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Witt v. Department of the Air Force Subjects "Don't Ask, Don't Tell" to Intermediate Scrutiny

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CASE SUMMARY

WITT V. DEPARTMENT OF THE AIR FORCE

SUBJECTS "DON'T ASK, DON'T TELL" TO INTERMEDIATE SCRUTINY

INTRODUCTION

"Don't Ask, Don't Tell" ("DADT") refers to the statutory U.S. policy of excluding openly homosexual individuals from serving in the military. It prohibits members of the armed forces from engaging in homosexual acts, stating that they are gay or bisexual, or openly marrying a person of the same sex.[1] Although the constitutionality of DADT has been upheld several times in federal court,[2] these cases preceded the United States Supreme Court's holding in *Lawrence v. Texas*.[3] In *Lawrence*, the Supreme Court struck down a Texas anti-sodomy statute as unconstitutional and declared that the private homosexual conduct targeted by the law was a part of the "liberty" protected by the substantive Due Process Clause of the Fourteenth Amendment.[4]

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[1] 10 U.S.C.A. § 654(b)(1)-(3) (Westlaw 2009); *see* 10 U.S.C.A. § 654 (b)(1)(A)-(E) (Westlaw 2009) (setting forth five exceptions to the general rule that a service member may not engage in homosexual acts).

[2] *See, e.g.*, Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996).

[3] Lawrence v. Texas, 539 U.S. 558 (2003).

[4] *See id.* at 578 ("The case does involve two adults who, with full and mutual consent from

In 2008, a panel of the United States Court of Appeals for the Ninth Circuit reconsidered the constitutionality of DADT in light of *Lawrence*.[5] Pre-*Lawrence*, DADT had been upheld under rational-basis review.[6] However, *Lawrence* left unclear the proper level of scrutiny to apply to classifications based on homosexuality.[7] While the Ninth Circuit in *Witt v. Department of the Air Force* did not subject DADT to strict scrutiny, it nevertheless became the first U.S. court of appeals to directly hold that *Lawrence v. Texas* requires a higher level of scrutiny than mere rational-basis review.[8]

I. FACTS AND PROCEDURAL HISTORY

Major Margaret Witt is a well-respected flight nurse and proudly served in the military for seventeen years before the Air Force began its investigation of allegations that she was a lesbian.[9] She was an outstanding officer: she earned several medals, received excellent performance reviews, and was even a literal "poster child" for the Air Force, as her picture appeared in Air Force recruiting materials for years.[10] Although Major Witt lived with her civilian partner from July 1997 through August 2003, she never informed anyone in the military that she was gay.[11] There were no allegations that Witt ever engaged in homosexual acts while on base, or with any other member of the military.[12]

In November 2004, Major Witt received a memorandum from her superiors informing her that the military would initiate separation

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each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."); U.S. CONST. amend. XIV.

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

[6] *See, e.g.*, Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996); Able v. United States, 88 F.3d 1280 (2d Cir. 1996); Thomasson v. Perry, 80 F.3d 915 (4th Cir. 1996), *cert. denied*, 519 U.S. 948 (1996).

[7] *See* Witt v. U.S. Dep't of the Air Force, 444 F. Supp 2d 1138, 1142 (W.D. Wash. 2006) ("In 2003, the Supreme Court's opinion in *Lawrence* expressly overruled *Bowers* . . . without making clear whether a new, higher standard of review is to be applied in cases involving regulation of homosexual conduct.").

[8] Witt v. Dep't of the Air Force, 527 F.3d 806, 817 (9th Cir. 2008).

[9] *Id.* at 809-10.

[10] *Id.* at 809.

[11] *Id.* at 809-10.

[12] *See id.* at 809; Witt v. U.S. Dep't of the Air Force, 444 F. Supp 2d 1138, 1141 (W.D. Wash. 2006).

proceedings against her for violating the DADT policy.[13] She could not work, receive pay, or earn credit toward pension or promotion pending the conclusion of the separation action.[14] Sixteen months later, in March 2006, she was notified that the Air Force was initiating a discharge action against her due to her homosexuality.[15] She immediately requested a hearing to contest the separation, and she brought suit a month later in the Western District of Washington.[16] She still had not received a military hearing when the district court issued its decision that July, and she did not receive a military hearing until September 2006.[17]

Major Witt challenged the separation proceedings at on three grounds: that it deprived her of due process, both substantive and procedural; that it violated the Equal Protection Clause of the Fourteenth Amendment; and that it violated her First Amendment rights.[18] She requested a preliminary injunction to allow her to keep going to work, to keep working toward promotion and pension benefits, and to prevent the government from going through with separation proceedings.[19] The district court admitted that the meaning of *Lawrence* was the crux of the discussion, and set out to determine whether it requires only a rational basis, or something more.[20]

The district court began by analyzing Major Witt's substantive due process claim. It stated that *Lawrence* left questions unanswered regarding whether the Supreme Court, in striking down an anti-sodomy statute, had held that consensual same-sex intimacy was a fundamental right requiring a "compelling state interest."[21] Witt asserted that *Lawrence* had so held, and she further argued that DADT should not survive strict-scrutiny review.[22] Alternatively, Witt argued for at least an intermediate-scrutiny analysis, which would require that DADT pass a

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

[14] *Id.* at 810 ("When she received this memorandum, Major Witt was less than one year short of twenty years of service for the Air Force, at which time she would have earned a right to a full Air Force retirement pension.").

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Witt v. U.S. Dep't of the Air Force, 444 F. Supp 2d 1138, 1141-42 (W.D. Wash. 2006) (basing her substantive due process claim on *Lawrence v. Texas*, and her procedural due process claim on the fact that she still had not received a hearing even a year and a half after being suspended).

[19] *Id.* at 1141.

[20] *Id.* at 1142 ("[I]t is the meaning of this relatively recent opinion that is the focal point of this court's inquiry here.")

[21] *Id.* at 1142-43.

[22] *Id.* at 1143.

"searching constitutional inquiry" in order to be valid.[23] Witt also argued for an "as-applied" analysis, in an attempt to show that DADT was unconstitutional as applied to her.[24]

Despite claiming to sympathize with Witt, the district court refused to use an as-applied analysis.[25] It explained that judges must use restraint when expanding individual rights.[26] Further, it gave three reasons for its conclusion that *Lawrence* did not change the validity of DADT: (1) the *Lawrence* Court used language typically used in rational-basis analysis; (2) it did not consider whether the law was narrowly tailored to meet a compelling state interest; and (3) it was purposefully silent on the issue of whether it was changing the level of scrutiny for private, consensual, same-sex intimacy.[27] Concluding that *Lawrence* used rational-basis review, the district court chose not to overrule the pre-*Lawrence* Ninth Circuit cases that had upheld the constitutionality of DADT.[28]

Next, the district court dismissed Witt's equal-protection claim with few words, simply stating that homosexuals are not a suspect or quasi-suspect class, and this was not affected by *Lawrence*.[29] It also found that there were no violations of Witt's rights under the First Amendment or procedural due process.[30] In sum, the district court denied Major Witt's request for an injunction and dismissed the entire suit for failure to state a claim.[31]

II. NINTH CIRCUIT ANALYSIS

On appeal, Witt again argued that DADT violates substantive due

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[23] *Id.* She also argued that DADT should not even survive rational-basis review and pointed to studies that show there is no support for the policy and that it actually detracts from unit cohesion and military effectiveness by promoting prejudice and dishonesty. *Id.* at 1143-44.

[24] *Id.* at 1143.

[25] *Id.* at 1144.

[26] *Id.*

[27] *Id.*

[28] *Id.*; *see* Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420 (9th Cir. 1997).

[29] Witt v. U.S. Dep't of the Air Force, 444 F. Supp 2d 1138, 1145 (W.D. Wash. 2006).

[30] *Id.* at 1146-48.

[31] *Id.* at 1148. The court stated:

> Prior to *Lawrence v. Texas*, DADT had been found constitutional under equal protection analysis and First Amendment case law. Similar provisions had passed constitutional muster under substantive due process review. The majority opinion in *Lawrence* did not change the framework within which DADT should be evaluated. Accordingly, prior case law approving DADT is not affected and DADT remains constitutional as a regulation upon individual conduct.

Id.

process, procedural due process, and the Equal Protection Clause.[32] A majority of the Ninth Circuit panel recognized that these claims had already been rejected under previous case law, but stated that they must be reconsidered in light of *Lawrence*.[33] For reasons described below, the court ultimately affirmed dismissal of the equal-protection claim, and it vacated and remanded the dismissal of the substantive and procedural due process claims.[34]

A. EQUAL PROTECTION AND PROCEDURAL DUE PROCESS CLAIMS

The majority had no difficulty in deciding to affirm the dismissal of Witt's equal-protection claim. It noted that *Lawrence* declined to address the equal-protection argument.[35] Thus, it held that *Lawrence* did not affect Ninth Circuit case law that clearly upholds DADT under rational-basis review against claimed violations of equal protection.[36]

The court in *Witt* took only slightly more time to explain its decision to remand the procedural due process claim to the district court due to a standing issue. The court noted that there was an issue over whether Witt had yet suffered an "injury in fact," one of three constitutional standing requirements, because Witt had not yet been formally discharged.[37] However, the court noted that she had been suspended, and a military board had recommended her discharge.[38] The court determined that Witt's long-term suspension was enough of a cognizable injury to satisfy the standing requirements for her substantive due process and equal-protection claims.[39] However, it found that her procedural due process claim was unripe because her alleged injury of the stigma of a dishonorable discharge had not yet occurred—and was not even likely to occur.[40] Thus, the Ninth Circuit remanded Witt's procedural due process claim to the district court so that further facts could be considered regarding the actual circumstances of her

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[32] Witt v. Dep't of the Air Force, 527 F.3d 806, 809 (9th Cir. 2008).

[33] *Id.* at 811 (explaining that its task was to "consider the effect of *Lawrence* on our prior precedents").

[34] *Id.* at 822.

[35] *Id.* at 821 (explaining that the *Lawrence* court declined to address equal protection, and instead specifically addressed "whether *Bowers* itself ha[d] continuing validity") (quoting *Lawrence v. Texas*, 539 U.S. 558, 574-75 (2003)).

[36] *Id.* (citing *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997)).

[37] *Id.* at 811-12.

[38] *Id.* at 812.

[39] *Id.*

[40] *Id.* at 812-13.

discharge.[41]

B. SUBSTANTIVE DUE PROCESS CLAIM

The bulk of the decision was devoted to determining what level of scrutiny was appropriate to apply to Witt's substantive due process claim. The Ninth Circuit determined that *Lawrence* "requires something more than traditional rational basis review"[42] and eventually settled on a heightened-scrutiny balancing analysis.[43] It then remanded the substantive due process claim because the record lacked sufficient facts to determine whether DADT could be upheld under what is essentially an intermediate level of scrutiny.[44]

1. Lawrence *Revisited*

To reach this result, the court first summarized the Supreme Court's holding in *Lawrence*, quoting at length from the decision.[45] For example, the court of appeals reiterated that "the right to make certain decision regarding sexual conduct extends beyond the marital relationship"[46] and that "liberty under the Due Process Clause gives . . . [homosexuals] the full right to engage in their conduct without intervention of the government."[47] Despite its description of the rights of homosexuals, the Ninth Circuit found *Lawrence's* actual language to be unhelpful in determining the proper level of scrutiny, because it found that the decision was "perhaps intentionally so, silent as to the level of scrutiny that is applied."[48] Further, it acknowledged that both parties could rely on the decision's irresolute language to support their opposing views.[49]

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[41] *Id.* at 813.

[42] *Id.*

[43] *Id.* at 819.

[44] *See id.* at 821-22.

[45] *Id.* at 813-14.

[46] *Id.* at 813 (quoting *Lawrence v. Texas*, 539 U.S. 558, 565 (2003)).

[47] *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

[48] *Id.* at 814; *see id.* at 816 ("The parties urge us to pick through *Lawrence* with a fine-toothed comb and to give credence to the particular turns of phrase used by the Supreme Court that best support their claims. But given the studied limits of the verbal analysis in *Lawrence*, this approach is not conclusive.").

[49] *Id.* at 814 (noting that "both parties draw upon language from *Lawrence* that supports their views"); *see id.* at 814-15. Witt argued that *Lawrence* requires subjecting DADT to heightened scrutiny because it relied on fundamental rights cases, and because it emphasized the "substantial protections" afforded to adults in matters regarding their private sex lives; the Air Force argued that *Lawrence's* use of the term "legitimate interest" is the "hallmark of rational basis review," that the

The court found Ninth Circuit precedent unhelpful in determining the level of scrutiny applied by *Lawrence* because the circuit had never directly addressed the issue.[50] It also did not find it very helpful to look to other circuits, because only two other cases had reached conclusions regarding the level of scrutiny required by *Lawrence*.[51] In one case, the Court of Appeals for the Eleventh Circuit explicitly held that *Lawrence* did not apply strict scrutiny.[52] The other, *United States v. Marcum*,[53] a case decided by the U.S. Court of Appeals for the Armed Forces, also directly addressed the implications of *Lawrence*.[54] In the Ninth Circuit's view, that case applied a heightened level of scrutiny in its application of *Lawrence*.[55] *Marcum* also concluded that courts should use an as-applied analysis, rather than a facial challenge, when applying *Lawrence*.[56]

Recognizing this lack of controlling precedent and *Lawrence's* ambiguous language, the Ninth Circuit determined it was best to solve the problem by analyzing what the Supreme Court actually did in the case, rather than what it said.[57] First, the court observed that *Lawrence* overruled *Bowers v. Hardwick*,[58] a Supreme Court case that upheld a Georgia sodomy law under rational-basis review.[59] It found that *Lawrence's* reason for overruling *Bowers* was inconsistent with rational-basis review: "[T]he [*Lawrence*] Court rejected *Bowers* because of the 'Court's own failure to appreciate the extent of the liberty at stake.'"[60] In the Ninth Circuit's view, it was inconsistent with rational-basis review to focus on the liberty interest involved, rather than the basis for law.[61] Second, the Ninth Circuit pointed out that *Lawrence* relied on cases that

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Supreme Court in *Lawrence* never said it was applying a level of scrutiny other than rational-basis review, and that no court has yet held that *Lawrence* applied a heightened level of scrutiny. *Id.*

[50] *See id.* at 815 ("Nor have we previously directly considered the implications of *Lawrence*."); *id.* at 816 ("Nor does a review of our circuit precedent answer the question . . . .").

[51] *Id.* at 815-16.

[52] *Id.* at 815 (citing *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004)).

[53] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

[54] *Witt*, 527 F.3d at 816.

[55] *Id.* ("By considering whether the policy applied properly to a particular litigant, rather than whether there was a permissible application of the statute, the court necessarily required more than hypothetical justification for the policy-all that is required under rational basis review.").

[56] *Id.* (citing United States v. Marcum, 60 M.J. 198, 206 (C.A.A.F. 2004)).

[57] *Id.*

[58] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[59] *See id.* at 196.

[60] *Witt*, 527 F.3d at 817 (quoting *Lawrence v. Texas*, 539 U.S. 558, 567 (2003)).

[61] *Id.* ("Under rational basis review, the Court determines whether governmental action is so arbitrary that a rational basis for the action cannot even be conceived *post hoc*. If the Court was applying that standard . . . it has no reason to consider the extent of the liberty involved.").

employed heighted scrutiny,[62] while neglecting to apply or even mention *Romer v. Evans*,[63] a post-*Bowers* Supreme Court case that applied rational-basis review to a law pertaining to homosexuals.[64] Third, it found that the rationale for the inquiry analysis the Supreme Court adopted was also inconsistent with rational-basis review: it was not necessary for the *Lawrence* court to consider whether there was a legitimate state interest that would justify the Texas statute's intrusion upon liberty, because under rational-basis review, "any hypothetical rationale for the law would do."[65]

For these reasons, the Ninth Circuit determined that *Lawrence* applied something more than rational-basis review.[66] The question then became: what level of heightened level of scrutiny did it apply?[67] The court in *Witt* declined to apply strict scrutiny to DADT because *Lawrence* made no mention of "narrow tailoring" or "compelling state interests."[68] Instead, the court looked to a different Supreme Court case for guidance and ultimately applied an intermediate-scrutiny analysis.[69]

2. *Drawing from* Sell v. United States *To Require an Intermediate Level of Scrutiny*

The case, *Sell v. United States*,[70] did not involve DADT, nor did it involve homosexuals. *Sell* addressed the constitutionality of forcing medication on mentally ill defendants in order to make them competent to stand trial.[71] The Ninth Circuit found *Sell's* scrutiny level to be instructive, and it relied on that case based on the notion that it is bound by the theory and reasoning of a Supreme Court case, even if the facts are not directly on point.[72]

Sell required balancing the interest of the government with the individual's liberty interests.[73] Its heightened scrutiny consisted of four

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[62] *Id.*

[63] Romer v. Evans, 517 U.S. 620 (1996).

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

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.* at 818.

[69] *Id.*

[70] Sell v. United States, 539 U.S. 166 (2003).

[71] *See id.* at 179.

[72] *Witt*, 527 F.3d at 818.

[73] *Id.* ("To balance those two interests, the [*Sell*] Court required the state to justify its intrusion into an individual's recognized liberty interest against forcible medication-just as *Lawrence* determined that the state had failed to 'justify its intrusion into the personal and private life of the

factors:

> First, a court must find that *important* governmental interests are at stake. . . . Second, the court must conclude that involuntary medication will *significantly further* those concomitant state interests. . . . Third, the court must conclude that involuntary medication is *necessary* to further those interests. . . . Fourth, . . . the court must conclude that administration of the drugs in *medically appropriate*.[74]

The Ninth Circuit found that *Sell's* analysis was similar to intermediate scrutiny in equal-protection cases.[75] As the first part of *Witt*'s holding, the Ninth Circuit concluded that consideration of *Sell's* first three factors favored applying a heightened level of scrutiny to DADT.[76] It found the fourth requirement to be inapplicable because it was specific to the medical context.[77] Thus, the court of appeals summarized its heightened scrutiny as follows:

> We hold that when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, *the government must advance an important governmental interest*, *the intrusion must significantly further that interest*, and *the intrusion must be necessary to further that interest*.[78]

The second part of *Witt*'s holding was the court's decision that the heightened level of scrutiny it adopted was to be analyzed as applied to Major Witt, rather than facially.[79] It expressly found *Beller v. Middendorf*,[80] a case in which the Ninth Circuit declined to perform an as-applied analysis, to be overruled.[81] It found *Beller's* analysis to be irreconcilable with subsequent Supreme Court cases that called for an individualized balancing analysis.[82] It stated: "[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

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individual.'") (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)).

[74] *Id.* at 819 (quoting Sell v. United States, 539 U.S. 166, 180-81 (2003)).

[75] *Id.* at 818 n.7 (citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

[76] *Id.*

[77] *Id.*

[78] *Id.* (emphasis added).

[79] *Id.*

[80] Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

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

[82] *Id.* at 820 (citing City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432 (1985), and Sell v. United States, 539 U.S. 166, 180-81 (2003)).

as applied to Major Witt."[83]

After defining the appropriate heightened level of scrutiny and deciding how it should be analyzed, the court then had to apply its balancing analysis to the facts of the case. It found the first factor easily met because managing the military is clearly an important governmental interest.[84] However, the record did not contain enough facts from which the court could determine whether the second and third factors were met.[85] Specifically, the Air Force's stated attempts to justify the policy as developed in the trial-court record did not address "whether the application of DADT specifically to Major Witt significantly furthers the government's interest and whether less intrusive means would achieve substantially the government's interest."[86] Therefore, the court of appeals remanded the substantive due process claim so that the district court could further develop the record on these issues.[87]

C. DISSENT

Judge Canby concurred in part and dissented in part.[88] He agreed with the majority that *Lawrence* requires something more than rational-basis review, and that the district court erred in dismissing the complaint for failure to state a substantive due process claim.[89] He disagreed, however, with the majority's decision to affirm the dismissal of the equal-protection claim, and more importantly, with the level of scrutiny to be applied to both claims: Judge Canby would have subjected DADT[90] to strict scrutiny.[91]

1. Substantive Due Process

Judy Canby stated that while *Lawrence* did indeed fail to expressly state what level of scrutiny it was applying, it nevertheless made it very

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[83] *Id.* at 819-20 (citing Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980)).

[84] *Id.* at 821.

[85] *Id.*

[86] *Id.; see id.* n.11 (admitting that the facts tended to support a contrary conclusion: "Major Witt was a model officer whose sexual activities hundreds of miles away from base did not affect her unit until the military initiated discharge proceedings under DADT and, even then, it was her suspension pursuant to DADT, not her homosexuality, that damaged unit cohesion.").

[87] *Id.*

[88] *Id.* at 822 (Canby, J., dissenting).

[89] *Id.*

[90] *Id.* (pointing out that "the statute's popular name appears to be a misnomer as applied to Major Witt. She did not tell, but the Air Force asked.").

[91] *Id.*

clear that it was protecting an important right.[92] He gleaned two main points from the reasons *Lawrence* gave for its decision to overrule *Bowers*: "first, the right to choose to engage in private, consensual sexual relations with another adult is a human right of the first order and, second, that right is firmly protected by the substantive guarantee of privacy-autonomy of the Due Process Clause."[93] He stated that even though *Lawrence* "did not expressly characterize the right as 'fundamental,' it certainly treated it as such."[94] This treatment, in his view, requires strict scrutiny of governmental encroachment upon this right.[95] In making this determination, he did not find it necessary for the court to interpret *Lawrence* as having adopted that standard of review, reasoning that "it is enough that the question is an open one."[96]

2. Equal Protection

While the majority pointed to *Philips v. Perry* as a Ninth Circuit case that remained untouched by *Lawrence*,[97] Judge Canby concluded that *Philips* is no longer controlling.[98] He stated that its theory and reasoning were undercut by *Lawrence* because the case *Philips* relied on, *High Tech Gays*,[99] was based on the outdated and overruled reasoning of *Bowers*.[100] Because of this, he determined that the court was free to use an equal-protection analysis applying strict scrutiny to DADT, and then he explained the two strict-scrutiny approaches he believed should be followed in the case.[101]

The first approach would be based on the premise that homosexuals are a suspect class such that governmental discrimination based on that classification warrants strict scrutiny.[102] He reiterated that Ninth Circuit case law holding otherwise was undermined by the overruling of

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[92] *Id.*

[93] *Id.* at 823.

[94] *Id.*

[95] *Id.*

[96] *Id.* (pointing out that "[c]ertainly nothing in *Lawrence* can reasonably be read as *forbidding* the application of strict scrutiny to statutes attaching severe consequences to homosexual behavior."); *see id.* n.2 ("*Lawrence* is to be contrasted with cases of gender discrimination, where the Supreme Court has expressly specified an intermediate standard of review.").

[97] *Id.* at 821 (majority opinion) (citing *Philips v. Perry*, 106 F.3d 1420, 1424-25 (9th Cir. 1997) (upholding DADT under rational-basis review against claimed violation of equal protection)).

[98] *Id.* at 824 (Canby, J., dissenting); *see id.* n.5.

[99] High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990).

[100] *Witt*, 527 F.3d at 824 (Canby, J., dissenting).

[101] *Id.*

[102] *Id.* at 824-25.

Bowers.[103] Thus, in his view, the court was free to hold that homosexuals are a suspect class for equal-protection purposes.[104] Because of their history of being subjected to unequal treatment and stereotyping, and because of their status as a minority with immutable and distinctive characteristics, he determined that homosexuals "are a group deserving of protection against the prejudices and power of an often-antagonistic majority."[105]

Secondly, Judge Canby also found strict scrutiny to be the proper equal-protection analysis because the classification in DADT impinges upon a fundamental right.[106] He explained: "*Lawrence* effectively established a fundamental right without so labeling it. At the very least, *Lawrence* leaves the question open, to permit us to recognize the fundamental right to homosexual relations . . . ."[107] He believed that it was important for this case to include an equal-protection analysis because he felt that the clear discrimination between homosexuals and heterosexuals should not go unaddressed.[108]

3. Judge Canby's Recommended Order of Inquiry in Further Proceedings

Judge Canby argued for an inquiry that would first require the Air Force to identify a compelling interest in the way it applied the DADT statute *generally*, before inquiring into how the statute was applied to Major Witt's unique circumstances.[109] First of all, he reasoned that hearing the Air Force's justifications *first* might end the inquiry.[110] Further, he felt this would be less disruptive to the Air Force work environment because it would require testimony from Witt's coworkers only as a last resort.[111] Additionally, he felt that it would provide more protections of the right set forth by *Lawrence* by ensuring protections for

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[103] *Id.* at 824.

[104] *Id.* Judge Canby also stated that *Romer v. Evans* was not a barrier to using a suspect-classification strict-scrutiny approach, finding that case did not address whether homosexuals were a "suspect class" because the Colorado provision at issue failed even rational-basis review. *Id.* at 825 (citing Romer v. Evans, 517 U.S. 620 (1996)).

[105] *Id.* at 825.

[106] *Id.* at 825-26.

[107] *Id.* at 825.

[108] *Id.* at 826 ("[A]n equal protection analysis focuses the inquiry sharply on a question that should not be ignored: what compelling interest of the Air Force is served by discharging homosexuals but not others who engage in sexual relations privately off duty, off base, and with persons unconnected to the military?").

[109] *Id.* at 826-27.

[110] *Id.* at 827.

[111] *Id.*

all service members.

> Because the right to choose to engage in private, intimate sexual conduct is a constitutional right of a high order, it must be protected not just for the outstanding service member like Major Witt, but also for the run-of-the-mill airman or soldier. It is thus the general application of the statute to the generic service member that the Air Force must be required to justify.[112]

In sum, Judge Canby would alter the remand instructions to first require the Air Force to show what important governmental interests were significantly furthered by the DADT statute, and why it is necessary to apply the statute to *any* service member who maintained a homosexual relationship off-duty, off military premises, and with a person unconnected to the military.[113] Doing so would save inquiring into other facts of Witt's employment until the end, and it might even make further inquiry into her circumstances unnecessary.[114]

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit itself noted that "[t]he issues posed by this case might generate great concern both from those who welcome Major Witt's continued participation in the Air Force and from those who may oppose it."[115] Since the DADT policy was introduced in 1993, the government has spent millions of dollars discharging nearly 12,500 troops from the military due to homosexuality.[116] Few laws in recent years have been more hotly debated, and this case is likely to draw even more attention to the opposition to DADT.

Witt's significance is already apparent because one court of appeals has followed suit by also holding that *Lawrence* requires more than rational-basis review. The case, *Cook v. Gates*, also concluded that *Lawrence* applied an intermediate level of scrutiny.[117] It is likely that other circuits will follow, and *Witt* may very well serve as the first in a

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[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Witt*, 527 F.3d at 821 (majority opinion).

[116] Servicemembers Legal Defense Network, About Don't Ask Don't Tell, http://www.sldn.org/pages/about-dadt (last visited Apr. 26, 2009).

[117] Cook v. Gates, 528 F.3d 42, 56 (1st Cir. 2008) (finding that *Lawrence* did recognize a protected liberty interest, yet declining to apply strict scrutiny). However, the First Circuit disagreed with the *Witt* majority in one respect by allowing the service member plaintiffs to bring an as-applied challenge to DADT. *Id.*

great line of cases that will interpret *Lawrence* as requiring more than rational-basis review. This, in turn, may assist the gay-rights movement, as more classifications based on homosexuality can be struck down under the standard of intermediate scrutiny.

Whether or not future courts agree with this interpretation of *Lawrence*, at least one survey has shown that as many as 79% of Americans think that openly gay people should serve in the U.S. military.[118] Many Congressmen and former generals and admirals support a repeal of the law.[119] Even President Obama wants to repeal DADT.[120] If DADT is repealed, it was nevertheless in existence long enough to be the impetus for a new conclusion regarding the level of scrutiny under *Lawrence.*

IV. CONCLUSION

In its determination that *Lawrence* did not apply rational-basis review, the *Witt* decision will be regarded by some as a refreshing step in the right direction. However, others who agree that *Lawrence* requires more than rational-basis review may be disappointed that *Witt* did not go further and interpret *Lawrence* as having allowed for a strict-scrutiny analysis. Nevertheless, there is no doubt that the case is groundbreaking for constitutional law jurisprudence: it is the first case to take the leap through the door left open by the Supreme Court in *Lawrence.*

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[118] SLDN 10th Annual Report on Don't Ask, Don't Tell (2004), http://dont.stanford.edu/commentary/sldn.10.pdf, at 23-27.

[119] *Id.*

[120] *See* Carl Cameron, *Obama To End Military's "Don't Ask, Don't Tell" Policy,* FOX NEWS, JAN. 15, 2009, http://www.foxnews.com/politics/2009/01/15/obama-end-militarys-dont-ask-dont-tell-policy/.

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