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IMPLICATIONS OF A SUPREME COURT REVIEW OF TRANSGENDER MILITARY POLICY

Summary

Justice Brett Kavanaugh's confirmation creates the possibility that the Supreme Court could allow the Trump administration to reinstate a ban on transgender military service. Four court-ordered preliminary injunctions currently prevent the Trump administration from implementing its transgender ban, but the government will argue that one of those injunctions should be dissolved, before the case goes to trial, at an October 10, 2018 hearing in the Ninth Circuit Court of Appeals.¹

If the Ninth Circuit denies the government's motion to dissolve the preliminary injunction, the administration may ask the Supreme Court to intervene. A Supreme Court reversal could lead to nullification of all four preliminary injunctions, allowing the transgender ban to go into effect.

If the injunctions that now protect the ability of transgender personnel to serve in the military were dissolved, the consequences would affect overall readiness and cohesion, set a precedent for the treatment of other minority groups, and directly harm thousands of Americans who volunteered to serve their country:

1. Contrary to the government's position, Trump's ban will be a ban on transgender people, not an even-handed regulation of medical fitness.
2. Dissolving the preliminary injunctions will revive a policy even more onerous than "don't ask, don't tell" for most transgender troops, effectively forcing them to give up their transgender identity as a condition of service.
3. Transgender personnel will be the only military personnel denied their statutory entitlement to proper medical care as determined by military doctors.
4. The small minority of transgender personnel officially grandfathered under the Trump ban will be made to serve on unequal terms with others, marked and stigmatized as categorically unfit.
5. Reinstating the ban will establish precedent for discriminating against women in the military.
6. Whipsaws in military personnel policy are damaging to military readiness.

IMPLICATIONS OF A SUPREME COURT REVIEW OF TRANSGENDER MILITARY POLICY

Memo

1. Contrary to the government’s position, Trump’s ban will be a ban on transgender people, not an even-handed regulation of medical fitness.

The government has argued in litigation that the Trump policy is not a ban because it allows transgender persons to serve in the military provided they 1) have not transitioned gender prior to enlistment, 2) are able to serve in birth sex for the duration of service, and 3) will not require any transition-related medical care. Courts have correctly recognized that a ban based on characteristics of people who are transgender is the same thing as a ban on transgender people. The D.C. district court in *Doe v. Trump* concluded:

“Under the Mattis Implementation Plan, those transgender persons who are not summarily banned are only allowed in the military if they serve *in their biological sex*. But by definition—at least the definition relevant to Plaintiffs’ claims in this lawsuit—transgender persons *do not identify or live in accord with their biological sex*. Accordingly, the Mattis Implementation Plan effectively translates into a ban on transgender persons in the military. Tolerating a person with a certain characteristic only on the condition that they renounce that characteristic is the same as not tolerating them at all.”²

2. Dissolving the preliminary injunctions will revive a policy even more onerous than “don’t ask, don’t tell” for most transgender troops, effectively forcing them to give up their transgender identity as a condition of service.

The terms of the ban, which would take effect if the preliminary injunctions were lifted, will impose a policy even more harmful and discriminatory than “don’t ask, don’t tell” for 90% of transgender troops. They will be forced to leave the military or to renounce their transgender identity, since discovery of any need to transition gender could mark them as unfit and target them for separation. Using DoD’s own data as of February 2018, only 937 service members have come out as transgender in order to transition, out of 8,980 active-duty transgender personnel.³ Under the Trump ban, therefore, only 10% of transgender personnel will receive grandfathered protection. The other 90% will be eligible to remain in service only under the condition that they agree to serve in birth sex indefinitely and are able to maintain fitness under general standards *without medical support* for gender transition. If they require medical care related to gender transition, they will be fired.

3. Transgender personnel will be the only military personnel denied their statutory entitlement to proper medical care as determined by military doctors.

Congress authorizes full medical care for transgender service members, just as it does for every person who serves in uniform. Under 10 U.S.C. § 1074(a)(1), every service member “is entitled to medical and dental care in any facility of any uniformed service.” Under 10 U.S.C. § 1071, Congress’s stated purpose is to “create and maintain high morale in the uniformed services by

providing an improved and uniform program of medical and dental care for members.” Congress has spoken on whether members of the military have earned full medical care. The Trump ban disregards that entitlement and mandates, without authority, that 90% of transgender personnel no longer receive care that military doctors would prescribe.

Denial of medical care means that most transgender personnel would serve under conditions akin to forced conversion therapy. Conversion therapy is “the practice of trying to change someone’s sexual orientation or gender identity. It has been discredited by the medical establishment and denounced by gay and transgender groups.”⁴ While the Trump ban does not literally mandate that transgender service members undergo conversion therapy, the policy itself accomplishes the same purpose by requiring transgender troops to live in their birth sex for as long as they serve. This means that transgender persons must effectively renounce their transgender identity and dress, live, and interact with others in a gender with which they do not identify.

4. The small minority of transgender personnel officially grandfathered under the Trump ban will be made to serve on unequal terms with others, marked and stigmatized as categorically unfit.

The government has contended in litigation that transgender personnel who are officially grandfathered under the ban will not be harmed by the ban. Yet the D.C. district court in *Doe v. Trump* disagreed:

“Defendants are wrong. The Mattis Implementation Plan clearly harms all current service members with gender dysphoria—even those who are allowed to remain in the military as a result of a narrow grandfather provision. It singles them out from all other service members and marks them as categorically unfit for military service. It sends the message to their fellow service members and superiors that they cannot function in their respective positions. That they are mentally unstable. That their presence in the military is incompatible with military readiness, unit cohesion, good order, and discipline. In sum, it is an express statement that these individuals’ very presence makes the military weaker and less combat-ready.”⁵

5. Reinstating the ban will establish precedent for discriminating against women in the military.

If the Court allows the administration to reinstate the military’s transgender ban, this ruling may dovetail with recent comments from the Secretary of Defense. In a speech at the Virginia Military Institute—to both male and female cadets who can now pursue all military positions if qualified, regardless of sex—Secretary Mattis said that “the jury is out” on women in combat service, and that the issue was “being looked at right now” by leaders of the Army and Marine Corps.⁶

The connection between equality for women and for LGBT persons is relevant to legal challenges to the transgender military ban because DoD’s justification for the ban relies in part on an asserted military necessity to preserve certain gendered expectations and customs for men and women, which DoD has argued could be jeopardized by the presence of transgender troops. It is only a short distance from arguing that transgender people violate gender norms in a military context to arguing that the presence of women can violate them as well. It is possible that language from the February 2018 DoD report implementing the transgender ban (a report that

was rebutted by retired military Surgeons General⁷) could be repurposed word-for-word as justification for rolling back policies that permit all qualified persons to serve in combat positions. As that report states:

“These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.”⁸

Thus, if the Supreme Court allows the armed forces to ban transgender troops, it could set a precedent that would sustain subsequent efforts to re-establish gender barriers that limit the service of women in the military.

6. Whipsaws in military personnel policy are damaging to military readiness.

Admiral John Hutson, a retired Judge Advocate General of the Navy (the Navy’s most senior lawyer) published an essay in the Stars and Stripes military newspaper earlier this year warning of the risks to military readiness caused by whipsaws in personnel policy.⁹ Whatever one believes about the policy justifications for or against allowing transgender Americans to meet the same military standards applied to all members—Admiral Hutson supports an open-service policy—he wrote that “there is no question that careening personnel policy from one pole to the other is bad for the armed forces.”

Policy whipsaws, in Admiral Hutson’s view, undermine both unit cohesion and military discipline. They undermine unit cohesion because they damage trust horizontally, between service members, and vertically, between service members and their commanders: “Policy flip-flops send confusing signals to all troops about who deserves to wear the uniform.” Policy flip-flops also undermine military discipline because they send mixed messages: “Institutions that depend on maintaining good order and discipline must be disciplined themselves, as inconsistency is the enemy of readiness.” A Supreme Court ruling that lifted the preliminary injunctions and disrupted the status quo they have carefully kept in place would only serve to further fray that trust and amplify that inconsistency, reducing readiness in a misdirected effort to sustain it.

¹ *Karnoski v. Trump*, U.S. Court of Appeals for the Ninth Circuit, Calendar for the Pioneer Courthouse, Portland, Oregon, October 9-12, 2018, at <https://www.ca9.uscourts.gov/calendar/view.php?hearing=October%20-%20The%20Pioneer%20Courthouse,%20Portland%20Oregon&dates=9-12&year=2018>. Briefs compiled here: https://www.ca9.uscourts.gov/content/view.php?pk_id=0000000945.

² *Doe v. Trump* Memorandum Opinion, D.C. District Court, August 6, 2018, 28, at <https://notransmilitaryban.org/wp-content/uploads/2018/08/doe-v-trump-08-06-18-opinion-denying-motion-to-dismiss-dissolve-pi.pdf>.

³ DoD Report and Recommendations on Military Service by Transgender Persons, February 2018, 7 fn. 10. Based on 8,980 transgender members in the active force, the Palm Center has estimated there are 14,700 transgender members across the active and reserve forces combined. Palm Center, *Breaking Down the March 23, 2018 Transgender Military Ban*, March 27, 2018, at <https://www.palmcenter.org/publication/breaking-down-the-march-23-2018-transgender-military-ban/breaking-down-the-trump-ban/>.

⁴ Mike Pence and ‘Conversion Therapy’: A History, *New York Times*, November 30, 2016, at <https://www.nytimes.com/2016/11/30/us/politics/mike-pence-and-conversion-therapy-a-history.html>.

⁵ *Doe v. Trump* Memorandum Opinion, D.C. District Court, August 6, 2018, 13-14 (citations omitted), at <https://notransmilitaryban.org/wp-content/uploads/2018/08/doe-v-trump-08-06-18-opinion-denying-motion-to-dismiss-dissolve-pi.pdf>.

⁶ Remarks by Secretary Mattis at the Virginia Military Institute, September 25, 2018, at <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/1645050/remarks-by-secretary-mattis-at-the-virginia-military-institute-lexington-virgin/>.

⁷ Vice Admiral Donald C. Arthur, U.S. Navy (Ret.) et al., *DoD’s Rationale for Reinstating the Transgender Ban Is Contradicted by Evidence*, May 4, 2018, at <https://www.palmcenter.org/publication/dods-rationale-for-reinstating-the-transgender-ban-is-contradicted-by-evidence/>.

⁸ DoD Report and Recommendations on Military Service by Transgender Persons, February 2018, 28, at <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

⁹ John D. Hutson, *An Unwarranted Attack on Transgender Service*, *Stars and Stripes*, February 6, 2018, at <https://www.stripes.com/opinion/an-unwarranted-attack-on-transgender-service-1.510324>.