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Pentagon's Discretion in Trump Trans Military Directive

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BY ARTHUR S. LEONARD | Under the cover of a Category 4 hurricane bearing down on Texas — or as Donald Trump would characterize it, taking advantage of all the eyes glued to TV because of it — the president on August 25 issued a formal “memorandum” to the secretaries of Defense and Homeland Security spelling out his objective of barring transgender Americans from open service in the military.

The memorandum was the first official word on the issue from Trump since his flurry of tweets early in the morning of July 26, which took the Pentagon, Congress, and even many in the White House by surprise and earned the president bipartisan scorn.

Though supporters of transgender service and equality rightly see the new memorandum as the other shoe dropping, in significant ways it falls short of the scope suggested in the July tweetstorm and offers hope that cooler heads at the Pentagon might yet forestall the reversal of the open service policy initiated by the Obama administration in mid-2016.

As advocates go to court, Mattis' moxie in standing by DoD's prior study could be tested

But legal advocacy groups are taking no chances on the political courage Trump appointees might be willing to exhibit and are expanding the challenges already underway to any new policy. The American Civil Liberties Union on August 28 announced it is filing suit on behalf of six plaintiffs who are currently serving, challenging Trump's proposed new policy, and on the same day Lambda Legal and OutServe-SLDN filed suit on behalf of one current service member and two trans individuals who wish to enlist. The ACLU and Lambda-OutServe-SLDN actions follow [a similar suit filed jointly by the GLBT Legal Advocates & Defenders \(GLAD\) and the National Center for Lesbian Rights \(NCLR\)](#) on August 9.

The three tweets in July from Trump spelled out a definitive rejection of transgender service and also suggested his reliance on military advice, which there is no evidence he actually received.

“After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow....,” the president began, followed by “....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming....,” and finally “....victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.”

That formulation signaled a complete reversal of a 2016 policy decision made by the Defense Department following a prolonged study that included [a report commissioned from the RAND Corporation](#), which specializes in producing defense-related policy studies, and widespread consultations within the military and with military allies that allow transgender individuals to serve. The Pentagon conclusion was that the existing ban, predicated on purported medical grounds, should be rescinded. Existing transgender service members would be allowed to remain on duty, while enlistment of new trans recruits was scheduled to begin July 1 of this year after additional study on how to adjust existing regulations and procedures to accommodate that.

The policy announced in June 2016 resulted in hundreds of transgender service members coming out to their superior officers, with some of them beginning the transition process they had previously held off on with the assurance that the costs would be covered under military health policies.

Estimates of the number of transgender service members range from a few thousand to as high as 15,000, most of whom have not yet made their presence known to their commanding officers. It is widely assumed that those trans service members who have not yet come forward include officers as well as enlisted personnel.

Given that Trump neither gave the Pentagon significant advance warning of his statement on Twitter nor provided officials with any details in its immediate aftermath, military officials quickly assured trans service members that there was no new policy yet in effect. Admiral Paul F. Zukunft, commandant of the Coast Guard, reacted first, immediately announcing that the Coast Guard would not “abandon” its out transgender members and that he and his staff had already reached out to them. The other military service heads as well

as Joint Chiefs Chairman Joseph Dunford followed in short order with similar clarification that nothing would change unless the president issued a formal directive.

The August 25 memorandum from Trump opened by summarizing the changes announced by the Obama administration last June and noting that Defense Secretary James Mattis had already extended the opening of new transgender enlistments from July 1 to January 1 of next year. The president then spelled out his rationale, writing, "In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupting unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."

That statement blithely disregarded the evidence that the hundreds of transgender service member who had come out over the past year had not produced any adverse effect on military operations and unit cohesion or any significant strain on the military's budget. There has been no reporting that military commanders had asked to abandon the inclusive Obama policy, that Trump and his staff have actually reviewed the voluminous materials generated by the Pentagon's prior review of the issue, or that the president was responding to any specific reports of problems.

The memorandum continues, "I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the US Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted."

The memorandum specifically directs the Pentagon and Homeland Security to maintain the ban on enlistment by transgender individuals beyond the January 1, 2018 date Mattis had earlier specified, though that could change if the Defense secretary "provides a recommendation to the contrary that I find convincing."

The memorandum also directs the Pentagon and Homeland Security to "halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, 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." Curiously, this provision mentions only "sex reassignment surgical procedures" but not any of the other costs associated with gender transition, including hormone treatment. This could reflect either ignorance by the White House staffers who drafted the memorandum or a deliberate intention to make the health care exclusion as narrow as possible, focusing only on the political "flashpoint" of surgery, funding for which has generated opposition from some conservatives in Congress.

In addition, the ban on surgical cost reimbursement does not take effect until next March 23.

Overall, the Defense secretary is given until February 21, 2018, to submit a "plan for implementing" Trump's directive. The Pentagon and Homeland Security must "determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals."

The effective dates in the Trump memorandum ease, to some degree, any panic created by the July 26 tweets, which led to some speculation transgender service members might be immediately discharged. Leaks from the White House since late July led to reports that transgender enlisted personnel would be allowed to serve out their enlistments but then be denied reenlistment while being encouraged to resign earlier, and that transgender officers could continue to serve their commissions but would be required to resign if being considered for promotions.

Based on the leaks, GLAD and NCLR, with cooperating attorneys from Foley Hoag LLP and Wilmer Cutler Pickering Hale & Dorr LLP, filed their August 9 lawsuit in the US District Court for the District of Columbia, representing five "Jane Doe" plaintiffs, all currently serving transgender individuals.

The plaintiffs, with varying lengths of service, present compelling stories about the harms the proposed policy would have on them, based on what was known when the complaint was filed. The harms included interference with ongoing gender transitions, the loss of career and benefits, and the potential that discharge could deny them of pensions for which they were close to being vested. There was also the emotional stress generated by uncertainty about their future employment and welfare.

The three-count complaint asserts violations of equal protection and due process under the Fifth Amendment and invokes the legal doctrine of “estoppel” to prevent adverse moves against transgender members of the military who had been encouraged to come out when the new policy was announced in June 2016.

The GLAD/ NCLR suit prompted some criticism that in filing the lawsuit before a formal policy was announced or implemented the complaint might be dismissed as premature. Given the release of the presidential memorandum, it's not surprising that the ACLU and Lambda and OutServe-SLDN have now stepped forward with their own suits, though even now, with implementation delayed until next year, the Justice Department might seek dismissal of at least some of the grounds for challenging the Trump policy based on their being premature.

The ACLU and the ACLU Foundation of Maryland filed in the US District Court in Maryland, assisted by cooperating attorneys from Covington & Burling LLP, while Lambda Legal and OutServe-SLDN filed in the US District Court in Seattle, assisted by cooperating attorneys from Kirkland & Ellis LLP and local counsel Derek A. Newman.

Both cases differ in some respects from the GLAD/ NCLR lawsuit filed earlier in August by. The Lambda case not only adds plaintiffs affected by the continuing policy against allowing transgender people to enlist — whose challenge is certainly not premature — it adds two institutional plaintiffs, the Human Rights Campaign and the Gender Justice League, which are suing on behalf of their transgender members who are either currently serving or wish to enlist. This complaint asserts equal protection and due process claims, and adds a free speech claim under the First Amendment, arguing that service members who told their commanders about their gender identity and continue to serve openly will be subject to dismissal for being open, and that the plaintiffs who seek to enlist had also spoken about their gender identity and so their free speech, too, was burdened by the policy without any rational justification.

The ACLU suit limits itself to equal protection and due process claims. Unlike the GLAD/ NCLR lawsuit, neither of the lawsuits filed on August 28 makes an estoppel claim based on transgender service members coming out in reliance on the 2016 announced change in policy.

Reaction to Trump's original statements on transgender service was strongly negative, with criticism coming even from reliably conservative Republicans including Utah Senator Orrin Hatch and Iowa Senator Joni Ernst, a 20-year military veteran. Where Ernst sided with the president was on the question of funding sex reassignment surgery. In fact, the greatest support for Trump's July tweets came from social conservatives among House Republicans who had earlier waged a losing battle to amend a pending Defense Department budget measure to specifically deny funding for such surgery.

Some press reports stated that the same Republicans had been threatening to block final passage of the Defense appropriation — which Trump hopes to lard with funding for his cherished border wall — unless the president offered assurances on the issue of funding sex reassignment procedures.

For Trump, the solution may have seemed obvious — simply removing transgender service from the equation altogether. The fact that reviving the ban offered another chance to overturn an Obama administration advance was simply gravy to the president. Reporting has suggested that the only collaboration with military officials regarding the July tweets was Trump's heads up to Mattis the evening before. One suspects that Trump's “expert” was likely Steve Bannon, a former Marine.

The August 25 memorandum, then, requires no immediate discharges and appears to give Mattis wide discretion and at least six months to come up with an implementation plan. Mattis promptly assured trans service members that any policy change would come only after further study. In Trump's typical “kick the can down the road” style, it leaves open the possibility that the Obama policies will be left in place, provided

Mattis chooses to make a persuasive case that nothing is gained and much is lost by blocking transgender service members from continuing their service and preventing transgender individuals from enlisting.

Mattis undertakes this responsibility against the backdrop of embarrassing news reports that the anticipated expense of covering sex reassignment surgery is dwarfed by the annual military expenditure on Viagra and similar drugs and that the replacement costs for thousands of fully-trained and productive military members would far outweigh the down-time costs for the relatively small number of individuals unavailable for duty at any given time due to sex reassignment surgery. There is no indication that other steps in gender transition, including hormone therapy, are disabling in a way that would interfere with military service.

As worded, the memorandum provides the possibility that with the passage of time, after the immediate political problem that may have inspired Trump to send his July tweets has gone away, sober heads will prevail and Mattis can convince the president to allow transgender individuals to serve after all. This interpretation, of course, depends on Mattis having the fortitude and political courage to tell the president — as he had on the use of torture in interrogations— that Trump's announced position did not make sense as a matter of military policy.