The Connecticut law in Griswold barred all sale of contraceptives merely because some uses of those contraceptives might be improper; this caused the Supreme Court to observe that the constitution would not allow the state "to achieve its goals by means having a maximum destructive impact" upon the constitutionally protected relationship between married people. Griswold, 381 U.S. at 485. Here, the challenged statute and Air Force regulation have the same "maximum destructive impact" on a constitutionally protected relationship. Even if it could be shown that there is some relationship between the presence of homosexuals in the military and an occasional weakening of military discipline, morale and unit cohesion, less restrictive means of addressing the situation obviously exist.[4] A rule that merely required homosexual members to abstain from having same-gender sexual relations while on duty, and requiring them to confine such sexual activity to their own private homes, would promote the same desired result by drastically decreasing the probability that other service members would ever come to learn about such activities. Similarly, a rule that required service members to limit their sexual relations to conduct with civilian partners would have much the same effect.

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[4] The rules restricting sexual activity for heterosexual service members are far more narrowly tailored. For example, to prevent superiors from favoring subordinate sexual partners, or from penalizing reluctant subordinates who do not wish to engage in sexual conduct with them, the Air Force has simply forbidden service members from having sexual relations with other members within their chain of command. See AFI 36-2909; Marcum, 60 M.J. at 207 ("the military has consistently regulated relationships between servicemembers based on differences in grade to avoid partiality, preferential treatment, and the improper use of one's rank.") But no such carefully tailored approach has been taken to homosexual conduct between servicemembers. There is no ambiguity in the breathtaking scope of the prohibition. 10 U.S.C. § 654(a)(9) states: "The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces." Section 654(a)(10) provides: "These standards of conduct, including the Uniform Code of

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There can be only one result in this case to the "searching constitutional inquiry," Marcum, 60 M.J. at 205, that is required by Lawrence in a case involving homosexual conduct in the military. Our constitution entitles Major Witt to "respect for [her] private li[fe]" when she chooses to engage in "sexual practices common to a homosexual lifestyle." Lawrence, 539 U.S. at 578. Her exercise of this right causes no harm to the government's interests. The Air Force therefore cannot meet its burden.

5. Pre-*Lawrence* Decisions of the Ninth Circuit Upholding Discharges of Homosexual Service Members Do Not Change The Result.

Earlier substantive due process cases did not benefit from the reasoning of Lawrence. The legal and factual assumptions made in those decisions have been undercut both by Lawrence and by the social changes of recent decades (including the successful experiences that American and allied armies have had with gay and lesbian troops). The rationales that were once given credence are simply implausible in light of Lawrence and the record.

a. The Leading Substantive Due Process Case: *Beller v. Middendorf*.

The leading Ninth Circuit substantive due process case on gays in the military is Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), authored by the future Justice Kennedy. The panel hearing that case did not have controlling Supreme Court precedent (as we do today) that intimate sexual conduct merits heightened constitutional protection. To the contrary, Beller noted that the Supreme Court's guidance on the subject at that time was a

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Military Justice, apply to a member of the armed forces at all times that the member has military status, whether

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summary affirmance of a decision that held, like Bowers did a few years later, that it was constitutionally permissible for a state to criminalize sodomy. 632 F.2d at 809 (discussing Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'g, 403 F.Supp. 1199 (E.D.Va.1975)). Beller recognized that most federal courts at that time understood the holding of Doe "to be that homosexual conduct does not enjoy special constitutional protection under the due process clause." 632 F.2d at 810. The specter of criminalization was clearly present in the record, with the military's primary affidavit stating, among other things, that "Homosexuals may be less productive/effective than their heterosexual counterparts because of ... fear of criminal prosecution." Id. at 811 n.22.[5] In light of this prevailing legal consensus, the most Beller would say regarding the plaintiff's liberty interest was to "concede arguendo" that some cases "suggest" that some kinds of government regulation of private consensual homosexual behavior "may" face "substantial constitutional challenge." Id. at 810.

The judicial balancing of governmental interests against individual rights will inescapably be carried out differently against this legal backdrop than against ours. Today, the most recent Supreme Court guidance is not a summary affirmance that upholds a criminal sodomy law, but instead an unequivocal statement that "Bowers was not correct when it was decided, and it is not correct today." Lawrence, 539 U.S. at 578. To take but

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the member is on or off base, and whether the member is on or off duty."

[5] The current statute makes the same assumption. 10 U.S.C. § 654(10) states as one of the justifications for the policy that the Uniform Code of Military Justice applies to members of the military at all times. While the

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one example: Beller said that one reason the Navy should be allowed to discharge all homosexuals was that "toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval." 632 F.2d at 811. The Navy has no interest in avoiding the appearance of "tacit approval" of conduct that has already received the Supreme Court's express approval.

The main reasons Beller relied upon for upholding the Navy's policy do not withstand inspection on the present facts. First, Beller said that "The Navy is concerned about tensions between known homosexuals and other members who 'despise/detest homosexuality'." 632 F.2d at 811. The Ninth Circuit has already expressly disavowed this reasoning.

> One of the justifications offered by the Navy in Beller was the tension "between known homosexuals and other members who 'despise/detest homosexuality.' " To the degree that Beller may thus have rested on prejudice of others against homosexuals themselves, rather than on disapproval of specific acts of criminal conduct, its reasoning is undercut by Palmore v. Sidotti, [which held that] "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." .... This justification accepted in Beller, therefore, should not be given unexamined effect today as a matter of law.

Pruitt v. Cheney, 963 F.2d 1160, 1165 (9th Cir. 1991) (citations omitted).

Second, Beller said that "undue influence in various contexts [could be] caused by an emotional relationship between two members." 632 F.2d at 811. Plainly, this concern must be re-evaluated in light of a generation or more of experience in a co-ed army that

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statute does not expressly refer to the UCMJ anti-sodomy law explored in Marcum, this is plainly what the

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has learned to cope with the possibility of emotional relationships among its heterosexual personnel. And of course, this concern has no bearing on Major Witt's relationship with a civilian.

Third, Beller said there could be "doubts concerning a homosexual officer's ability to command the respect and trust of the personnel he or she commands." 632 F.2d at 811. The record in this case amply demonstrates that this mere "doubt" did not come to fruition in Major Witt's case. Both her superiors and subordinates gave her enormous respect. In any event, this factor merely restates in another form the deference to prejudice that Pruitt rejects.

Fourth, Beller said that the presence of gays in the military could have "possible adverse impact on recruiting." Id. Major Witt was literally the poster child for recruiting Air Force flight nurses. Even after she was suspended from duty, the Air Force has continued to use her face and example to encourage recruitment. *Declaration of MajorVince Oda,* **¶8.** Far from harming recruitment if she stays in, discharging Major Witt has been proven to harm retention, with senior officers leaving the service due to their displeasure with the Air Force's mistreatment of Major Witt. And once again, this factor would simply replicate the presumed biases of recruits.

Then-Judge (and now-Justice) Kennedy would hardly take umbrage at the notion that developments in the law and society might change the result of a case decided over 25 years ago. To the contrary, Beller itself is filled with provisos indicating that if legal

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section intends.

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or social conditions change, so would the result. Judge Kennedy noted that a substantive due process inquiry always "involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals." Id. at 807. The case-by-case balance struck in Beller was expressly limited to a conclusion that the regulation was (grudgingly) permissible "at the present time." Id. at 812. Elsewhere, the opinion reiterated that the decision hinged "to some extent [on] the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case." Id. at 810 (emphasis added). Beller was plainly concerned with maintaining the ability of future courts to consider the evidence of present social circumstances. The need to re-examine old assumptions is particularly strong in cases involving rights of unpopular minorities. The Founders "knew times can blind us to certain truths, and later generations can see that laws once thought necessary and proper in fact serve only to oppress." Lawrence, 539 U.S. at 579. See also Pruitt, 963 F.2d at 1164.

b. Substantive Due Process Cases After *Beller*.

Later cases have applied Beller without much discussion. However, the discussion they do contain indicates that they must be re-examined after Lawrence.

Hatheway v. Secretary of the Army, 641 F.2d 1376 (9th Cir. 1981), was a challenge to a court martial arising from a charge of homosexual sodomy with an enlisted man in

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the barracks within sight of other service members. Id. at 1381 n.5. The court rejected the argument that the sexual conduct truly occurred in a private place. Id. at 1384. Legally, the court viewed Hatheway's primary claim as arising under equal protection. Id. at 1382. To the extent it was a substantive due process case, it simply relied on Beller. Id. at 1384. Pruitt later noted that Hatheway had "similar weaknesses" to Beller, especially as it "relied on the same justifications accepted in Beller, including those arising from prejudice of other servicemembers or potential recruits against homosexuals. Hatheway, like Beller, preceded the Supreme Court's decisions in Palmore and Cleburne." 963 F.2d at 1165 n.4.

Schowengerdt v. United States, 944 F.2d 483 (9th Cir. 1991), was the Circuit's first substantive due process case on this topic after Bowers v. Hardwick. It expressly relied on Bowers as a case that supported Beller's result. Id. at 490. Since Bowers was "not correct when it was decided, and it is not correct today," Lawrence, 539 U.S. at 578, Schowengerdt cannot be considered controlling.

After Bowers and Schowengerdt, litigants in this area understandably avoided substantive due process challenges in the Ninth Circuit, turning their attention instead to equal protection and free speech theories. Since that time, substantive due process was addressed only in a brief sentence from Holmes v. California Army National Guard, 124 F.3d 1126 (9th Cir. 1997): "We have previously rejected claims similar to Watson's substantive due process claim. See Schowengerdt v. United States, 944 F.2d 483, 490 (9th Cir.1991) (stating that substantive due process claim with respect to the old policy

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was foreclosed by Bowers v. Hardwick, 478 U.S. 186 (1986), Beller, and High Tech Gays)."

Holmes is plainly not the last word on the subject. After Lawrence was decided, the plaintiff in Hensala v. Department of the Air Force, 343 F.3d 951 (9th Cir. 2003), added a substantive due process claim on appeal in a case that was otherwise premised on equal protection. A majority of the panel indicated that it would not consider the issue for the first time on appeal, but expressly allowed the district court to consider on remand "whether Lawrence has effectively overruled Holmes." Id. at 956, 959. Hensala thus recognizes that Lawrence seriously calls into question the continued vitality of all pre-Lawrence Ninth Circuit law regarding the discharge of homosexual military service members, whether such discharges are based upon the making of statements, status, or acts.

c. The Status Cases.

A parallel development in the Ninth Circuit case law is worthy of note: namely, the unbroken line of cases holding that it is constitutionally impermissible to discharge a service member for the status of having a homosexual or bisexual orientation. See Pruitt v. Cheney, 963 F.2d 1160, 1164 (9th Cir. 1991) (allegations that the Army was discharging plaintiff because of her status as a homosexual state a claim under the Equal Protection Clause); Meinhold v. United States Department of Defense, 34 F.3d 1469 (9th Cir. 1994) (enjoining discharge of service member based solely on status as a person with a homosexual orientation); Cammermeyer v. Perry, 97 F.3d 1235, 1237 (9th Cir. 1996) (affirming the District Court judgment entered by the Honorable Thomas Zilly, which

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vacated the discharge of Colonel Margarethe Cammermeyer from the Washington National Guard because of her "status as a homosexual"). Even when it rejected an equal protection challenge premised on homosexual acts, Phillips v. Perry, 106 F.3d 1420 (9th Cir. 1997), took pains to distinguish cases where discharges were predicated solely upon homosexual orientation or status from cases involving homosexual acts. Id. at 1429-30.

This unchallenged recognition that orientation alone cannot be a basis for discharge is premised on a sound footing. Orientation alone, divorced from any conduct, is in the realm of freedom of thought and conscience and clearly protected by the Constitution, even among members of the military. "At the heart of liberty is the right to define one's own concept of existence." Casey, 505 U.S. at 851. Lawrence adds to this principle the insight that intimate sexual conduct is part and parcel of that same protected realm of personal dignity and autonomy. In Casey the Court noted with regard to childbearing choices that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." 505 U.S. at 851. Quoting directly from Casey, Lawrence reiterated that "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Lawrence, 539 U.S. at 574, *quoting* Casey, 505 U.S. at 851. Recognizing that "[a]t the heart of liberty is the right to define one's own concept of existence," id. the Lawrence Court concluded: "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Lawrence, 539 U.S. at 574.

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The constitutionally protected conduct of which Major Witt stands accused is inextricably linked to her constitutionally protected orientation—her right to define her own concept of existence without demeaning interference from the government. Both the conduct and the status are protected. For this reason, she has a strong likelihood of success on her substantive due process claim.

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B. DISCHARGING MAJOR WITT BASED ON AN IRREBUTTABLE PRESUMPTION THAT HER PRESENCE HARMS THE MILITARY WOULD VIOLATE PROCEDURAL DUE PROCESS.

1. Irrebuttable Presumptions that Burden the Liberty Interests Protected By Substantive Due Process Violate Procedural Due Process.

The Supreme Court has long held "permanent irrebuttable presumptions are disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments." Vlandis v. Kline, 412 U.S. 441, 446 (1973). Particularly where governments have imposed burdens upon intimate bodily choices protected by substantive due process, the Court has struck down governmental rules "which sweep too broadly" and which rest upon irrebuttable presumptions. Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

For example, in Stanley v. Illinois, 405 U.S. 645, 654 (1969) the Court held that an Illinois statute containing an irrebuttable presumption that unmarried fathers are incompetent to raise their children violated the Due Process Clause:

> It may be, as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.

Similarly, in LaFleur the Court struck down a local school board maternity leave policy which required all pregnant school teachers to take leave without pay five months before the expected birth of their child. Just as the military asserts that the exclusion of homosexuals is "necessary" to promote the discipline, morale and unit cohesion of the armed forces, the

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Cleveland School Board contended that the mandatory leave policy for pregnant school teachers was "necessary" because "some teachers become physically incapable of adequately performing certain of their duties during the latter part of pregnancy." 414 U.S. at 640-41. The Court held the "mandatory termination" of every pregnant school teacher at the end of the fourth month of pregnancy violated procedural due process because it was a conclusive presumption that failed to account for the individual capabilities of each pregnant teacher:

> The mandatory termination provisions of the Cleveland and Chesterfield County rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. [Citation]. That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor – or the school boards – as to any particular teacher's ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.

LaFleur, 414 U.S. at 644.

Since it was demonstrably untrue that every pregnant woman was incapable of doing her job after her fourth month of pregnancy, the Court found the Cleveland School Board rule to be unconstitutional: "[T]he conclusive presumption embodied in these rules, . . . is neither 'necessarily (nor) universally true,' and is violative of the Due Process Clause." LaFleur, 414 U.S. at 646.

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The LaFleur Court recognized that it would be administratively more efficient to have a sweeping rule which dispensed with the need for individual determinations, but rejected the contention that such administrative efficiency concerns could trump the constitutional requirement of individualized determinations imposed by the Due Process Clause:

> While it might be easier for the school boards to conclusively presume that all pregnant women are unfit to teach past the fourth or fifth month or even the first month, of pregnancy, administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law. ***The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals.***

LaFleur, 414 U.S. at 799-800 (bold italics added).

2. The Statute and the Air Force Instruction Contain an Irrebuttable Presumption that a Homosexual Who Engages in Homosexual Conduct Will Cause Morale, Discipline, and Unit Cohesion Problems If He or She Is Retained in the Service.

The Congressional statute and the Air Force Regulations pertaining to military service by persons both direct that *all* military service members with a true homosexual orientation must be discharged from service. The mechanism for accomplishing this is straightforward. Where there is evidence of "homosexual conduct" the service member "shall" be discharged. 10 U.S.C. § 654(b). An exception to this rule exists, but it applies only to persons who have engaged in isolated homosexual acts and have no "propensity" to do so again (that is, persons who are predominantly heterosexual). 10 U.S.C. § 654(b)(1). Thus, the discharge occurs:

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> ***Unless there are further findings***, made and approved in accordance with procedures set forth in such regulations, ***that the member has demonstrated that*** –
>
> (A) ***such conduct is a departure from the member's usual and customary behavior***;
>
> (B) ***such conduct, under the circumstances, is unlikely to recur;***
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
>
> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; ***and***
>
> (E) ***the member does not have a propensity to engage in homosexual acts.***

10 U.S.C. 654(b)(1) (bold italics added). The service member must prove *all five* of these additional facts in order to be exempt from the mandatory discharge policy. The Air Force regulations track the statute. AFI 36-3209 ¶ 2.30.1.

The net result is a curious paradox. Even though the statute and the regulation expressly recognize that there are circumstances under which the continued presence of a homosexual service member would not threaten "the interests of the armed forces in proper discipline, good order, and morale," these homosexual service members must still be discharged because they cannot prove that they are really not homosexuals after all. Ultimately, the statute and the Air Force regulation are internally inconsistent. They explicitly recognize that there will be situations in which an individual homosexual service member does *not* cause any harm to military discipline, order or morale. Nevertheless they insist that because in *most* situations there will be a deleterious effect on military discipline,

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order or morale, all homosexual service members must be discharged, *even if they can prove that the generalization does not apply in their case.*

The inflexible, mandatory directive to discharge all persons with a "propensity" to engage in homosexual acts, without any exceptions, is in stark contrast to policies regarding discharge from military service for other reasons. For example, AFI 36-3209 specifies that the Air Force "may discharge a commissioned officer who has committed one or more acts of misconduct or moral or professional dereliction." AFI 36-3209 ¶ 2.29. Under this section of the regulation an officer "may" be discharged if she has bounced checks, failed to pay child support, or failed to comply with a court order, or mismanaged governmental affairs. AFI 36-3209 ¶ 2.29.1 & 2.29.2. An officer who deliberately lies in connection with an application for appointment or in an official statement "may" be discharged; but there is no mandatory requirement that a deliberate liar be discharged. There is no constitutional right to deliberately pass bad checks, violate court orders, or lie in official military records. But as Lawrence explicitly recognizes, there is a constitutional right to engage in consensual sexual activity with a consenting adult. And yet the former acts, which are generally criminal in nature, do not trigger a mandatory discharge, where acts falling with the scope of Lawrence's constitutional protection do trigger a mandatory discharge.

Similarly, those with drug abuse problems "may" be discharged, but discharge is not required. AFI 36-3209 ¶ 1.16 & 2.35. Even when a drug abuser fails or refuses to participate in or successfully complete an Air Force drug rehabilitation treatment program, discharge is still not required; it remains discretionary:

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> Members who are in an Air Force program for personal alcohol or drug abuse may be discharged for failure through inability or refusal to participate in, cooperate in, or successfully complete such a program in the following circumstances:
>
> - There is a lack of potential for continued military service.
> - Long term treatment is determined necessary and the member is transferred to or receiving treatment in a civilian medical facility.

AFI 36-3209 ¶ 2.35.

The irrationality of the irrebuttable presumption against homosexuals is most starkly revealed by the fact that the Air Force allows child molesters the opportunity to prove that their presence in a unit will not be disruptive, while denying the same opportunity to homosexuals. AFI 36-3209 states that the Air Force "may" discharge those who engage in "sexual perversion" which includes "indecent acts with or assault on a child." ¶ 2.29.10. And yet AFI 36-3209 directs that the Air Force "shall" discharge those with a propensity to engage in consensual homosexual acts with an adult. It is hard to conceive of a class of servicemembers who are more likely to have a degrading effect upon unit cohesion, morale and order than child molesters. Yet their exclusion from military service is not mandatory in all cases, while the exclusion of those engaging in homosexual conduct is required in every case.

The military clearly understands the value of making individualized determinations of fitness. It makes them all the time. But with regard to homosexual service members, Congress has created an irrebuttable presumption similar to the one struck down in LaFleur. Here, as in LaFleur, procedural due process does not allow the government to proceed with a

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discharge of Major Witt where she is barred from rebutting a conclusive presumption that her conduct threatens the efficiency and order of the government.

C. DISCHARGING MAJOR WITT AFTER DENYING HER A REASONABLY PROMPT POST SUSPENSION HEARING WOULD VIOLATE PROCEDURAL DUE PROCESS.

Where a tenured government employee is not entitled to a formal hearing *before* he is suspended, he is entitled to a reasonably prompt post-suspension hearing sometime shortly *after* he is suspended. In this case, Major Witt's procedural due process rights have been violated by the Air Force's failure to afford her a reasonably prompt *post*-deprivation hearing. Major Witt was suspended without pay in November 2004—this was the time of initial deprivation. There is still no hearing date, although she received a notice in March 6, 2006 that one may be set. The due process principles are clear: Major Witt was entitled to a prompt post-deprivation hearing, and the remedy for this violation is to enjoin the deprivation.

1. Procedural Due Process Requires A Reasonably Prompt Post-Deprivation Hearing If No Pre-Deprivation Hearing Is Provided.

Barry v. Barchi, 443 U.S. 55 (1979) and FDIC v. Mallen, 486 U.S. 230 (1988) provide the controlling principles. Barchi examined New York statutes regulating horse racing. Under those statutes, if a horse tested positive for a banned substance following a race, there was a rebuttable presumption that the trainer either administered the drug or negligently failed to prevent its administration. Id. at 58. A horse trained by John Barchi tested positive for a banned substance following a race. Barchi denied any knowledge of

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the drugging, and "two lie detector tests supported his lack of knowledge of the drugging." Nevertheless, Mr. Barchi's training license was suspended for 15 days. Id. at 59.

The statutes entitled Mr. Barchi to a *post*-suspension hearing and mandated that the suspension remain in effect pending the hearing but did not provide a time frame in which the hearing must be held. Id. Rather than wait an indeterminate period of time for a hearing, Mr. Barchi filed suit in federal court. The Supreme Court held that "the provision for an administrative hearing, neither on its face nor as applied in this case, assured a prompt disposition of the outstanding issues between Barchi and the State." Barchi, 443 U.S. at 66. "Once suspension has been imposed, the trainer's interest in a speedy resolution of the controversy becomes paramount." Id. The Court could "discern little or no State interest... in an appreciable delay in going forward with a full hearing." Id. Accordingly, the Court held that "[i]n these circumstances, it was necessary that Barchi be assured a prompt postsuspension hearing, one that would proceed and be concluded without appreciable delay." Id. This is so because the opportunity to be heard must be "at a meaningful time and in a meaningful manner." Id. (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The Court thus affirmed the District Court finding that the suspension was unconstitutional. Id. at 68.

In Mallen, the Supreme Court reaffirmed the constitutional requirement of a prompt post-deprivation hearing, although it found that under the circumstances a hearing held 29 days after the suspension of a bank president was proper, given that the statute

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required a post-suspension hearing within 30 days. Id. at 242, citing 12 U.S.C. §1818(g)(3). Mallen expanded on the Barchi analysis and prescribed a set of factors for evaluating the constitutional significance of a delay prior to a post-deprivation hearing:

> In determining how long a delay is justified in affording a post-suspension hearing and decision, it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken.

Mallen, 486 U.S. at 242.

In Major Witt's case, as in Barchi, the regulation in effect does not contain any specific time limit within which the hearing must be held. AFI 36-3209, ¶4.7 simply provides that separation proceedings should be conducted "as expeditiously as possible":

> Once the recommendation for separation or discharge is made, it is usually in the best interest of both the respondent and the Air Force to process the cases ***as expeditiously as possible.*** Commanders should monitor the effectiveness of separation or discharge programs under their control to insure that cases are processed ***without undue delay***.

(Bold italics added). In Major Witt's case, it has been more than 16 months since defendant Walker initiated separation proceedings and still no date has been set for the administrative discharge board hearing. No reasons for this extraordinary delay have been offered. When counsel for Major Witt inquired of headquarters Air Force Reserve at Ft. Robins why there was such a delay, no one responded to counsel's phone messages.

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The Air Force's protracted delay in affording Major Witt a hearing cannot be excused under Barchi and Mallen. In fact, each of the Mallen factors weighs in favor of finding a due process violation.

First, Major Witt's interest in continuing her military career as an Air Force officer is "paramount." Barchi, 443 U.S. at 66. Each day that passes while her suspension remains in effect denies her the opportunity to serve her country, to earn the promotion to Lieutenant Colonel that she was eligible for prior to her suspension, and the ability to earn any credit towards a military retirement pension that would vest after 20 years of service. In addition, naturally, she has not been receiving any pay from the Air Force since her suspension was effected 16 months ago in November of 2004. Thus the harm to Major Witt's private interests is very severe.

Second, the Air Force cannot offer any significant justification for the lengthy delay in processing defendant Walker's order initiating separation proceedings. It is difficult to conceive of any set of facts that would justify the delay of more than 16 months that has lasted from the time Major Witt was summarily suspended from points and pay and banished from McChord AFB by defendant Walker. When the government takes such extremely adverse personnel action, it should be prepared with its proof before the decision is made, and make it available for testing promptly thereafter.

Third, there is unacceptable risk of erroneous deprivation. Procedural due process rules are shaped by the risk of error inherent in the truth finding process as applied to the generality of cases. Mathews v. Eldridge, 424 U.S. 319, 344 (1976). In cases involving

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allegations of homosexual misconduct, the determination of whether the allegations are true are likely to be depend upon the credibility of witnesses. As time passes, witness memory fades, and an accurate determination of the facts becomes more difficult. Thus, the passage of time increases the risk of an erroneous determination.

The summary and as yet unreviewed suspension of Major Witt by defendant Walker invades highly significant private interests, and every additional day that a hearing is delayed further harms her by depriving her of income, promotion, and credit towards an earned military retirement. *Declaration of Major Margaret Witt*, ¶¶ 24-29. It also deprives the Air Force of the services of an exceptionally talented Air Force Reserve Officer, whose specific skills are in great need at the present time. The Air Force has not even attempted to justify the delay of over sixteen months that has already elapsed. In short, all of the Mallen factors weigh against the delay that has occurred and establish that Major Witt has been, and continues to be, seriously harmed by the denial of a reasonably prompt post-suspension hearing.

2. The Correct Remedy Is To Enjoin The Deprivation; Holding An Untimely Hearing Does Not Cure The Failure To Provide A Timely Hearing.

At the very least, Major Witt is entitled to a preliminary injunction ordering the Air Force to immediately reverse her suspension, reinstating her to full points and pay activity status. Merely setting aside the interim suspension, however, is *not* a sufficient remedy for this due process violation. The Air Force must also be prohibited from discharging Major Witt. When the delay in holding a reasonably prompt post-deprivation

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hearing is excessive, the courts have held that the proper remedy is *not* to order the agency to immediately hold the long delayed hearing, but is instead to order the *dismissal* of the entire proceeding.

Barchi is instructive. The plaintiff had been suspended for 15 days, but had no prompt post-suspension hearing. The Supreme Court found a due process violation for that reason. The remedy was not to remand for a hearing on the propriety of the suspension. Instead, the remedy was to affirm the judgment that the suspension was unconstitutional. 443 U.S. at 68. The entire punishment was disallowed.

In United States v. Two Hundred & Ninety Five Ivory Carvings, 689 F.2d 850 (9th Cir. 1982), the Customs Service waited 18 months after seizing property before initiating a judicial forfeiture proceeding. The government claimed that the violation of the property owner's procedural due process right to a reasonably prompt hearing could be cured either "by a later hearing or a damage action." Id. at 857. The Court rejected the government's argument that these were acceptable ways of remedying the procedural due process violation. Relying upon Fuentes v. Shevin, 407 U.S. 67 (1972), the Ninth Circuit held that, where delay in providing a hearing rose to the level of a constitutional violation, the provision of an even later hearing could not possibly cure the violation:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred.

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Ivory Carvings, 689 F.2d at 857, quoting Fuentes, 407 U.S. at 81-82.

The Air Force may argue that it expects to prevail at the administrative discharge hearing, so due process concerns relating to its timing and accuracy are irrelevant. This argument would misapprehend the purpose of the Barchi rule, which protects important interests even for people whose defenses might not have succeeded at a timely hearing. Ivory Carvings quoted Fuentes on this point:

> [A]ssuming that the appellants had fallen behind in their installment payments, and that they had no other valid defenses, that is immaterial here. The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense on the merits."

Id. at 856, quoting Fuentes, 407 U.S. at 87.

In the present case, the logic of Barchi, Fuentes and Ivory Carvings is particularly compelling. Whereas the parties in Fuentes and Ivory Carvings were merely deprived of items of physical property, Major Witt has been deprived of her military pay and employment, denied the opportunity to practice her profession and serve her country, and separated from trusted colleagues. She is threatened with the loss of her profession in a more extreme fashion than the short suspension meted out to the horse trainer in Barchi. Thus the proper remedy in this case is to enjoin the Air Force from discharging Major Witt on grounds of homosexual conduct.

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VI. MAJOR WITT HAS MET THE CRITERIA FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

To warrant the granting of this motion, Major Witt 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. Miller, 19 F.3d at 456. She respectfully submits that she has made a showing which meets *both* of these alternative tests. Even assuming, *arguendo*, that the Court is not convinced that she has met the first test, she has clearly demonstrated the existence of serious questions going to the merits of her claims and at least a fair chance of success on the merits. That leaves for consideration the question of whether the balance of hardships tips in her favor.

Obviously it does. If the Air Force is forced to retain her in the service, and to allow her to resume active duty, the Air Force will not suffer any hardship at all. On the contrary, the Air Force will benefit, just as it has benefited from her exemplary service over the past 18 years. The 446th AES will not suffer if she is allowed to return to duty. As Sgt. Julian has pointed out, the 446th has always had gays and lesbians in it, and their presence is widely known, and yet it has never been an issue. *Declaration of Sgt. Julian*, ¶ 13. Similarly, Major Mueller, Major Schindler, and Major Carlson, all state that if the entire AFB were informed that Major Witt is a lesbian and is coming back to duty, no one would be upset and she would be welcomed back. *Affidavit of Major Mueller*, ¶ 13; *Declaration of Major Scott,* ¶ 14; *Declaration of Major Schindler*, ¶ 12; *Declaration of Major Carlson*, ¶ 15.

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On the other hand, Major Witt is already suffering from her suspension from active duty and pay, and if discharged she will suffer severe harms that will not be remediable even if she later wins this lawsuit:

> I love my job with the Air Force and I am very dedicated to my military career. I want very much to be promoted to Colonel, and to continue to serve my country. I want very much to earn a full military retirement pension, which I cannot do unless I have 20 years or more of service. . . .
>
> If I am discharged from service, even if I later prevail in this lawsuit and I am later reinstated to my present position at my present rank, I will never be promoted to Colonel because there will be gaps in my military record, and for that gap period I will not be able to supply any officer performance reports. Without such reports showing continuous good service, I will never be selected for promotion to Colonel.
>
> If I am discharged from service I will never earn a retirement pension because I will not have 20 years of military service.
>
> If I am discharged from service, for the rest of my life I will have to disclose the fact of my involuntary separation from the military to all future employers. An involuntary separation from the military is generally a stigmatizing fact which makes employers suspicious and less willing to offer positions of employment to the separated person. Moreover, my discharge papers would state the reason for my separation and thereby informing every potential employer of my sexual orientation.
>
> * * *
>
> Unless this Court grants this motion for preliminary injunctive relief and enjoins my discharge, I will suffer irreparable injury to my military career.

Declaration of Major Witt, ¶¶ 23-29.

VII. CONCLUSION

For the reasons stated above Plaintiff asks this Court to grant the requested preliminary injunction. Specifically, Plaintiff asks this Court to preliminarily join the

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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.

DATED this 24th day of April, 2006.

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By s/Nicki D. McCraw
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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:_____, and I hereby certify that I have mailed by United States Postal Service, Postage Prepaid/ABC Legal Messenger Service, Inc./Facsimile to the following non CM/ECF participants: _____.

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