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# Trump Anti-Trans Regs Vulnerable to Challenge

Proposal flies in face of science, court rulings, but SCOTUS could change that

BY ARTHUR S. LEONARD

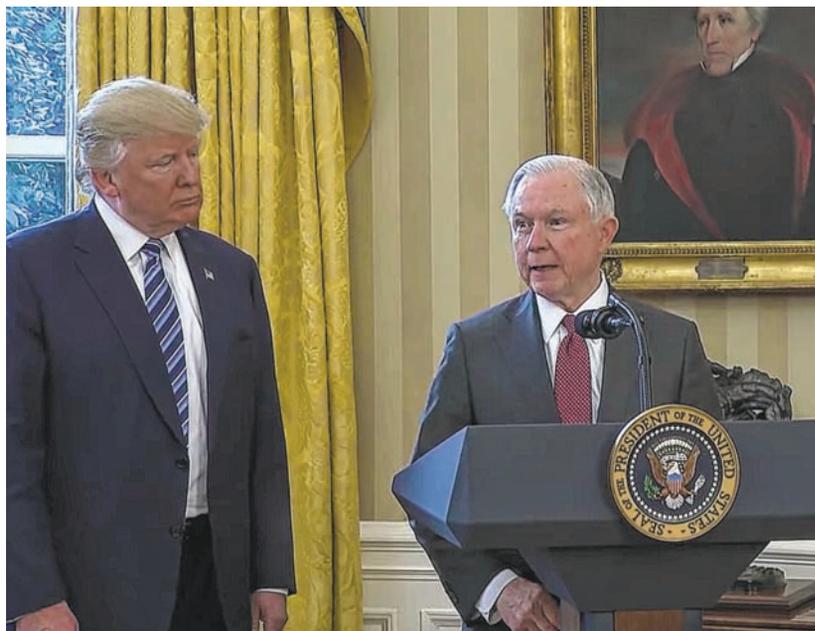
**T**he proposal by the US Department of Health and Human Services (HHS) floating within the Trump administration to adopt a regulatory definition of “sex” limited to genital and chromosomal sex, as reported by the New York Times on Sunday — startling as it was — is consistent with the position that Attorney General Jeff Sessions took in a memorandum he circulated within the Justice Department about a year ago.

In that memo, Sessions rejected the argument that laws prohibiting discrimination “because of sex” would extend to discrimination because of gender identity. Similarly, he rejected coverage for sexual orientation discrimination claims under laws banning sex discrimination.

HHS is seeking the Justice Department’s endorsement for its proposal, and hopes to persuade other departments and agencies to adopt the same definition.

The Times report described this in its headline as “defining transgender out of existence.” Even if a bit overblown, that characterization is roughly accurate for purposes of administrative application of existing federal statutes and regulations.

Any such proposal would have to go through an extended process required under the Administrative Procedure Act before it was published in the Code of Federal Regulations. It must first be published in the Federal Register and opened up to receive public comments. Public hearings could also be held. After the conclusion of this “publication and comment” period, the agency would study the public’s input and then publish a final regulation in the Code of Federal Regulations, accompanied by an explanation of what it means and is intended to accomplish, summarizing the comments received and the agency’s response. It would not become “law” until its final publication in the Federal Register and



Attorney General Jeff Sessions, seen here with President Donald Trump in 2017, voiced views roughly a year ago consistent with the proposal on transgender rights currently being circulated by the Department of Health and Human Services.

the Code of Federal Regulations.

Even then, final publication is never the end of the story for a matter as controversial as this. Individuals and organizations affected by a new regulation may immediately challenge it in federal court. Claims could be made that it violates constitutional rights or, on a more mundane level, that it is “arbitrary or capricious” and so invalid and not enforceable. Challengers could also argue that it is not authorized by the underlying law it is intended to interpret and is inconsistent with that law’s policy and purpose.

HHS’s proposed regulation, adversely affecting the rights of transgender people under numerous federal laws, would be subject to serious challenge as being “arbitrary and capricious” because it declares as a “fact” something that is contrary to widely held professional opinion in relevant scientific and medical fields. The regulation is also inconsistent with the way numerous courts have interpreted federal laws and rules prohibiting discrimination based on sex.

The notion that sex can be reduced to a simple matter of chromosomes or genitalia — and that everybody can be easily and per-

manently classified as male or female based on a birth certificate notation reflecting a doctor’s visible observation of a newborn’s genitals — has been widely rejected in recent decades in numerous peer-reviewed scientific journals and treatises and, as significantly, by numerous federal courts.

**The contention by its HHS authors that their proposed definition is “scientific” is laughable. It is a definition inspired by politics and religious ideology.**

The contention by its HHS authors that their proposed definition is “scientific” is laughable. It is a definition inspired by politics

and religious ideology, and is of a piece with the spurious “factual findings” of the Mattis Memorandum on transgender military service submitted to the president in February. Several federal courts have already rejected that memo as probably violating the constitutional rights of transgender people.

A similar definition adopted as part of a Mississippi statute — which purports to protect those who hold the view that sex is a simple and unchanging matter of chromosomes and genitalia from any adverse treatment under state law — was viewed as probably unconstitutional by a federal judge, partly on the ground of violating the Constitution’s prohibition on an “establishment of religion” as well as its requirement for “equal protection of the laws.” The Mississippi law was preliminarily enjoined from going into effect, although the Fifth Circuit Court of Appeals later held that the plaintiffs in that case lacked formal standing for their lawsuit, vacating the injunction. But a new version of the lawsuit continues.

Perhaps more relevantly, on September 19, a federal judge in Denver ordered the State Department to issue a gender-neutral passport to Dana Zzyym, an individual identified as female on their birth certificate, but who does not now identify as either male or female and who sought a passport with an “X” rather than an “M” or an “F.” The court found the State Department’s insistence that everybody identify as M or F “arbitrary and capricious” in violation of the Administrative Procedure Act and beyond its authority under the passport statute. An “X” passport for Zzyym was ordered. The court did not find it necessary to take up any constitutional issues, having resolved the case on statutory grounds.

Regulatory definitions adopted by government agencies must be based on documented facts, not

► VULNERABLE, continued on p.7

religious or ideological beliefs. And those agencies do not have authority to amend statutes or overrule court interpretations of statute in their administrative rule-making.

In fact, this HHS proposal is late to the game, with numerous federal courts, including many courts of appeals, already having ruled, for example, that the ban on sex discrimination in insurance coverage under the Affordable Care Act — the department's immediate concern here — extends to gender identity claims. Federal trial courts have ruled in recent weeks that Wisconsin must cover gender transition medical costs for trans state employees based on the ACA, Title VII of the Civil Rights Act of 1964, and the Equal Protection Clause of the 14th Amendment. Similarly, a Minnesota employer's self-funded health plan was ordered to cover gender transition costs to comply with the ACA. Earlier, a federal court found the Iowa Medicaid program's refusal to cover gender-affirming surgery for trans Medicaid partic-



Aimee Stephens, who prevailed at the Sixth Circuit Court of Appeals on her claim that her firing by a funeral home because of her transgender status was unlawful sex discrimination.

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ipants unlawful. And, years ago, the US Tax Court ruled that gender-affirming surgery counts as medically-necessary treatment for purposes of the medical expense tax deduction, overruling decades

of adverse precedent.

There is also a mountain of federal court decisions recognizing the existence of transgender people in the context of prison conditions, employment discrimina-

tion, housing discrimination, and equal credit and educational opportunities. Federal statutes even refer explicitly to gender identity in the context of violence against women and victimization in hate crimes.

Recognition of the concepts of gender identity and transgender individuals are now deeply woven into the texture of federal law, although a religious litigation group has petitioned the Supreme Court to review a gender identity discrimination case in the hopes of persuading the court to roll back the protection for transgender people under Title VII of the Civil Rights Act. The high court is expected to announce soon whether it will hear an appeal by the Harris Funeral Homes in Michigan of a Sixth Circuit Court of Appeals ruling that their firing of a transgender employee, Aimee Stephens, was illegal sex discrimination. Unfortunately, if the court were to rule for the employer, that would deliver the result HHS is seeking: the exclusion of transgender people from the protections of federal law and policy.

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