WITT REINSTATED TO THE AIR FORCE; WITTLESS IN THE WHITE HOUSE

The late, but great, news this fine Friday afternoon is the decision of Western District of Washington (WDWA) Judge Ronald Leighton in the case of Air Force Major Margaret Witt. Witt has been an Air Force reserve flight and operating room nurse since 1987 and was suspended from duty in 2004, just short of retirement, upon her base commanders being informed by an off base nosy neighbor that she was a lesbian.

From NPR:

> A federal judge ruled Friday that a decorated flight nurse discharged from the Air Force for being gay should be given her job back as soon as possible in the latest legal setback to the military's "don't ask, don't tell" policy.
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> The decision by U.S. District Judge Ronald Leighton came in a closely watched case as a tense debate has been playing out over the policy. Senate Republicans blocked an effort to lift the ban this week, but two federal judges have ruled against the policy in recent weeks.
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> Maj. Margaret Witt was discharged under the "don't ask, don't tell" policy and sued to get her job back. A judge in 2006 rejected Witt's claims that the Air Force violated her rights when it fired her. An appeals court panel overruled him two years later, leaving it to Leighton to determine whether her firing met that standard.

This is indeed a wonderful decision, and one based upon the elevated level of scrutiny that is now clearly the standard in Federal court consideration of the rights based on sexual preference. The full text of the court's decision is here. The critical language from the decision setting and clearing the table is as follows:

> Plaintiff commenced this action by filing a Complaint on April 12, 2006. On July 26, 2006, this Court granted the government's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), concluding that the regulation was subject to rational basis scrutiny, and that the evidentiary hearings held, and factual findings adopted, by Congress provided a sufficient foundation to support the regulation. Plaintiff timely appealed.
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> The Ninth Circuit agreed with plaintiff. It held that Lawrence v. Texas, 539 U.S. 558, 123 S. Ct. 2472 (2003) effectively overruled previous cases wherein the Ninth Circuit had applied rational basis to DADT and predecessor policies. It held that something more than traditional rational basis review was required. Witt v. Department of the Air Force, 527 F.3d 806, 813 (9th Cir. 2008). The Circuit
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> Court vacated the judgment and remanded to the District Court the plaintiff's substantive and procedural due process claims. It affirmed this Court's dismissal of the plaintiff's equal protection claim. On remand, this Court was directed to determine whether the specific application of DADT to Major Witt significantly furthers the government's interest, and whether less intrusive means would substantially achieve the government's interest. Witt, 527 F.3d at 821.

Now comes the interesting part of the opinion (and case as argued by the government) and it ties in directly with the *Log Cabin Republicans v. USA DOD* decision recently rendered in the Central District of California (I will return to that in a bit). Specifically, the 9th Circuit based at least partially upon briefing in the alternative by the government (i.e arguing multiple positions), granted the government's argument that, at a minimum, they were at least entitled to argue that homosexuals were bad for moral and unit cohesion on a case by case basis.

In essence, the government figured that, rather than lose the whole case, they would be "smart" and roll with being able to at least handle it on a case by case basis. But Judge Leighton saw through the government's baloney in the remand of the very case they had argued it, *Witt:*

> Added to this calculus, is the government's plea for uniformity. Lt. General Charles Stenner, the government's expert, made the unassailable point that uniformity and consistency in the administration of personnel policies is a desirable objective. When similar people are treated differently, morale and cohesion suffer. The government argues that Major Witt's continued military service necessarily would result in the application of a different personnel policy to her than to other service members, such as those in the First Circuit, where the DADT statute was upheld as constitutional. See, Cook v. Gates, 528 F.3d 42, 60 (1st Cir. 2008). The argument proves too much, however. The call for uniformity defies as-applied analysis. By definition, if uniformity is required, exceptions cannot be encouraged. And if exceptions cannot be encouraged, as-applied analysis is pointless. The direction to this Court to apply DADT to the specific circumstances of Major Witt compels it

> to reject any notion that the overriding need for uniformity trumps individualized treatment of Major Witt.
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> …..
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> For the reasons expressed, the Court concludes that DADT, when applied to Major Margaret Witt, does not further the government's interest in promoting military readiness, unit morale and cohesion. If DADT does not significantly further an important government interest under prong two of the three-part test, it cannot be necessary to further that interest as required under prong three. Application of DADT therefore violates Major Witt's substantive due process rights under the Fifth Amendment to the United States Constitution. She should be reinstated at the earliest possible moment.

In a nutshell, Leighton called bullshit on the government, and rightly so. The government came out of the earlier appeal in Witt with the order that it only seek DADT discharges where it was provably appropriate, and then went and tried to continue to do just that in the most absurd case imaginable, and after having been excoriated on the facts by the 9th Circuit. And the decision to so proceed in the face of such overwhelming absurdity was made squarely by the Obama DOJ, the tools of the Administration that ran for, and took, office promising to do the opposite.

Which brings us back to the aforementioned Log Cabin Republican (LCR) case. Shocking, but true, the Obama DOJ doubled down on the hypocritical two faced argument. In *LCR*, Judge Virginia Phillips found DADT unconstitutional under both due process and First Amendment analysis and, seeing as how the case sought injunctive relief, told the plaintiff LCRs to submit a proposed injunction and the government to put any objections in writing thereafter. The plaintiff LCRs submitted their proposed injunctive order

on September 16th, and the government filed its objection thereto yesterday. (By the way, the reply by the LCRs was literally just filed and is here).

Now the hilarity and absurdity of the Obama Administration policy rears its ugly head because, you see, part of the government's objection in LCR is based on the Witt 9th Circuit decision that they should at least be entitled to make a showing on a case by case basis. When, at almost the same exact moment, the Obama Administration was proving in the further proceedings of the Witt case itself, that they could not, and would not, adhere to the spirit of Witt and proceed intelligently and on a case by case basis where they could prove morale and unit cohesion were at risk.

Instead, what the Obama Administration, by and through the actions of their Department of Justice, have proven that their current rhetoric about being dedicated to ending DADT is as empty as their similar campaign promises were hollow. Yet day after day, the Administration wonders why those on the left are unhappy and chastises them for not clapping loudly enough heading into midterm elections where turnout of the base is critical. Tin ear does not begin to describe this arrogance.