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US Judge Smacks Down Trump Transgender Military Ban

Arthur S. Leonard
New York Law School, arthur.leonard@nyls.edu

Military Ban

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BY ARTHUR S. LEONARD | In a blunt rebuke to President Donald Trump, US District Judge Colleen Kollar-Kotelly, finding no factual basis for Trump's July 26 tweet decreeing a ban on military service by transgender people or his August 25 memorandum fleshing out that policy, has issued a preliminary injunction against its implementation.

US District Judge Colleen Kollar-Kotelly has issued a preliminary injunction against implementation of President Donald Trump's proposed ban on transgender military service. | DCD.USCOURTS.GOV

Kollar-Kotelly's action on October 30 ordered the government "to revert to the status quo with regard to accession and retention that existed before the issuance of the Presidential Memorandum — that is, the retention and accession policies established in the June 30, 2016 Directive-type Memorandum as modified by Secretary of Defense James Mattis on June 30, 2017."

The practical effect of the preliminary injunction — which will stay in effect until the court issues a final ruling on the case's merits, unless an appellate court reverses it — is that the policy on transgender service announced on June 30, 2016, by Ashton Carter, former President Barack Obama's secretary of defense, will remain in effect. Trump's tweet and subsequent memorandum purporting to revoke these policies, which the administration planned to put into effect next February and March, are blocked for now.

In preliminary injunction, court finds no factual basis for president's sudden reversal of Obama 2016 policy

By incorporating reference to Mattis' directive of this past June 30, the judge's order requires that the Defense Department allow transgender people to enlist beginning on January 1.

The memorandum that Trump issued on August 25 specified that his new policy — involving the discharge of transgender military personnel and a ban on new enlistments, at least until the president was persuaded it should be lifted — would go into effect no later than March 23, 2018.

Key to Kollar-Kotelly's ruling was her conclusion that the plaintiffs, represented by the National Center for Lesbian Rights and GLBTQ Legal Advocates & Defenders (GLAD), have adequately established they are likely to prevail on the merits of their claim that Trump's ban violates their equal protection rights under the Fifth Amendment and that allowing it to go into effect while the case is pending would cause them irreparable harm that could not be remedied later by monetary damages.

The judge concluded that a policy that explicitly discriminates against people because of their gender identity is subject to "heightened scrutiny" under the Fifth Amendment, meaning that the policy is presumed to be

unconstitutional and the burden is placed on the government to demonstrate an "exceedingly persuasive" justification.

"As a class," she wrote, "transgender individuals have suffered, and continue to suffer, severe persecution and discrimination. Despite this discrimination, the court is aware of no argument or evidence suggesting that being transgender in any way limits one's ability to contribute to society."

In the absence of a clear precedent by the US Court of Appeals for the District of Columbia Circuit — under whose jurisdiction her court is — or the Supreme Court, Kollar-Kotelly's ruling was staking out new ground here.

She noted, however, that appeals court panels in the Sixth and 11th Circuits have ruled that gender identity discrimination is really sex discrimination and should be evaluated by the same "heightened scrutiny" standard that courts use to evaluate sex discrimination claims against the government.

A petition by a Wisconsin school district is pending at the Supreme Court presenting the question whether gender identity discrimination is sex discrimination, in the context of Title IX of the Education Amendments of 1972 and bathroom access in public schools.

As for the justifications advanced by the government for Trump's ban, the judge wrote, "There is absolutely no support for the claim that the ongoing service of transgender people would have any negative effect on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects."

The judge concluded that the public interest is served by blocking the ban, since harm to the military from allowing transgender service was non-existent while letting the ban go into effect would actually impose significant costs and readiness issues on the military, including the loss of a large investment in training of transgender people now serving and the cost of recruiting and training people to take their places.

President Donald Trump, with one of his "generals," Defense Secretary James Mattis, and Vice President Mike Pence. | DEFENSE.GOV

A major part of Kollar-Kotelly's decision was devoted to refuting the administration's contention that she did not have jurisdiction to decide the case, which she characterized as a red herring. The government argued that because Trump's August 25 memorandum delayed the policy's implementation until next year, nobody yet has standing to challenge it since none of the plaintiffs has suffered tangible harm.

The judge, however, accepted the plaintiffs' argument that both intangible and tangible harm was imposed as soon as Trump declared his policy, stigmatizing transgender people as unworthy to serve, tarnishing their reputations, and creating uncertainty and emotional distress regarding their future employment. As well, federal courts have long held that a policy that deprives a person of equal protection of the laws imposes an injury affording constitutional standing to mount a legal challenge.

The issue that seems to have provoked Trump's July 26 tweet starting this whole controversy was military payment for sex reassignment surgery. Several Republican House members, outraged by that chamber's rejection of their proposed defense appropriations amendment barring payment for such procedures, complained to the president and reportedly threatened to withhold their support for the must-pass budget bill. The simple-minded president apparently jumped to the easiest conclusion: barring all transgender people from the service would solve his immediate problem while also playing to the anti-transgender biases of his political base. In common with his other major Twitter policy proclamations, this seemed to be impulsive, not vetted for legality or defensibility, and oblivious to the harm it would do to thousands of people.

The way in which Trump rolled out his decision contributed to the judge's conclusions. The policy was announced without any factual basis, by contrast with the 2016 policy decision from the Obama administration, which followed several years of study, a report by the RAND Corporation (a widely-respected nonpartisan military policy think tank), wide-ranging surveys, and participation of numerous military officials. The outcome of all this investigation was a well-documented conclusion that there was no good reason why transgender people should not be allowed to serve, explicitly rejecting the grounds raised by Trump in support of his decision.

Kollar-Kotelly noted the irony of Trump's methodology: first announce a ban, then a month later task Defense Department leaders with setting in motion a process to study the issue, and mandate that the policy go into effect several months after that, with the study limited to recommending how to implement the ban.

Attorneys for the government argued, in effect, that the policy is still in development and that at present it is not clear what the final implemented policy will be, including whether it would provide discretion to military leaders over discharging specific transgender personnel or even allowing particular individuals to enlist (such as, for example, highly qualified people who had already transitioned and thus would not be seeking transition-related medical procedures while serving). Their arguments lacked all credibility, however, in light of the absolute ban proclaimed by Trump on July 26 and the directive to implement that ban contained in his August 25 memorandum.

The judge granted the government's motion to dismiss a different theory raised by the plaintiffs — "estoppel" — as opposed to their constitutional claim. She found that none of the plaintiffs had alleged facts to support a claim that they had individually relied on the June 2016 policy announcement and its implementation in a way that would support the rarely-invoked doctrine that the government is precluded from changing a policy on which people have relied.

Despite its length (76 pages), Kollar-Kotelly's opinion left some ambiguity about the very issue that sparked Trump's tweet — availability of sex-reassignment surgery for transgender personnel while this case is pending. Trump cited the cost of providing such treatment as one of the reasons for his ban (though the judge noted that the actual costs were a trivial fraction of the Defense Department's health care budget). She found, however, that none of the individual plaintiffs had standing to challenge it or to seek preliminary relief against it while the case is pending, since, among other things, Trump's August 25 memorandum provided that such procedures would continue to be covered until a new policy's implementation.

Kollar-Kotelly's dismissal on this point was "without prejudice," which means that if additional plaintiffs with standing are added to the complaint, the claim could be revived.