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Legal Sidebar

Questions Remain, Litigation Continues, over Military Service by Transgender Individuals

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At present, the ability of openly transgender individuals to enlist and serve in the military, and receive certain military-funded medical care, remains unclear. Four lawsuits challenging the President's August 25, 2017, memorandum concerning transgender individuals in the military continue to work their way through federal courts in the District of Columbia (*Doe v. Trump*), Maryland (*Stone v. Trump*), California (*Stockman v. Trump*), and Washington (*Karnoski v. Trump*). While this litigation was underway, the President issued a *second* memorandum on March 23, 2018, revoking the first memorandum, and providing for further policies with respect to transgender persons. The effect of this second memorandum on these four cases and the legal arguments they raise—including a constitutional challenge to the President's first memorandum on Fifth Amendment equal protection grounds—has yet to be definitively resolved by the courts. This sidebar discusses the procedural background of these lawsuits, the President's first and second memoranda, and the issues that may come before the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit), which could be the first federal appellate court to determine the constitutionality of the President's latest policies on military service by transgender persons.

The President's First Memorandum

In the August 25, 2017, memorandum, President Trump ordered the Department of Defense (DoD) to implement three principal directives: 1) to continue prohibiting the accession (*i.e.*, enlisting) of "openly transgender" individuals in the military indefinitely; 2) to return to a policy that authorized the discharge of "such individuals"; and 3) to halt military-funded sex-reassignment surgery, "except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex." Under the terms of the memorandum, the accession directive would become effective January 1, 2018, while the latter two directives—sometimes referred to as the "retention" and "sex reassignment surgery" directives, respectively—were to take effect March 23, 2018.

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The memorandum also directed the Secretaries of Defense and Homeland Security (with respect to the U.S. Coast Guard) to submit an implementation plan for the President's directives by February 21, 2018, and stated that, with respect to transgender individuals currently serving in the military, the Secretary of Defense "shall determine how to address" such personnel, and that "no action may be taken against such individuals" under the policy set forth in the memorandum until the Secretary made that determination.

Legal Challenges to the President's First Memorandum

In separate lawsuits, the plaintiffs—transgender individuals either currently serving in the military or who wish to join the military—challenged the President's policy on the grounds that it unconstitutionally denied them equal protection and due process under the Fifth Amendment, among other claims. In support of those arguments, the plaintiffs drew attention to the President's July 26, 2017, statements on Twitter shortly before issuing the August 25, 2017, memorandum, that "the United States Government will not accept or allow...Transgender individuals to serve in any capacity in the U.S. Military." After the lawsuits were filed, two states formally intervened as co-plaintiffs in two of the four cases—the State of California in *Stockman v. Trump*, and the State of Washington in *Karnoski v. Trump*.

Upon filing the lawsuits, each set of respective plaintiffs sought a preliminary injunction to stop the military's implementation of the President's three directives. By the end of 2017, all four district courts had granted preliminary injunctions. The district court in *Doe v. Trump*, for example, which was the first court to issue an injunction, concluded that the plaintiffs lacked standing to challenge the sex reassignment surgery directive, but ordered a preliminary injunction as to the accession and retention directives. The other three district courts subsequently concluded that the plaintiffs in their respective cases alleged facts distinguishable from *Doe v. Trump* sufficient to establish standing to challenge the sex reassignment surgery directive, and granted preliminary injunctions as to all three directives.

Though the language of the injunctions varied, three of the courts enjoined the military from enforcing *any* of the three directives in the August 25 memorandum, pending final resolution of the litigation. The district court in *Doe v. Trump* phrased its injunction to require the military to "revert to the status quo" by maintaining the previous administration's policy on the accession and retention of transgender individuals in the military, as reflected in a June 30, 2016 memorandum. That memorandum required the military to permit transgender individuals currently in the military to serve openly, prohibited the military from firing or denying a service member continued service on the basis of being transgender, and would have begun the accession of transgender applicants no later than July 1, 2017; however, the current administration delayed implementation of that policy until January 1, 2018.

After the district courts' decisions, the government appealed seeking a stay of the preliminary injunctions, which the Fourth Circuit and the D.C. Circuit denied in December 2017. (The government also filed an appeal to the Ninth Circuit, but withdrew it before that court issued a ruling.) Thereafter, the Department of Defense announced that it would comply with federal court orders pending final judicial resolution of the cases, and began allowing the accession of transgender individuals on January 1, 2018, provided accession standards were met.

The President's Second Memorandum

On March 23, 2018, as the litigation was underway, the President issued a second memorandum that "revoke[s] my memorandum of August 25, 2017" and "any other directive I may have made with respect to military service by transgender individuals." This second memorandum directs the Secretaries of Defense and Homeland Security to "exercise their authority to implement any appropriate policies concerning military service by transgender individuals," and expressly referred to policies that Secretary

of Defense James Mattis recommended to the President in a February 22, 2018, memorandum and accompanying 44-page report.

Specifically, Secretary of Defense Mattis recommended that transgender persons who require or have undergone gender transition be disqualified from military service; whereas transgender persons who do not have a history or diagnosis of gender dysphoria may serve, provided they serve in their biological sex and are otherwise qualified for service. The accompanying report describes gender dysphoria as "a mental health condition that can require substantial medical treatment," involving a "marked incongruence between one's own experience/expressed gender and assigned gender, of at least six months duration," and which is "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." The report characterizes individuals with gender dysphoria as a subset of transgender persons, and states that "transgender status alone is not a condition."

Notwithstanding the general disqualification of transgender persons diagnosed with gender dysphoria, the military would allow transgender persons with a history or diagnosis of the condition to serve upon a showing of one of three exceptions: 1) the individual has been stable for 36 consecutive months in his or her biological sex prior to accession; 2) the individual is a service member who was diagnosed with gender dysphoria *after* entering military service, does not require a change in gender, and remains deployable within applicable retention standards; or 3) the individual is a service member who had been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, in which case the individual may serve in the preferred gender and receive medically necessary treatment for gender dysphoria.

Impact of the President's Second Memorandum

The President's second memorandum has prompted a new set of arguments and questions, including the constitutionality of these latest policies and whether the plaintiffs can challenge the second memorandum through the current litigation. For example, the government argues that the legal challenges to the first memorandum are moot, as the second memorandum supersedes it, and constitutes a different policy that focuses on gender dysphoria rather than transgender status. The plaintiffs, however, argue that because the second memorandum substantively continues the discriminatory policies of the first memorandum, they can challenge the second memorandum in the context of the four existing cases.

At this juncture, the first federal district court to have substantively reached some of these issues with respect to the latest policies—in *Karnoski v. Trump*—rejected the government's arguments that the President's second memorandum constituted a new and substantially different policy from the first memorandum, and that the preliminary injunction with respect to the first policy should be dissolved. Instead, in an April 13, 2018, decision, the court in Washington held that the preliminary injunction was to remain in place, and enjoined the military from taking any action concerning transgender individuals "that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." The court, however, declined to rule on the constitutionality of this second set of policies at this stage, stating that further fact-finding was needed concerning the military's deliberations relating to the 2018 policies. This evidence, the court stated, would be relevant to whether the government's actions could survive constitutional review. On June 15, 2018, the court also issued an order denying the government's motion to stay the preliminary injunction, and rejected the contention that the injunction should be narrowed from a nationwide scope to the nine individual plaintiffs. A bench trial is currently scheduled for April 2019.

The other three federal district courts have not yet ruled on the government's motions to either dissolve the preliminary injunctions in light of the second memorandum or to dismiss the plaintiffs' amended complaints incorporating the second memorandum, but are likely to do so in the next several months.

The Ninth Circuit's Forthcoming Decision and Options for Congress

The Ninth Circuit may be the first federal appellate court to weigh in on the latest iteration of the military's transgender policies. Following the Washington district court's April 13, 2018, decision in *Karnoski*, the government filed an appeal of that decision to the Ninth Circuit, and the parties are presently submitting briefs to the court. Among the issues before the Ninth Circuit, several involve novel and noteworthy legal questions that could have lasting implication.

First, the Ninth Circuit may address whether or not to lift the preliminary injunction in part or in whole, as the injunction currently enjoins the military from implementing the 2018 policy nationwide. The government argues that, at a minimum, the nationwide injunction should be narrowed to preliminarily enjoin military action only as to the plaintiffs who would not fall into an exception under the new 2018 policy. If the court narrows the scope of the preliminary injunction or lifts it altogether, this would impact whether and when the military could begin implementing some or all of the policies reflected in the February 22, 2018, memorandum and report, and could affect transgender individuals who are current and prospective service members.

Second, in its analysis of the plaintiffs' Fifth Amendment due process and equal protection claims, the appeals court may address what level of review courts should apply—rational basis, intermediate, or strict scrutiny—when evaluating the constitutionality of a government action based on transgender status. The district court in *Karnoski* held that transgender status is a suspect class that triggers strict scrutiny—the most stringent level of judicial review and the same level of review applied to racial classifications. The other three district courts—in *Doe v. Trump*, *Stone v. Trump*, and *Stockman v. Trump*—held that intermediate review—the standard applied to sex-based classifications—applies. Meanwhile, the government argues that the new 2018 policy is no longer based on transgender status, but on gender dysphoria, and thus, that the court should review the new policies under the most lenient standard—rational basis review.

Finally, the Ninth Circuit may also address whether, as the government argues, a court should apply a particularly deferential level of review when assessing the constitutionality of a government action in the military context, in light of Supreme Court precedent such as *Rostker v. Goldberg*, discussing the level of deference courts should accord to military judgments, including when military decisions are challenged on equal protection grounds. The district court described *Rostker* as signaling that deference is owed to "well-reasoned policies" and concluded that the deference question could not be resolved at this juncture without evidence concerning DoD's deliberative process regarding its transgender policy. The court stated that its preliminary injunction was not intended to prevent the military from ever modifying the previous administration's policy, but also noted that even if it found that *Rostker*-type deference was due, "it would not be rendered powerless to address Plaintiffs' and Washington's constitutional claims."

As courts evaluate the constitutionality of the President's policies, Congress could introduce legislation addressing issues related to military service by transgender individuals, pursuant to its powers under Article 1 Section 8 of the U.S. Constitution to "raise and support armies," to "provide and maintain a navy," and "make rules for the government and regulation of the land and naval forces." Some legislation was introduced in the 115th Congress on transgender individuals in the military, such as H.R. 4041 and S. 1820, which would prohibit the termination of a currently serving member of the Armed Forces on the basis of a member's gender identity.