2018

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BY ARTHUR S. LEONARD

The administration will now argue that Donald Trump’s transgender ban is informed by Pentagon chief James Mattis’ “expert military judgment,” but was the DOD report hijacked by Vice President Mike Pence and outside right-wing groups? | DEFENSE.GOV

In a move intended to evade existing preliminary injunctions while reaffirming in its essential elements President Donald Trump’s Twitter announcement from last July categorically prohibiting military service by transgender individuals, the administration issued three new documents on March 23, the date the president had designated in an August 2017 memorandum as his new policy’s effective date.

A new presidential memorandum “revoked” a memo issued by Trump last August on the issue and authorized the Defense and Homeland Security secretaries to “implement any appropriate policies concerning military service by transgender individuals.”

At the same time, Department of Justice (DOJ) attorneys filed with the federal court in Seattle copies of Defense Secretary James Mattis’ memorandum to the president and a Department of Defense working group’s “Report and Recommendations” that had been submitted to the White House on February 23, in which Mattis recommended a version of Trump’s transgender ban that would effectively preclude military service for many, perhaps most, transgender applicants and some of those already serving, although the number affected was not immediately clear.

Will courts drop injunctions in deference to Pentagon report Pence may have steered?

Mattis’ recommendation drew a distinction between transgender status and the “medical condition” of gender dysphoria, as defined in the psychiatric diagnostic manual and generally seen as authoritative in litigation. Mattis

is willing to let transgender people enlist unless they have been diagnosed with gender dysphoria, which the report characterizes, based heavily on subjective assertions rather than any evidence, as a condition presenting undue risks in a military environment. Transgender people can enlist if they do not desire to transition and are willing to conform to all military requirements consistent with their *biological* sex as designated at birth.

Similarly, transgender people currently serving who have not been diagnosed with gender dysphoria can remain in the military on the same basis: that they comply with all requirements for service members of their biological sex.

However, people with a gender dysphoria diagnosis are largely excluded from either enlisting or staying in the military, with some individual exceptions, although those currently serving who were diagnosed after the Obama administration lifted the transgender ban on June 30, 2016, are "exempted" from these exclusions and may serve while transitioning and afterward consistent with their *gender identity*. (This exemption is justified in the report by the military's investment in their training and is conditioned on their meeting all military performance requirement for those who share their gender identity.)

Under the recommended policy, Defense Department transition-related health coverage will continue to be available for this "grandfathered" group under the Obama policy, but for no others.

The March 23 document release took place just days before Lambda Legal and DOJ attorneys' scheduled appearance on March 27 in US District Judge Marsha Pechman's Seattle federal courtroom to present arguments on Lambda's motion for summary judgment in Karnoski v. Trump, one of the four pending legal challenges to Trump's policy. Lambda's motion, filed in January, was aimed at Trump's July tweet and August memorandum, though the legal advocacy group anticipated the administration would produce some sort of documents to fill the fatal gap identified by four federal district judges, including Pechman, when they issued preliminary injunctions in late 2017: that Trump's unilateral actions last summer were not based on any sort of "expert military judgment," but rather on his short-term political need to win sufficient Republican votes in the House to pass a then-pending Defense Department spending measure. Some conservatives at that time were unhappy that a ban on military funding of gender reassignment surgery was not part of the measure, and Trump apparently decided to eliminate the entire controversy by simply reversing the Obama policy of opening up service to transgender individuals.

Based on the obvious conclusion that Trump's policy was not based on "expert military judgment," the judges refused to accord it the usual deference that federal courts give to military regulations when they are challenged.

Indeed, the only in-depth military study on the subject was the one carried out over a period of years by the Obama administration before it lifted the transgender service ban formally on June 30, 2016, with new enlistees free to join the military one year later. (On the eve of that opening up of enlistment last June, Mattis extended the deadline an additional six months to January 1, 2018.)

With no factual backup, Trump's across-the-board ban was highly vulnerable to constitutional challenge in light of recent federal court rulings that gender identity discrimination is a form of sex discrimination. Courts treat policies that discriminate based on sex as presumptively unconstitutional, putting the burden on the government to show, with "exceedingly persuasive" proof, that they substantially advance an important government interest.

The "Report and Recommendations" that have now been filed in Judge Pechman's court were clearly devised in an attempt to fill that evidentiary gap, despite the claim that the group Mattis assembled to study the issues and formulate recommendations for him and the president were tasked with an objective policy review.

The White House document dump ignited a host of questions. There was no clarity about when the "new" policies recommended by Mattis would go into effect — their implementation requiring rewriting and adoption in the form of regulations — and there were many questions about how transgender people currently serving would be affected. Spokespeople for the Defense Department said the Pentagon would abide by federal law, which currently consists of the preliminary injunctions against the policies Trump announced last summer.

Since the preliminary injunctions were all aimed at last summer's tweets and the president's subsequent August memorandum, were they rendered moot by Trump revoking those policy announcements? Or would the courts see the proposed new policy as essentially a continuation of what Trump had initiated, and thus covered by the preliminary injunctions?

The district judges had all denied requests by the government to stay their injunctions, and two courts of appeals had refused to stay those issued by the judges in Baltimore and Washington, DC, leading DOJ to not bother pursuing stays of the injunctions issued by judges in Seattle and Riverside, California. Complying with the four injunctions, the Pentagon allowed transgender people to begin applying to enlist in January, and announced that at least one transgender applicant had completed the enlistment process by February.

Arguably, the preliminary injunctions — giving them a broad reading consistent with their analysis of the underlying issues — would apply to any policy that excludes transgender people from military service pending final resolution of these cases, perhaps at the Supreme Court.

In a signal of what was coming on March 23, DOJ attorneys stoutly combated the plaintiffs' demand in the Seattle case for disclosure of the identity of the "generals" and other "military experts" Trump, in his July tweets, claimed he consulted with before announcing his categorical ban. The government's attorneys argued they would not be defending the policy the president announced last summer but rather whatever new policy Trump decided to adopt based on Mattis' "expert military judgment" and the documentation provided to support that.

In a series of confrontations over the plaintiffs' demand for discovery, Judge Pechman produced two written opinions ordering DOJ to come up with the requested information and DOJ attorneys offered a questionable claim of executive privilege protecting the identity of those consulted by Trump. This issue awaited resolution at the March 27 hearing in Seattle as the White House released its new policy documents last week.

The administration's strategic moves on March 23 appeared intended to change the field of battle in the pending lawsuits. When they were originally filed, the lawsuits had a big fat target in Trump's unilateral, unsupported actions. By revoking his August memorandum and "any other directive I may have made" (that is, the tweets from July), Trump sought to remove that target and replace it with a new, possibly more defensible one: a policy recommended and eventually adopted as "appropriate" by Mattis based on his "expert military judgment." Clearly, the administration is counting on the judicial deference typically accorded the military to avoid having to defend the newly-announced policy on its constitutional merits.

The big lingering question is whether the courts will let them get away with this. The policy itself suffers from many of the same constitutional flaws as the one it replaces, but the "Report and Recommendations" — cobbled together in heavy reliance on the work of dedicated opponents to transgender military service — has at least the veneer and trappings of a serious policy review. The plaintiffs in the existing lawsuit will now need to discredit it in the eyes of the courts, painting it as the litigation advocacy document that it obviously is.

Mark Joseph Stern, in a detailed dissection published online in Slate shortly after the document release, reported that administration sources told him that the process of producing the report had been taken over by Vice President Mike Pence and Heritage Foundation and Family Research Council personnel who have written numerous articles opposing transgender rights. According to Stern's reporting, Mattis was opposed to reinstating the transgender ban, but was overruled by the White House and is reacting as a soldier to the dictates of his commander in chief, unwilling to spend political capital on this issue. Tellingly, the "Report and Recommendations" itself does not provide the names of those responsible for its composition, setting up a new discovery confrontation between the plaintiffs and DOJ.

Some are predicting that the new policy will never go into effect. If the courts refuse to be bamboozled by the façade of reasoned policy-making now presented by the administration, those predictions may be correct.

Updated 2:20 pm, September 4, 2018