Office of the Attorney General

Washington, D.C. 20530

April 24, 2009

Mr. Morgan Frankel
Senate Legal Counsel
United States Senate
Washington, D.C. 20510

Re: Witt v. Department of the Air Force, 527 F.3d 806 (9th Cir. 2008)

Dear Mr. Frankel:

I am sending this letter consistent with my obligation under 28 U.S.C. 530D to report to Congress on the enforcement of laws. Because this is the first such letter I have sent to Congress, I take this opportunity to note the process that I will generally follow. As the chief law enforcement officer of the United States, I intend in the usual case to send notifications consistent with Section 530D in my own name.

Consistent with the purposes of 28 U.S.C. 530D, I am writing to advise you that the Department of Justice has decided not to seek Supreme Court review of the interlocutory decision of the United States Court of Appeals for the Ninth Circuit in the above-referenced case, but instead to continue defending the constitutionality of the statute at issue, 10 U.S.C. 654, on remand in the district court. This decision was made after extensive consultation with the Department of Defense and is based on the longstanding presumption against Supreme Court review of interlocutory decisions as well as practical litigation considerations. The government retains all rights to petition the Supreme Court to review a final decision in the case, including every aspect of the Ninth Circuit's ruling, after the proceedings on remand are completed.

The court of appeals held in Witt that a discharged service member's challenge to 10 U.S.C. 654, which establishes the policy concerning homosexuality in the armed forces, is subject to intermediate scrutiny under the substantive component of the Due Process Clause. 527 F.3d at 817-19. Under that standard, the court of appeals concluded that the government had advanced a sufficiently important interest, but remanded to the district court to determine whether applying the statute to the service member at issue, plaintiff Margaret Witt, would significantly further that interest and whether that interest could be achieved substantially through a less intrusive means. Id. at 821. The Ninth Circuit subsequently denied the government's petition for rehearing en banc, over the dissent of six judges. Witt v. Department of the Air Force, 548 F.3d 1264 (2008). Copies of the opinions are enclosed.

The court of appeals' decision neither declared 10 U.S.C. 654 unconstitutional on its face nor held the statute unconstitutional as applied to Margaret Witt. The court of appeals instead instructed the district court to determine the statute's constitutionality as applied to Witt. The question at this juncture concerns the most appropriate way to continue defending the constitutionality of the statute against Witt's claims in this procedural context.

The Supreme Court ordinarily does not review nonfinal, interlocutory decisions. Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "to review the adverse rulings made by the Court of Appeals . . . because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court"); American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372, 384 (stating the general rule that "this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order"); VMI v. United States, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); see generally Robert L. Stern, et al., Supreme Court Practice § 4.18, at 280 (9th ed. 2007) ("'[E]xcept in extraordinary cases, the writ is not issued until final decree.'") (quoting Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916)). The government's usual practice is to respect this principle of certiorari jurisdiction in its decisions about whether and when to petition the Supreme Court for review. Indeed, the government often invokes the Supreme Court's presumption against reviewing interlocutory decisions as a reason to deny certiorari, because it avoids decision of unnecessary questions.

In this case, if the remand and any subsequent appeal results in the upholding of the statute as applied, Margaret Witt's claims against the government will terminate. If, instead, the remand and a subsequent appeal results in the invalidation of the statute as applied, the government can raise any and all of its arguments in defense of the statute in a petition for a writ of certiorari seeking review of the final judgment. In the event that defense of the statute in the Supreme Court should prove necessary, the development of the factual record on remand will provide the government with an opportunity to strengthen its case; at a minimum, it will afford the Court a more complete basis on which to assess the parties' various contentions concerning the statute. And the Department of Justice's assessment is that the burdens associated with any discovery requests by the plaintiff in the remand proceedings likely can be appropriately cabined.

The Department of Defense has provided views to the Solicitor General about this case consistent with the above analysis. Noting the interlocutory nature of the court of appeals' decision and the ability of the government to petition for certiorari in the case at a later time, the General Counsel of the Department of Defense advised that "a remand will allow DoD to develop a factual record in the case which will, we believe, demonstrate that the discharge was fully appropriate and consistent with law." Letter from J. Johnson to E. Kagan (Apr. 20, 2009). A copy of the recommendation from the Department of Defense is enclosed.

The appropriate course, in light of the Department of Defense's views, all relevant litigation considerations, and the government's usual practice of waiting for a final judgment to petition the Supreme Court for certiorari, is now to defend the constitutionality of 10 U.S.C. 654 on remand in the district court.

At the same time, the Department of Justice will oppose a petition for certiorari in Pietrangelo v. Gates, No. 08-824 (filed Dec. 23, 2008). In that case, the United States Court of Appeals for the First Circuit dismissed a service member's constitutionally-based challenge to his discharge under 10 U.S.C. 654. See Cook v. Gates, 528 F.3d 42 (1st Cir. 2008). The government will file its opposition to certiorari, defending the constitutionality of the statute, by May 6.

Thank you for your attention to this matter.

Sincerely,

Eric H. Holder, Jr.
Attorney General

Enclosures