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

PLAINTIFF'S TRIAL MEMORANDUM

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A. JURISDICTION

This Court has jurisdiction over the claims raised in this case pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1346 because plaintiff's claims arise under the Constitution of the United States, the laws of the United States, and a regulation of an executive department of the United States. This Court also has jurisdiction over the claims raised here under the Administrative Procedures Act, 5 U.S.C. § 702 *et seq.*

At trial the plaintiff is pursuing the following claims: (1) her discharge violates her substantive due process rights under the due process clause of the Fifth Amendment;[1] and (2) her discharge violates her procedural due process rights under the due process clause of the Fifth Amendment.

B. DEFENDANTS BEAR THE BURDEN OF PROOF TO SHOW THAT MAJOR WITT'S PRESENCE WOULD CAUSE A UNIT COHESION PROBLEM AND THEY CANNOT MEET THEIR BURDEN.

Although the Ninth Circuit held that intermediate scrutiny applies to the plaintiff's substantive due process claim in this case, the Defendants persist in asking the question of whether Congress "could have rationally" made the judgment in 1993 that open service by gays and lesbians presented an unacceptable risk to unit cohesion. Thus Defendants seek to have this Court apply the "rational basis" test to Congress' 1993 judgment that it is too risky to allow any gay or lesbian person to serve openly in our armed forces.

This contention directly conflicts with the *Witt* decision which requires an as-applied analysis of Plaintiff's substantive due process claim. Congress never made an as-applied determination of whether the discharge of Witt was "necessary" to protect the unit cohesion

[1] Plaintiff also raised a claim that her discharge violated the equal protection component of the due process clause of the Fifth Amendment. A majority of the panel which decided the appeal in this case ruled that this claim was foreclosed by prior Ninth Circuit precedent. *See Witt v. Department of the Air* Force, 527 F.3d 806, 821 (9th Cir. 2008)(foreclosed by *Phillips v. Perry,* 106 F.3d 1420 (9th Cir. 1997)) and *Witt*, at 823-24 (Canby, J., dissenting in part)(equal protection claim is *not* foreclosed by *Perry*). While plaintiff acknowledges that this equal protection claim is not before this Court, she continues to reserve the right to raise this claim before the Ninth Circuit *en banc* and before the United States Supreme Court.

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of the 446th AES. Nor did Congress ever make any assessment of whether there was some less restrictive alternative to Witt's discharge which would serve to maintain the unit cohesion of the 44th AES.

The Defendants, not the plaintiff, have the burden of proof. It is not Witt's burden to prove a negative (that her reinstatement would *not* cause a unit cohesion problem). It is the Defendants' burden to show that unit cohesion *would* in fact be negatively affected.[2] Indeed, it is well settled that the Government bears the burden of proving that it meets the requirements imposed by intermediate scrutiny. *See, e.g., Ashcroft v. ACLU,* 542 U.S. 656, 666 (2004);[3] *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982).[4] "The burden . . . is on those defending the discrimination to make out the claimed justification . . ." *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 151 (1980). In sum, *Witt* holds that it is the Defendants' burden to "justify" Witt's discharge by showing both that her reinstatement *would* cause a unit morale problem, *and* that such a problem could not be solved by any means less restrictive than refusing to reinstate her.[5]

Rather than confront the fact that they cannot carry their burden, Defendants seek to shift the burden of proof to the plaintiff by arguing that she cannot prove there will not be unit cohesion problems if she is reinstated to the 446th.[6] By attempting to make it seem that Witt must prove

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[2] The *Witt* opinion notes that in *Sell v. United States,* 539 U.S. 166 (2003), "the Court required the state ***to justify*** its intrusion into an individual's recognized liberty interest against forcible medication -- just as *Lawrence [v. Texas,* 539 U.S. 558 (2003)*]* determined that the state had failed ***to 'justify*** its intrusion into the personal and private life of the individual.'" *Witt,* 527 F.3d at 818, quoting *Lawrence*, 539 U.S. at 578 (emphasis added).

[3] "As ***the Government bears the burden of proof*** on the ultimate question of [the statute's] constitutionality, respondents must be deemed likely to prevail unless ***the Government has shown*** that respondents' proposed less restrictive alternatives are less effective than [the statute]." (Emphasis added).

[4] "[T]he party seeking to uphold a statute that classifies individuals on the basis of their gender ***must carry the burden*** of showing 'an exceedingly persuasive justification' for it." (Emphasis added)

[5] "[W]e must determine not whether DADT has some hypothetical, posthoc rationalization in general, but whether ***a justification*** exists for the application of the policy as applied to Major Witt." *Witt,* 527 F.3d at 819 (emphasis added).

[6] In response to the 19 declarations that Witt submitted in support of her summary judgment motion, the Defendants argued that these 19 people had no personal knowledge as to how *other* people in the 446th would react to her reinstatement, and thus their testimony on this point is inadmissible and barred by Fed. R. Evid. 602. Of course these declarants obviously *do* have personal knowledge of their own attitudes towards serving alongside gays and lesbians. And to the extent that their opinions as to the attitudes of others in their unit is

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that her reinstatement will not cause a unit cohesion problem, the Defendants seek to draw attention away from the fact that General Stenner, their own expert witness, has conceded that he simply does not know what effect her reinstatement would have. *Dep. Stenner*, at 89:19 – 90:10.[7]

In sum, Defendants acknowledge that they cannot meet the burden of proof which the Ninth Circuit has held is their responsibility to meet, and instead attempt to evade the rule of *Witt* by claiming that a uniform rule of discharge of all known gays and lesbians is constitutionally necessary in all cases.

C. BECAUSE THEY CANNOT PROVE THAT MAJOR WITT'S DISCHARGE WAS NECESSARY IN ORDER TO PREVENT A NEGATIVE EFFECT ON THE UNIT COHESION OF THE 446TH, THE DEFENDANTS ARGUE INSTEAD THAT A "UNIFORM" RULE OF DISCHARGE OF *ALL* KNOWN GAYS AND LESBIANS IS CONSTITUTIONALLY "NECESSARY." BUT THIS CONTENTION (1) IGNORES THE NINTH CIRCUIT'S HOLDING THAT THE NECESSITY OF A DISCHARGE MUST BE DECIDED ON A CASE BY CASE BASIS, AND (2) IS CONTRADICTED BY DEFENDANTS' OWN ACTIONS WHICH SHOW THE ABILITY TO USE LESS RESTRICTIVE MEANS, AND (3) THE ABILITY TO MAKE AS-APPLIED JUDGMENTS ABOUT A SERVICEMEMBER'S EFFECT ON UNIT COHESION.

1. Two Years Ago The Commander of All Air Force Personnel in Europe Ordered All Servicemembers to Treat Gay and Lesbian Servicemembers with Respect, To Make Sure That They Fostered an Atmosphere of "Inclusion" in Their Units, And to Foster a Standard of Mutual Respect Regardless of Sexual Orientation.

Defendants purport to rely on the expert opinion of General Charles E. Stenner, who opines that in order to foster unit cohesion, morale, good order and discipline, "the Air Force, an

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based on what they have heard them say, or on what they have *not* heard them say, their opinions *are* based on personal knowledge. Curiously, Defendants seem to think that the 1993 Congress' 17 year old "predictive judgment" -- as to how some unknown group of servicemembers would react in the year 2010 to the presence of some unknown, hypothetical, openly gay or lesbian servicemember, serving in some hypothetical military unit -- is *not* speculative, and *is* admissible.

[7] "Q. What about her reinstatement?
A. I don't know.
Q. If – okay. Let me ask it this way. If she were reinstated, would her reinstatement cause a problem for basic military functionality?
MR. PHIPPS: Objection: Speculation.
THE WTNESS: I go back to the fact that we applied a uniform – we uniformly applied a policy through the due process up until the discharge board and that's – that's where we are.
BY MS. DUNNE: And so my question is, if she were reinstatement – excuse me – if she were reinstated, the question is, would that reinstatement somehow affect negatively basic military functionality?
A. I don't know."

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institution globally organized and globally assigned, needs a uniform personnel policy, not different personnel policies for separate geographical regions." *Defendants' Supplemental Response to Plaintiff's Interrogatory No. 12(d)* (Docket #131-1, at p. 31, *ll.* 19-22). Similarly, Defendants also rely on Col. Moore-Harbert's testimony that at any moment members of the 446th may be deployed overseas. *See Defendants' Motion for Summary Judgment*, at 9, *ll.* 3-6, citing *Deposition Moore-Harbert*, at 184, *ll.* 10-14.

But such unsupported assertions regarding the alleged "necessity" of purging the ranks of all known gays and lesbians because they might be deployed overseas are flatly contradicted by documents, such as the Memorandum issued on May 5, 2008 by General Roger A. Brady, which direct Air Force personnel to treat gay and lesbian servicemembers serving overseas with respect. *Trial Exhibit No. 75.* General Brady is the Commander of U.S. Air Forces Europe and of the Air Component Command, at Ramstein AFB; as well as the Director of Joint Air Power Competency Center, Ramstein.[8] He commands all Air Force personnel in 51 countries covering one-fifth of the globe.[9] His memo specifically directed all Air Force personnel to maintain a work environment free from discrimination on the basis of, *inter alia,* "sexual orientation":

> 1. Each and every member of the United States Air Forces in Europe, military and civilian alike, has a vital role in our nation's defense and a direct responsibility for executing all assigned missions. Our responsibility to each other is to provide a workplace and living environment free from discrimination and harassing behavior. Now, more than ever, we need every Airman fully focused on mission accomplishment. Our Airmen and their families have the right to live and work in an environment free of harassment regardless of race, religion, ethnicity, national origin, gender, ***or sexual orientation. The standard is mutual respect, plain and simple.***
>
> 2. Our diversity is one of our greatest strengths. Commanders and leaders at every level ***must seek ways to embrace diversity and foster an environment of inclusion – not exclusion***. . . .

Trial Exhibit No. 75, Memorandum for U.S. Air Force Europe Units, May 5, 2008 (emphasis added)(Appendix A).

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[8] www.af.mil/information/bios/bio.asp?bioID=4769 (Appendix B).
[9] *Id.*

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General Brady's command to treat gays and lesbians with respect neatly illustrates the fact that there *are* less restrictive alternatives to the default practice of simply discharging all known gays and lesbians. Even assuming the existence of some unit where there is some reluctance to serve alongside gay and lesbian servicemembers, the armed forces have the ability to command tolerance and to order any such reluctant servicemembers exercise a professional commitment to mission accomplishment by putting aside their personal biases, just as soldiers in the 1940's and 1950's were commanded to put aside any personal feelings of bias which made them reluctant to serve alongside black soldiers.[10]

2. Defendants' Insistence on the Need for A Uniform Rule Applicable Across the Globe Conflicts With Both the Law They Cite and the Military's Past Experience With Regulations Which Allowed for the Retention of Some Known Gay Soldiers.

Defendants' entire argument ultimately boils down to the "opinion" of General Stenner (which is really a legal conclusion) that it is constitutionally "necessary" to have a "uniform" rule across geographical boundaries of the United States. The uniform rule General Stenner supports is the rule adopted by the First Circuit, that all discharges of known gays and lesbians are constitutionally valid because every single one of them poses an unacceptable risk to unit cohesion. Defendants claim that this uniform rule is constitutionally necessary, and that no possible less restrictive alternative exists, because any gay or lesbian servicemember like Major Witt could be deployed at any time to a new location and thus could be required to work with members of a different unit. This argument simply ignores the Ninth Circuit's ruling in this case, which requires an "as-applied" analysis. This necessitates a determination of whether there *is* – in fact -- a unit cohesion problem in the plaintiff's particular unit.

Oddly, in their summary judgment briefing the Defendants cited to *Gonzales v. O'Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) in support of their contention that

[10] *See Witt*, 527 F.3d at 820, n.10, and *Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1991), quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984): "'[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.'"

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the need for a uniform national rule satisfies the *Witt* standard of heightened scrutiny. But in *Gonzales* the Court actually *rejected* the contention that a uniform rule was so necessary as to make the refusal to make individualized determinations constitutionally acceptable. In that case a Christian Spiritist sect filed suit against the U.S. Attorney General and other law enforcement officers, seeking a preliminary injunction against enforcement of the Controlled Substance Act against them. The Act made it illegal for their adherents to consume a sacramental tea that contained a hallucinogenic drug (dimethyltryptamine, known as "DMT"). The Government defendants argued that a uniform rule against the use of this tea was necessary because enforcement would be hampered if the defendants had to make exceptions, and that a uniform rule of prohibition was the least restrictive alternative means of advancing three compelling governmental interests. *Id.* at 426. The Supreme Court *rejected* this argument, holding that the Government had failed to show that allowing exceptions on a case by case basis was unworkable, noting that exceptions had been permitted in the past and the feared insuperable difficulties had not materialized:

> The Government argues that the effectiveness of the Controlled Substances Act will be "necessarily . . . undercut" if the Act is not uniformly applied, without regard to burdens on religious exercise. Brief for Petitioners 18. The peyote exception, however, has been in place since the outset of the Controlled Substances Act, and there is no evidence that it has "undercut" the Government's ability to enforce the ban on peyote use by non-Indians.

Gonzales, 546 U.S. at 434-35.[11]

In *Gonzales* the Government failed to prove that a refusal to recognize a religious exception to the "no use of DMT" rule was necessary in order to accomplish legitimate government

[11] In so ruling, the Supreme Court noted that in prior cases it had held that exemptions for Amish children from a compulsory school attendance law were constitutionally required. *See Wisconsin v. Yoder,* 406 U.S. 205, 236 (1963) (State required "to show with more particularity how the admittedly strong interest . . . would be adversely affected by granting an exemption to the Amish."). Similarly, in some freedom of association and freedom of speech cases, the Court has held that legitimate concerns about retaliation and harassment compel the constitutional recognition of exceptions to a uniform rule of disclosure of the identity of contributors and supporters of candidates and ballot propositions. *Brown v. Socialist Workers,* 459 U.S. 87, 93 (1982) (where evidence shows reasonable probability of that compelled disclosure will leads to threats or harassment an exemption from disclosure requirement is constitutionally required); *Buckley v. Valeo*, 424 U.S. 1, 74 (1976) (same).

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interests. Similarly, the Defendants in this case will not be able to prove (1) that it is necessary to discharge *all* openly gay and lesbian servicemembers, *including* those who pose no risk to unit cohesion, and (2) that there is no less restrictive alternative to enforcement of an absolutely "uniform" rule that "no gays will be allowed to serve openly." The Government acknowledges that there is evidence that in the 23 other countries that have permitted gays and lesbians to serve openly; that there have been no problems there; and that the feared negative impact on unit cohesion or military effectiveness simply failed to materialize (just as it did when the generals expressed alarm at the anticipated effects of racial integration of the armed forces, *see Decl. Kier,* ¶¶ 25-28 (Docket #19). In addition, there is also the evidence of "exceptions" which have from time to time been permitted in this country. For example, in the pre-DADT era when the military's regulations expressly *permitted* exceptions, openly gay soldiers such as Sgt. Perry Watkins were explicitly found to have rendered fine service without having any negative impact upon unit performance, morale or discipline. *Watkins v. United States Army,* 875 F.2d 699, 702 (9th Cir. 1989)(en banc).[12]

Since the enactment of DADT in 1993, "exceptions" are no longer allowed. But as the experience of former Air Force Sergeant Anthony Loverde shows, frequently the very same servicemember who has been discharged under DADT continues to serve the country as a civilian employee, often working on a daily basis with the same unit he or she was discharged from. As attested to in his perpetuation deposition, after openly disclosing that he was a gay man, Loverde encountered no problems whatsoever when he served openly for two more months prior to his DADT discharge. *After* his discharge, he continued to serve in Iraq and Afghanistan as an employee of a defense contractor working alongside *the same* servicemembers as before, using the same showering facilities, and displaying a gay flag. Despite the fact that he was now openly acknowledging his sexual orientation, he encountered

[12] Watkins was deployed abroad in South Korea when he was retained. After his discharge board decided to retain him, he continued to serve openly without any problems for many years.

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no problems working with them.

While Defendants claim that it would be impossible to have a non-uniform rule, the fact is that the armed forces no longer even has a "uniform" rule about uniforms. Notwithstanding a 30 year old ban on wearing articles of religious clothing, the Army recently decided to allow a devout Sikh doctor to wear a turban instead of the usual Army headgear:

> The decision does not overturn an Army policy from the 1980s that regulates the wearing of religious items, the acting deputy chief of staff, Maj. Gen. Gina Farrisee, wrote in a letter to Captain Kalsi dated Thursday and posted online by the Sikh Coalition.
>
> Instead, the Army's decision follows a longstanding practice of deciding such requests on a case-by-case basis, the letter said. General Farrisee said ***the Army had weighed Captain Kalsi's request against factors such as "unit cohesion,*** morale, discipline, safety and/or health."

Army Allows a Sikh Doctor to Serve Wearing a Turban,(bold italics added).[13] The contention that they cannot possibly make case-by-case assessments of the impact on unit cohesion of allowing an exception to a policy banning all open lesbians is thus contradicted by the fact that the military has a long-standing practice of making precisely such case-by-case determinations of the impact it would have on unit cohesion to except an "openly" Sikh soldier from a policy that normally prohibits him from "telling" people he is Sikh by wearing his turban.

3. Because This is an As-Applied Challenge to Witt's Discharge, Deference to a Congressional Judgment is Neither Required Nor Even Possible.

Defendants claim that this Court is required to give deference to a Congressional judgment made 17 years ago, even though that judgment had nothing to do with the particular circumstances of Major Witt, or with the 446th AES.[14]

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[13] http://www.nytimes.com/2009/10/24/nyregion/24sikh.html?_r=2&ref=us.

[14] In support of this contention, the Defendants have cited to *Roby v. U.S. Navy*, 76 F.3d 1052 (9th Cir. 1996). And yet in that case the Court of Appeals expressly noted that the challenged regulation "is not being challenged on constitutional grounds." *Id.* at 1056. "At most," then Court said it was "being asked to disregard the test because it might be subjective [citation] or difficult to apply [citation]." *Id.* at 1057. The *Roby* Court concluded, "Where a regulation is not being challenged on constitutional grounds we owe the military great deference." *Id.* at 1058. In this case, the application of the DADT statute to Witt *is* being challenged on constitutional grounds, and thus *Roby* is not on point.

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While the Defendants have cited to *Rostker v. Goldberg*, 453 U.S. 57 (1981) for the general proposition that courts must give deference to the military judgments of Congress, they ignore the ultimate holding of *Rostker* that ""[w]e of course do not abdicate our ultimate responsibility to decide the constitutional question." *Id.* at 67. In fact, *Rostker* flatly holds that 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 . . .. *Id.*

Moreover, *Rostker* involved a facial challenge to a statute which required men, but not women, to register for the draft. The Court noted, "Whenever [a court is] called upon to judge the constitutionality of an Act of Congress, 'the gravest and most delicate duty that this Court is called upon to perform,' [citation], the Court accords great weight to the decision of Congress." *Id.* at 64. In this case, this Court is *not* called upon to judge the constitutionality of the DADT statute; it is merely called upon to decide the constitutionality of its *application* to one military officer. It is precisely because as-applied analysis "enables courts to avoid making unnecessarily broad constitutional judgments" that the Ninth Circuit held that as-applied analysis was appropriate in this type of case. *Witt*, 527 F.3d at 819, quoting *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 437 (1985). Therefore no great deference is required in this case, and since Congress never made any determination as to how Major Witt's presence would affect unit cohesion, no deference is even possible.

Even before *Witt* decided that *Lawrence had* elevated the applicable constitutional standard to intermediate scrutiny, in a case involving a lesbian officer's challenge to her discharge the Ninth Circuit had already recognized that the admonition that military decisions "are not to be lightly overturned by the judiciary" is "best applied in the process of judging whether the reasons put forth on the record for the [military's] discrimination against [the servicemember] are rationally related to the [military's] permissible goals." *Pruitt v. Cheney,*

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963 F.2d at 1166. In light of the change in the law occasioned by *Lawrence* and *Witt*, the *Pruitt* statement of the proper degree of deference must now be restated as follows: The admonition not to lightly overturn a military discharge "is best applied in the process of judging whether the reasons put forth on the record" for the servicemember's discharge "will significantly further the government's interest and whether less intrusive means would achieve substantially the government's interest." *Witt*, 527 F.3d at 821.

D. BECAUSE THE INVESTIGATION OF WITT FOR HOMOSEXUAL CONDUCT WAS NOT INITIATED BY HER SQUADRON COMMANDER AS REQUIRED BY AIR FORCE REGULATIONS, HER SEPARATION FROM THE AIR FORCE VIOLATED PROCEDURAL DUE PROCESS.

Air Force Instruction 36-3209, ¶¶ 1.22 and 2.33 restrict the authority to initiate an inquiry into homosexual conduct to a servicemember's "unit commander." The regulation further provides that "only the unit commander is authorized" to initiate such an investigation, and that "unless otherwise specified" the term unit commander refers to the servicemember's "immediate commander" who is usually her squadron commander, but who may also be a squadron section chief appointed by her squadron commander. AFI 36-3209, Attachment 11 Guidelines, ¶¶ A.11.1.1 & A.11.6.2.

In the present case it is undisputed that Witt's immediate commander, Colonel Mary Walker, the commander of the 446th Aeromedical Evacuation Squadron, was *not* the person who initiated the inquiry into Witt's conduct. *Deposition Mary Walker,* 102:3-23.[15] The

[15] "Q. What I'd first like to direct your attention to is 11.1. That first page there, A11.1, it's entitled "Responsibility." Would you agree with me that this first sentence, let me read it, "Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct." It goes on after that, and if you feel that the rest of that is important to my question, you let me know. But I would like to ask you now, ***do you agree with me that the only person who could initiate fact-finding inquiries into homosexual conduct in this case was you?***
MR. PHIPPS: Objection. Foundation.
THE WITNESS: ***I agree.***
MR. PHIPPS: Calls for a legal conclusion and improper lay opinion.
Q. (By Mr. Lobsenz) ***And you didn't initiate this fact-finding inquiry, did you?***
A. ***No, I did not.***
Q. ***And you did not appoint Major Torem, did you?***
A. ***No, I did not.***"

regulations explicitly provide that the immediate commander is "responsible for insuring . . . that no abuse of authority occurs." ¶ A.11.1.2. This provision of the regulation is thus designed to protect the interests of the servicemember to be investigated.

While not every violation of a regulation is a procedural due process violation, if the procedure prescribed by the regulation "is intended to protect the interests of a party before the agency," then it must be "scrupulously observed," and failure to do so does constitute a due process violation. *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) (bold italics added). *Accord Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003). Since the requirement that an investigation can only be initiated by the servicemember's immediate commander is designed to prevent "abuse of authority," it is precisely the type of regulation which, when violated, gives rise to a procedural due process violation. Because it was violated in this case, the Plaintiff's procedural due process rights were violated, and thus her discharge was unconstitutional and must be set aside.

E. THE RELIEF REQUESTED IS AVAILABLE.

1. Sovereign Immunity Has Been Waived by The APA Because A Suit For Reinstatement and Back Pay is Not "a Suit for Money Damages."

Defendants have erroneously asserted that there has been no waiver of sovereign immunity which would allow this Court to award the plaintiff back pay and reinstatement of her lost retirement credit. Defendants overlook the fact that the Ninth Circuit has specifically held that the Administrative Procedures Act constitutes a waiver of sovereign immunity in suits against military officials in which the plaintiff alleges that the officials violated the Constitution.

In *Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980), overruled on other grounds by *Witt v. Department of the Air Force*, *supra,* three gay and lesbian Navy enlisted personnel brought suit against the Secretary of the Navy and the Secretary of Defense, alleging unconstitutional military discrimination against them. The plaintiffs, like Witt, sought back pay, as well as injunctive relief to prevent their discharge. *Id.* at 793. The *Beller* Court rejected the defendants'

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contention that the suit was barred by sovereign immunity. *Beller* relied upon the Court's earlier decision in *Glines v. Wade,* 586 F.2d 675 (9th Cir. 1978), rev'd on other grounds sub nom. *Brown v. Glines,* 440 U.S. 957 (1980). In *Glines*, the Court held that sovereign immunity did not bar suit in any case where the plaintiff alleged that the defendant acted "in violation of the Constitution" because 5 U.S.C. § 702 includes an express waiver of sovereign immunity for actions "in a court of the United States seeking relief other than money damages." *Glines*, 586 F.2d at 681, cited in *Beller*, 632 F.2d at 796. Thus, the *Beller* Court held that the APA waived sovereign immunity as a bar to the plaintiffs' suit which was properly brought for violation of her Fifth Amendment rights (just as Witt's case was). *Id.* at 797.

Defendants have mistakenly contended that because Witt is seeking an award of back pay and lost retirement credits that her suit is an action for money damages to which the APA sovereign immunity waiver does not apply. They erroneously asserted that simply "because . . . her claims for back pay and retirement credit . . . would undoubtedly be paid from the public treasury, [they] constitute claims for money damages." *Defendants Opposition to Plaintiff's Motion for Summary Judgment*, at 20, *ll.* 16-19. But Defendants have ignored the holding of *Bowen v. Massachusetts*, 487 U.S. 879 (1988) which rejected precisely this contention. *Bowen* holds that simply because money is requested, that does *not* mean that a suit is an action for money damages, and thus it does *not* mean that the intentionally broad waiver of sovereign immunity[16] set forth in 5 U.S.C. § 702 does not apply.

> Our cases have long recognized the distinction between an action at law for damages – which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation – and an equitable action for specific relief – ***which may include an order providing for the reinstatement of an employee with back pay***, or for 'the recovery of specific property or monies, ejectment from land, or injunction either directing or restraining the defendant officer's actions. [Citation]. ***The fact that a judicial remedy may require one party to pay money to another is not sufficient reason to characterize the relief***

[16] "[I]t is undisputed that the 1976 amendment to § 702 was intended to broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment." *Bowen,* 487 U.S. at 891.

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as "money damages."

Bowen, 487 U.S. at 893 (emphasis added).[17] Since "an equitable action for specific relief" such as "an order for reinstatement of an employee with back pay" is *not* an action for money damages, the waiver of sovereign immunity set forth in 5 U.S.C. § 702 applies to this case.

2. Since The Court of Claims Does Not Have the Power to Grant Equitable Relief, and Thus Cannot Grant "Complete Relief," This Court Has the Power to Order Both Reinstatement and Back Pay.

The Defendants have argued that the only possible way that plaintiff Witt can sue for an award of back pay is to bring suit in the Claims Court under the Tucker Act. As noted above, the plaintiff need *not* rely solely on the Tucker Act as a basis for a waiver of sovereign immunity. Moreover, even assuming that plaintiff could establish a waiver of sovereign immunity under *both* the Administrative Procedures Act *and* the Tucker Act, she still would not be required to bring suit for back pay in the Claims Court. *Bowen* specifically rejected this argument as well.

Bowen reaffirmed the well established principle that the Court of Claims does not have the power to grant equitable relief: "Indeed, we have stated categorically that 'the Court of Claims has no power to grant equitable relief." *Id.* at 905. Since the Court of Claims does *not* have the power to order the equitable remedy of reinstatement, it does not have the power to provide "complete relief" to the plaintiff. In *Bowen* the Supreme Court expressly held that the District Court's jurisdiction to award "complete relief" was "not barred by the possibility that a purely monetary judgment may be entered in the Claims Court." *Id.* at 910. The same is true in this case.

F. CONCLUSION

Here, as in *Gonzales*, the defendants' plea that a uniform rule is necessary and that a case-by-case approach is unworkable is simply untenable:

> The Government's argument echoes the classic rejoinder of bureaucrats

[17] The Court refused to construe the term "money damages" as if it meant "monetary relief." *Id.* at 896.

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> throughout history: If I make an exception for you, I'll have to make an exception for everybody, so no exceptions.

Gonzales, 546 U.S. at 436. Even in the case of military service, the Supreme Court has recognized that constitutional rights may compel the government to grant an exemption from a general law that requires military service in times of war. *See Seeger v. United States*, 380 U.S. 163 (1965) (affirming the reversal of a conviction for refusal to submit to induction because conscientious objector was entitled to exemption from a statute compelling military service).

The *Witt* Court held that a uniform rule precluding military service by all known gays and lesbians is *not* constitutional. *Witt* holds that the law categorically prohibiting all gays and lesbians from serving openly *cannot* be applied to a servicemember without a more particularized showing that its application is justified because service by that servicemember will harm the national security interests of the country. In this case the Defendants will not be able to prove that Major Witt will cause a negative impact on unit cohesion and that nothing short of her complete removal from the Air Force will prevent that negative impact. Thus, they will not be able to carry their burden of proving that application of DADT to Witt is necessary to further any important governmental interest. Even assuming, for the sake of argument, that there is some Air Force unit, somewhere on the planet, where a unit cohesion problem might result if Major Witt were assigned to that unit, the Defendants will not be able to prove that there are no less restrictive alternatives to the discharge of Major Witt which could successfully mitigate such a hypothetically possible future negative effect.

Accordingly, this Court should find that the Defendants cannot carry their burden of showing a constitutionally adequate justification for the discharge of Major Witt. Therefore, her discharge violated her due process rights and she is entitled to reinstatement in the Air Force Reserve.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2010, 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:

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