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GAYS IN THE MILITARY—THE NINTH CIRCUIT COURT OF APPEALS FAILS TO SUBJECT "DON'T ASK, DON'T TELL" TO A STRICT SCRUTINY TEST: *WITT V. DEPARTMENT OF THE AIR FORCE*

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WITT V. Department of the Air Force centers on the appropriate standard of review to apply when the military's Don't Ask, Don't Tell (DADT) policy[1] infringes on the liberty of homosexuals.[2] There are three commonly referenced levels of judicial review: strict scrutiny, intermediate scrutiny, and the rational basis test.[3] The *Witt* court held that an intermediate level of scrutiny applies to cases involving DADT.[4] The plaintiff in this case, a highly respected and decorated Air Force nurse, claimed that her equal protection, substantive due process, and procedural

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[1] 10 U.S.C. § 654 (2000). The statute requires expulsion of members of the military who engage or attempt to engage in homosexual acts, or if they state or indicate that they are homosexual or bisexual. *Id.* § 654(b). There are scenarios under which service members will not be expelled, for instance, if the "conduct is a departure from the member's usual and customary behavior." *Id.* § 654(b)(1)(A). However, none of those exceptions are relevant to this case.

[2] Witt v. Dep't of the Air Force, 527 F.3d 806, 813 (9th Cir. 2008).

[3] District of Columbia v. Heller, 128 S. Ct. 2783, 2821 (2008). Strict scrutiny is used when a fundamental right or liberty interest is impacted and requires the law in question to be "narrowly tailored to achieve a compelling governmental interest" in order to survive. Abrams v. Johnson, 521 U.S. 74, 82 (1997); *see also* Washington v. Glucksberg, 521 U.S. 702, 721 (1997). In contrast, a rational basis test simply requires that "an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 452 (1985). Intermediate scrutiny lies somewhere in between. Clark v. Jeter, 486 U.S. 456, 461 (1988); *see also* United States v. Virginia, 518 U.S. 515, 567–68 (1996) (Scalia, J., dissenting) ("We have no established criterion for 'intermediate scrutiny'. . . but essentially apply it when it seems like a good idea to load the dice.").

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

due process rights were violated when she was suspended from duty for violating DADT.[5] The Ninth Circuit Court of Appeals remanded her substantive due process claim, holding that DADT must be reviewed under an intermediate level of scrutiny; it remanded her procedural due process claim, but dismissed her equal protection claim.[6]

Major Witt was in a relationship with another woman for six years; they lived together approximately 250 miles away from her base.[7] Major Witt never discussed her sexual orientation with anyone in the military, she never had sex on duty or on military property, and her partner had no connection to the military whatsoever.[8] In 2004, the Air Force investigated an allegation that she was a homosexual; later that year, she was suspended.[9] In September 2006, a military board found her in violation of DADT, and in 2007, the Secretary of the Air Force ordered that Major Witt receive an honorable discharge.[10]

This case originated in April 2006, in between the March start of Major Witt's discharge proceedings and the military board hearing in September.[11] Major Witt sought declaratory and injunctive relief with the U.S. District Court for the Western District of Washington, arguing that the DADT policy "violates substantive due process, the Equal Protection Clause, and procedural due process."[12] The district court dismissed the suit for failure to state a claim under rule 12(b)(6) of the Federal Rules of Civil Procedure and Major Witt appealed.[13]

The Ninth Circuit Court of Appeals upheld the dismissal of Major Witt's equal protection claim because it failed to withstand a rational basis review.[14] Additionally, the court held that her procedural due process claim was not yet ripe and remanded that claim.[15] Her substantive due process claim was

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[5] *Id.* at 809–10.

[6] *Id.* at 821–22. Note that this case note focuses its critique solely on the court's handling of the substantive due process claim.

[7] *Id.* at 809–10.

[8] *Id.*

[9] *Id.* at 809.

[10] *Id.* at 810. Despite this order, Major Witt has not yet been formally discharged. *Id.* at 812.

[11] *Id.* at 810.

[12] *Id.* at 811.

[13] *Id.* at 809.

[14] *Id.* at 821–22 (citing Philips v. Perry, 106 F.3d 1420, 1424–25 (9th Cir. 1997)).

[15] *Id.* at 812–13.

similarly remanded, but with the instruction to analyze DADT's impact on Major Witt in light of an intermediate level of scrutiny.[16]

The military's DADT policy generally requires expulsion of openly gay service members and has historically been reviewed under a rational basis test.[17] However, the Supreme Court's decision in *Lawrence v. Texas*[18] requires a new approach "when the government attempts to intrude upon the personal and private lives of homosexuals."[19] In that case, the Court struck down a Texas law criminalizing consensual sodomy between adults because constitutionally guaranteed liberty rights allow all individuals to choose what kind of relationships they want to engage in, regardless of sexual orientation.[20] In doing so, the Court overruled its prior decision, *Bowers v. Hardwick*, which upheld a similar Georgia statute.[21]

The *Witt* court grappled with the application of the *Lawrence* holding, particularly in light of the fact that the *Lawrence* opinion did not explicitly discuss which standard of review it applied.[22] The *Witt* court noted that the *Lawrence* Court rejected the *Bowers* holding because it "fail[ed] to appreciate the extent of the liberty at stake,"[23] and reasoned that if the *Lawrence* Court were applying a rational basis review "it [would] ha[ve] no reason to consider the extent of the liberty involved."[24] The *Witt* court also examined the types of cases on which *Lawrence* was based, finding that they all employed a heightened level of scrutiny.[25] Furthermore, the language of the *Lawrence* Court's rationale is more consistent with a heightened level of scrutiny.[26] *Lawrence* noted "no legitimate state interest which can justify

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[16] *Id.* at 821–22.

[17] 10 U.S.C. § 654(b) (2000); *Witt*, 527 F.3d at 803 (citing Holmes v. California Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997) and *Philips*, 106 F.3d at 1425–26).

[18] 539 U.S. 558 (2003).

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

[20] *Lawrence*, 539 U.S. at 567, 578–79.

[21] 478 U.S. 186 (1986).

[22] *Witt*, 527 F.3d at 813–18.

[23] *Id.* at 817 (quoting *Lawrence*, 539 U.S. at 567).

[24] *Id.*

[25] *Id.* at 817. "Notably, the Court did not mention or apply the *post-Bowers* case of *Romer v. Evans*, in which the Court applied rational basis review to a law concerning homosexuals." *Id.* (citing Romer v. Evans, 517 U.S. 620 (1996)); *see, e.g.*, Carey v. Population Servs. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

[26] *Witt*, 527 F.3d at 817.

[the Texas statute's] intrusion into the personal and private life" of homosexuals.[27] The *Witt* court reasoned that if *Lawrence* applied a rational basis review, it would have no reason to discuss a legitimate state interest because "any hypothetical rationale for the law would do."[28]

Having considered the language and approach of the Supreme Court as it ruled criminal anti-sodomy laws unconstitutional, the *Witt* court concluded that DADT required a heightened level of examination over rational basis, yet it stopped short of using a strict scrutiny analysis.[29] Instead, it applied an intermediate level of scrutiny, adopting a three-factor analysis: (1) "[A] court must find that *important* governmental interests are at stake"; (2) the intrusion "will *significantly further*" those interests; and (3) the intrusion must be "*necessary* to further those interests" and that there is no less intrusive alternative available which will "achieve substantially the same results."[30] In deference to Congress's right to manage the military, the court acknowledged that the first factor was satisfied by the law's stated purpose of protecting unit cohesion, but remanded the case to develop the record on the second and third factors.[31]

Judge Canby dissented from the majority on the equal protection claim and on the level of scrutiny required for Major Witt's substantive and procedural due process claims.[32] He believed that *Lawrence* treated private, consensual, sexual relationships between adults as a fundamental right, "firmly protected by the substantive guarantee of privacy—autonomy of the Due Process Clause."[33] Consequently, in his view, DADT's infringement of

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[27] *Lawrence*, 539 U.S. at 578.

[28] *Witt*, 527 F.3d at 817.

[29] *Id.* at 817–18. "[W]e hesitate to apply strict scrutiny when the Supreme Court did not discuss narrow tailoring or a compelling state interest in *Lawrence*." *Id.* at 818.

[30] *Id.* at 818–19. The court adopted these factors from a four-factor test used by the Supreme Court in *Sell v. United States*, 539 U.S. 166, 180–81 (2003). *Id.* That case dealt with the forcible administration of medication to a mentally-ill criminal defendant, and the fourth factor, whether the drug was medically appropriate, is inapplicable in the instant case. *Id.*

[31] *Witt*, 527 F.3d at 821. The DADT policy includes a number of congressional findings, one of which states that the presence of homosexuals in the military "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(a)(15) (2000).

[32] *Witt*, 527 F.3d at 822 (Canby, J., dissenting).

[33] *Id.* at 823.

that right requires a strict scrutiny level of review for the substantive due process claim.[34]

The Ninth Circuit was correct to recognize that rational basis is no longer an appropriate level of scrutiny for DADT and similar claims; however, the court stopped too short.[35] Issues surrounding homosexuality are laden with deeply held beliefs.[36] Over the past fifty years, there has been groundswell of recognition in the United States and other western nations that "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" regardless of sexual orientation.[37] Laws that infringe on fundamental rights must pass the test of strict scrutiny.[38] While the Court stops short of specifically saying that this is a fundamental right, the language of the *Lawrence* opinion leaves little room for doubt:

> [S]tatutes [criminalizing homosexual conduct] do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.
>
> This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. 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

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[34] *Id.* Judge Canby also disagreed with the majority's view that *Philips* mandated dismissal of the equal protection claim because the *Philips* decision was rooted in *Bowers,* which was "unequivocally overruled" by *Lawrence. Id.* at 824.

[35] *Id.* at 822–24.

[36] Lawrence v. Texas, 539 U.S. 558, 571 (2003). "For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." *Id.*

[37] *Id.* at 571–72. The Supreme Court notes that the 1995 Model Penal Code does not recommend "criminal penalties for consensual sexual relations conducted in private." *Id.* at 572. It also notes that just thirteen states criminalize sodomy, down from all fifty in 1961, and those remaining states generally do not enforce those statutes against consenting adults. *Id.* at 573. Great Britain, Northern Ireland, and the European Court of Human Rights have all moved away from criminalizing homosexual conduct in the last fifty years. *Id.*

[38] Washington v. Glucksberg, 521 U.S. 702, 766–67 (1997).

protected by the Constitution allows homosexual persons the right to make this choice.[39]

In fact, the majority opinion in *Witt* quotes compelling language from *Lawrence* and *Planned Parenthood v. Casey*,[40] which makes it difficult to understand why it failed to conclude that choices regarding sexual conduct are a fundamental right: "Homosexuals' 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."[41] The dissent correctly stated that "*Lawrence* effectively establishe[d] a fundamental right without so labeling it."[42] Even if the majority did not see *Lawrence* as a mandate, it certainly had the opportunity to give intimate relationships between consenting adults the status it deserves and it is unfortunate that the court chose not to take advantage of this opportunity.[43]

If homosexual relationships, as well as heterosexual relationships, were recognized as a fundamental right, DADT would have to pass a strict scrutiny test in order to survive a constitutional challenge.[44] Congress has concluded that homosexuals in the military are a risk to unit cohesion[45] and although deference should be given to statutes regarding military management, "deference does not mean abdication."[46] Rationalizing DADT based on biases and bigotry is inappropriate.[47] Granted, requiring strict scrutiny of DADT claims would have a profound and immediate impact on the military.[48] However, at a time when the military is conducting two wars and struggling to recruit new

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[39] *Lawrence*, 539 U.S. at 567.

[40] 55 U.S. 833 (1992).

[41] Witt v. Dep't of the Air Force, 527 F.3d 806, 814 (9th Cir. 2008) (internal quotations omitted).

[42] *Id.* at 825.

[43] "At the very least, *Lawrence* leaves the question open, to permit [the court] to recognize [it as a] fundamental right." *Id.*

[44] *See* Washington v. Glucksberg, 521 U.S. 702, 766-67 (1997).

[45] 10 U.S.C. § 654(a)(15) (2000).

[46] *Witt*, 527 F.3d at 821 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

[47] The *Witt* dissent aptly notes that while "[p]rivate biases may be outside the reach of the law, . . . the law cannot, directly or indirectly, give them effect." *Id.* at 826 (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)).

[48] "Few laws survive [strict] scrutiny, and DADT most likely would not." *Id.* at 817.

service members,[49] the benefits of its voidance may well offset any detriments. In fact, polls suggest that most Americans believe DADT is no longer necessary.[50] Take Major Witt as a case-in-point. The only way unit cohesion was negatively impacted by her homosexuality was the Air Force investigation and her subsequent discharge.[51] She was a decorated officer, literally a "poster child" for the Air Force, yet the application of DADT forced her out of the military at a time when there was a shortage of nurses in the Air Force of Major Witt's caliber.[52]

The holding in *Witt* makes positive strides towards bringing DADT under the more appropriate, strict scrutiny level of review. It is encouraging to see the impact of the *Lawrence* decision, prompting the Ninth Circuit to overturn its earlier application of rational basis and to now require an intermediate level of scrutiny for claims arising under DADT. However, the court still must take that final step and recognize the fundamental right of individuals to conduct private, intimate relationships in a manner of their choosing, and to demand that DADT satisfy the highest level of strict scrutiny.

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[49] *See* Lolita C. Baldor, *Military Recruiting Bonuses Grow by 25 Percent*, ABC NEWS, Oct. 2, 2008, *available at* http://abcnews.go.com/politics/wirestory?id=5940901. The military continues to meet its recruiting goals each year, but does so by offering higher bonuses and accepting individuals who are older, less educated, and have criminal backgrounds. *See id.*; Deroy Murdock, *Don't Make Sense—A Policy That Deserves a Dishonorable Discharge*, NAT'L REV., July 23, 2008, *available at* http://article.nationalreview.com/?q=ODliYjkwN2RkNWExMWE5OGQxMzA2ODNlZTc5NTRhYjY=.

[50] *See, e.g.*, Steve Chapman, *'Don't Ask' Rule's Serious Tradeoffs*, CHI. TRIB., Mar. 4, 2007, *available at* http://archives.chicagotribune.com/2007/mar/04/news/chi-0703040578mar04. According to a poll, fifty-five percent of Americans believe gay persons should be able to openly serve in the military. *Id.* That number shoots to sixty-four percent among individuals ages eighteen to thirty, which is the military's target age group for recruits. *Id.* Despite the fact that only thirty percent of current service members support accepting open homosexuals into their ranks, seventy-five percent of those who have served in Iraq or Afghanistan are "comfortable around homosexuals." *Id.* Of the subsection of troops who know that they have gay colleagues, two-thirds do not feel that morale is negatively impacted. *Id.* Notably, former Senator Sam Nunn, one of the original key proponents of the policy, now feels that "it's appropriate to take another look at it" and twenty-eight retired admirals and generals have pushed for Congress to repeal the statute. Murdock, *supra* note 49.

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

[52] *Id.* at 809-10. Major Witt was featured in Air Force promotional materials for many years. *Id.*


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