong when unit cohesion and military performance proved *not* to be adversely affected by these changes.

> Our historical experience also shows that the integration of new social groups into the U.S. military does not disrupt unit cohesion or degrade military performance, even though military authorities had forecast serious risks to combat effectiveness. Studies of racial and gender integration of the U.S. armed forces repeatedly find that these previously segregated groups were integrated *without* disrupting unit cohesion and military performance. Moreover, these studies support the conclusion that the open integration of gays and lesbians into our armed forces would *increase* military effectiveness.

Kier Declaration, ¶ 24. *See also* ¶ ¶ 25-30. *See also* Watkins II, 837 F.2d at 1449 (describing racial integration of the American military), *aff'd on other grounds* 875 F.2d 699 (9th Cir. 1989) (en banc). The internal studies of the Defense Department have reached the conclusion that there is no evidence to support the military's discriminatory policy against homosexuals. *Kier* at ¶ ¶ 34-35. Sadly, the military has attempted to suppress these internal studies because they have all reached the conclusion that there is no empirical support for Defense Department's policy of excluding homosexuals.

> [T]wo Defense Department commissioned reports reached conclusions that are at odds with the Pentagon's policy towards gays and lesbians: the 1957 Crittenden Report and the 1988 PERSEREC report. For example, the PERSEREC report bluntly stated: "Studies of homosexual veterans make clear that having a same gender or an opposite gender-orientation is

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unrelated to job performance in the same way as is being left or right-handed."

Decl. Kier, ¶ 32, quoting Sarbin & Karols, Nonconforming Sexual Orientation, p. 33.

> The GAO concluded that the Defense Department's "policy is not based on scientific or empirical data, but rather on the considered judgment of military professionals . . ." GAO, Homosexuals in the Military, at p. 68. Other analysts agree: Lawrence Korb, former assistant secretary of defense for manpower, reserve affairs, and logistics during the Reagan administration, stated that the justification for the ban on homosexuals in the military is "without factual foundation." See *Declaration of Dr. Lawrence J. Korb*, dated June 7, 1993, (Appendix H), on file in Cammermeyer v. Aspin, 850 F. Supp. 910, 024 (W. Wash. 1994). Indeed, ***DoD admits that it cannot provide scientific evidence in support of its argument.*** In 1993 General John Otjen, a member of a working group that studied the issue of homosexuals in the military, and ***former Assistant Secretary of Defense Edwin Dorn stated that they had no facts – defined as statistics, scientific studies, and reports, rather than opinions and anecdotes – supporting the rationale for the military's discriminatory policy towards gays and lesbians.*** Id. at 924 & n.22.
>
> The lack of evidence is not surprising: DoD has never attempted to document its argument about the negative effect of homosexuals on unit cohesion or operational effectiveness. In 1988 the PERSEREC report recommended that future research examine the claim that the presence of gays and lesbians is a barrier to the development of group cohesion and morale, but DoD never followed up on this advice. Instead, the DOD attempted to suppress the PERSEREC Report: DoD labeled it a draft so that it would not be released to the public. This pattern of behavior is familiar. After World War II, the U.S. Army tried to prevent the public release of studies that showed that the limited experiments with racial integration had worked. For example, Army Chief of Staff General George Marshall argued that surveys regarding racial integration of units in 1945 should not be disclosed. MacGregor, Integration of the Armed Forces, pp. 54-55.

Decl. Kier, ¶ ¶ 34-35 (bold italics added).

The Government's discriminatory policy is counterproductive, because allowing homosexuals to serve openly in the armed forces would actually improve unit cohesion

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and military effectiveness. *See Decl. Kier,* ¶¶ 18 ("Thus the "Don't Ask Don't Tell" policy seems to undermine its apparent intent: rather than promote unit cohesion, the policy seems to impede it."). The bottom line is that the Defense Department continues to enforce a policy that rests solely on prejudice and has no evidence to support it:

> There is no evidence supporting the Pentagon's rationale. To the contrary, decades of social science research provides overwhelming evidence that the open integration of homosexuals in the armed forces does not hurt combat performance. Just as racial segregation degraded military effectiveness, the current policy toward homosexuals in the U.S. military degrades military efficiency. Abolishing discrimination on the basis of sexual orientation in the U.S. armed forces would advance civil rights *and* military readiness.

Kier Declaration, ¶ 9.

"The mere recitation of a benign . . . purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." Weinberger v. Wisenfeld, 420 U.S. 636, 648 (1975). Where the actual purpose is mere ratification of prejudice, the constitution is offended. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." Palmore v. Sidotti, 466 U.S. 429, 433 (1984).

c. Discharging Major Witt Will Not Be Narrowly Tailored To Achieve The Air Force's Stated Goals.

Even if the court credits the Air Force's recitation of benign purposes, it must consider whether its rule is narrowly tailored to serve those purposes. When a law burdens a fundamental right, a reviewing court must determine whether the particular infringement is "precisely tailored" to achieve a "compelling governmental interest." Plyler v. Doe, 457

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U.S. 202, 216 (1982). "[R]egulations imposing a burden on [such privacy rights] may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." Carey v. Population Services, 431 U.S. 678, 686 (1977). Judicial protection of substantive due process rights "require[s] particularly careful scrutiny of the state needs asserted to justify their abridgement." Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (citations omitted). Accord, Cleburne, 473 U.S. at 440 (when laws "impinge on personal rights protected by the Constitution" they "are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest."); Griswold, 381 U.S. at 485 (even a legitimate governmental purpose "may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms").

Discharge of *all* homosexual members of the Air Force who engage in homosexual acts is not a "narrowly drawn" policy. On the contrary, in order to pursue a military career, a homosexual service member must be completely celibate and refrain from engaging in any homosexual conduct for the entire time he or she serves in our armed forces. In *addition*, the service member must refrain from making any statement acknowledging his or her sexual orientation. Thus the statute and the regulation deny the homosexual service member both the right to engage in "private sexual conduct" free from governmental intervention recognized by Lawrence, 539 U.S. at 578, and "the right to define one's own concept of existence" which Casey and Lawrence recognize to be the right "at the heart of liberty." 505 U.S. at 851.

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