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Federal Courts Trumping POTUS's Military Transgender Ban

By Christopher J. Chimeri

In July of this year, President Trump tweeted that the Federal Government "will not accept or allow" transgender individuals to serve "in any capacity" in the U.S. Military. A year earlier, former President Obama established a policy that allowed transgender people to serve openly in our military.

President Trump's August 25, 2017 Memorandum (the "ban") contains three directives. First, all transgender service members are to be discharged starting no later than March 23, 2018. Second, the existing ban on accession of transgender members, which was scheduled to end on January 1, 2018, is to extend indefinitely. Third, after March 23, 2018, the Defense Department is required to cease providing sex reassignment surgery for transgender personnel, with a possible individual exception in cases where failure to complete procedures already underway could endanger the health of the individual.

Since then, four separate lawsuits were filed on behalf of plaintiffs challenging the policy. In all four cases, as of December of 2017, the various district courts have granted injunctive relief. Specifically, the ACLU first filed suit in the U.S. District Court in Maryland on August 8, 2017, which resulted in a preliminary injunction against all directives contained in the ban in *Stone v. Trump*, 2017 U.S. Dist. LEXIS 192183, 2017 WL 5589122 (D. Md.). Then, on August 9, 2017, another suit was filed in the D.C. District Court. That suit resulted in Judge Colleen Kollar-Kotelly issuing a preliminary injunction against two directives in Trump's three-directive memo. (See *Doe v. Trump*, 2017 U.S. Dist. LEXIS 178892, 2017 WL 4873042 (D.D.C. Oct. 30, 2017). The D.C. Circuit Court of Appeals has denied the Administration's appeal from Judge Kollar-Kotelly's order as of December 21, 2017. Likewise, on December 11, 2017 in the U.S. District Court in Seattle, Washington, in the matter of *Karnoski v. Trump*, the court found "that the policy prohibiting openly transgender individuals from serving in the military is likely unconstitutional." Finally, the U.S. District Court in Los Angeles, California granted injunctive relief against the ban on December 22, 2017 in *Doe v. Trump*.


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At the heart of the analysis in each of these cases is whether heightened judicial scrutiny applies to the plaintiffs' equal protection claim and whether the usual judicial deference to military policy decisions by the Executive branch are appropriate in this case. One of the District Court judges cited an amicus brief filed by retired military officers and former national security officials, and wrote that "this is not a case where deference is warranted, in light of the absence of any considered military policymaking process, and the sharp departure from decades of precedent on the approach of the U.S. military to major personnel policy changes." Another concluded that heightened judicial scrutiny was not required to rule in plaintiffs' favor on the motion for injunctive relief.

Also of note, the Maryland Court found that "President Trump's tweets did not emerge from a policy review, nor did the Presidential Memorandum identify any policymaking process or evidence demonstrating that the revocation of transgender rights was necessary for any legitimate national interest. Based on the circumstances surrounding the president's announcement and the departure from normal procedure, the court agrees with the D.C. court that there is sufficient support for plaintiffs' claims that 'the decision to exclude transgender individuals was not driven by genuine concerns regarding military efficacy.'" Judge Garbis of the Maryland District Court followed Judge Kollar-Kotelly's (of the D.C. District Court) example by including a 'cut and paste' version of the original Trump tweet sequence in the background section of his opinion, and specifically identified policy announcement via Twitter as a departure from normal procedure that is to be factored into this constitutional analysis.

The preliminary injunctions have largely been based on findings that plaintiffs are likely to prevail in their equal protection argument. However, there is also a due process argument at play, and the Maryland Circuit Judge (Garbis) found that "it is egregiously offensive to actively encourage transgender service members to reveal their status and serve openly, only to use the revelation to destroy those service members' careers." Judge Garbis also wrote, of due process: "An unexpected announcement by the President and Commander in Chief of the United States via Twitter that 'the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military' can be considered shocking under the circumstances. According to news reports provided by Plaintiffs, the Secretary of Defense and other military officials were surprised by the announcement. The announcement also drew swift criticism from retired generals and admirals, senators, and more than 100 Members of Congress. A capricious, arbitrary, and unqualified tweet of new policy does not trump the methodical and systematic review by military stakeholders qualified to understand the ramifications of policy changes."

Among the defenses, the government argued that there has been no "harm" yet, and thus, plaintiffs lack standing to bring suit. The courts uniformly rejected the government's argument in this regard, as well as rejected that the matter is not yet ripe for judicial resolution. In doing so, the courts reason that the adoption of a policy that violates equal protection is deemed a harm even before it is implemented, and the stigmatic harm of the government officially deeming all transgender people as unfit to serve the country is immediate. This type of holding may, if the matter works its way through the Circuit Courts and to SCOTUS, have important precedential value in years to come.

Note: Christopher J. Chimeri is partner with the Hauppauge law firm Quatela Chimeri PLLC and heavily focuses on complex trial and appellate work in the matrimonial and family arena. He sits on the Board of Directors of the Suffolk County Matrimonial Bar Association and is a co-founder and co-chair of the Suffolk County Bar Association's LGBT Law Committee. From 2014-2017, he has been peer-selected as a Thomson Reuters Super Lawyers® "Rising Star," and was recently featured in Forbes Magazine, Long Island Business News, and New York Magazine as a "Leader in Law."