Center for Military Readiness
– Policy Analysis –
August 2018

# LGBT Lawyers Suing to Revoke Trump Military Transgender Policies

## Seattle Subpoena SLAPPs CMR

***Litigation Update #3:***

For years, political ideologues have misused the courts to impose their agenda and sometimes to inflict harm on their opponents. One tactic is known as the **SLAPP** suit (strategic litigation against public participation). This form of "lawfare" involves bogus lawsuits forcing individuals or groups to waste excessive time and money on legal defense.

Now we are seeing a new SLAPP tactic, which uses intrusive subpoenas to impose legal costs and time-consuming "discovery" burdens on organizations or individuals who are "non-parties" in litigation against someone else.

Since February, this has been happening to the **Center for Military Readiness. CMR** has been targeted as a "non-party" in a **Seattle**-based lawsuit against **President Donald J. Trump** titled ***Karnoski v. Trump***. [1] Plaintiffs in the litigation – individual transgenders, several LGBT groups, and the entire state of **Washington –** are demanding permanent court-ordered reversal of President Trump's policies regarding transgenders in the military.

In connection with this case, LGBT Plaintiffs' attorneys slapped CMR with a grossly unreasonable subpoena on May 2, which was followed by a "Motion to Compel" compliance. In response, CMR filed a Motion with the **U.S. District Court for the Eastern District of Michigan,** asking the court for a **Protective Order** against the high-handed subpoena,

To accomplish their goal – nullification of President Trump's transgender policy – Plaintiffs are trying to prove a ridiculous conspiracy theory. They contend that CMR and several other groups with alleged "animus" toward transgenders directly influenced President Trump's state of mind before he announced changes in Obama-era military transgender policies.

Plaintiffs further speculate that Trump announced policy changes for reasons of "animus," not concerns about military readiness. Therefore, they argue, federal courts should revoke Trump's policies without the "deference" that usually applies to presidential decisions affecting national security.

Starting last Fall, four federal district courts did just that. [2] Since then, various cases have been winding their way through the courts.

***Seattle Subpoena SLAPPs CMR***

The Seattle subpoena served on CMR is especially wide-ranging and intrusive. It demands access to CMR documents and emails with **White House** and **Pentagon** officials related to the transgender issue from **June 29, 2015** – the day when businessman Donald Trump announced his presidential candidacy – until "the present."

CMR's attorney, Law Prof. Emeritus **William A. Woodruff**, stated numerous objections to the subpoena in a May 3 letter. [3] On July 3, the *Karnoski* plaintiffs' attorneys filed in the Michigan federal court a Motion to Compel CMR to produce the subpoenaed documents.

Fourteen days later, **Kate Oliveri** of the Ann Arbor-based **Thomas More Law Center (TMLC)** filed a petition with the same court, asking for a Protective Order against the plaintiffs' subpoena and their Motion to Compel. [4]

The news release announcing the TMLC Motion for a Protective Order for CMR described the Plaintiffs' subpoena demands as "staggering," and noted that the intrusive subpoena seeks information that is *irrelevant* to the underlying case against President Trump:

> **"Plaintiffs have failed to set out any coherent chain of supportable logical inferences** that could lead from CMR's communications to the President's state of mind in July 2017 and in August 2017 when he issued his Memorandum to the Secretary of Defense." (emphasis added throughout)

In a second document filed with the Michigan federal court on July 31, CMR's legal team reinforced the point by quoting the Plaintiffs' own filing in the *Karnoski* case, which admitted that there was no need to invade the privacy rights of CMR and other non-parties to the case:

> "On July 27, 2018, the trial judge in *Karnoski* granted the Plaintiffs' Motion to Compel discovery from Defendants [Trump *et al.*] and ordered the government to produce the actual materials relied upon by the Defendants in formulating the policy – information Plaintiffs claim is critical to their case. (Exhibit 1)
>
> **"No longer can Plaintiffs claim they need to search CMR's communications so that they can speculate as to what the President might have considered in issuing his tweets and memorandum. The court's order obviates any need to seek discovery from non-party CMR.**
>
> **"Despite some 35 pages of legal argument, Plaintiffs have yet to articulate a viable theory of relevance to support the discovery they seek."** (p. 1) [5]

The July 31 TMLC Motion filed on behalf of CMR also noted that **Judge Marsha Pechman**, the trial judge in *Karnoski*, stated this in her July 27 Order compelling the government to produce discovery documents:

> **"Defendants** [Trump *et. al*.] **possess all of the evidence concerning their deliberations over the** [military transgender] **Ban, and there is no suggestion that this evidence can be obtained from other sources."** (p. 2)

Referring to that significant finding, CMR's Motion hammered home the point:

> "The court's finding that 'there is no suggestion that this evidence can be obtained from other sources' **eliminates any colorable claim that CMR possesses relevant information, much less information that is 'actually needed' to prove Plaintiffs' claims."** (p. 3)

***The President's State of Mind***

In congressional testimony last May, Secretary of Defense **James Mattis** said in response to a question that members of the military had expressed concern about the transgender policy weeks before President Trump's July 2017 tweets. Mattis also reported news: Then-Defense Secretary **Ashton Carter** did not ask military leaders for advice before he changed policy in June 2016.

For more than six months, a "panel of experts" appointed by Secretary Mattis conducted an extensive study of the costs and consequences of retaining and recruiting persons who identify as transgender or have been diagnosed with gender dysphoria – a psychological condition involving confusion about gender identity.

The resulting 44-page ***DoD Report and Recommendations on Service by Transgender Persons***, completed in February 2018, set forth detailed information and new data shedding light on the high costs and consequences of retaining Obama-era policies. [6]

The Mattis/DoD report stressed the need for mission readiness and combat lethality, not "equal opportunity" or political correctness, but Secretary Mattis' recommendations differed from President Trump's August 2017 Memorandum in several respects.

In summary, the nuanced policy that Mattis recommended: a) **Disqualifies** persons with gender dysphoria from military service; b) **Allows** persons identifying as "transgender" but without **gender dysphoria**, to serve in their **biological gender**, if they have been "stable" for **36 months** and meet requirements for deployability; and c) **Retains "grandfathered" personnel** identifying as transgender and receiving treatment under previous administration policies.

On March 23, President Trump approved Secretary Mattis' recommendations, and revoked his own August 2017 memo calling for a full review and revision of transgender policies. An analysis of the 2018 Trump/Mattis policy is available in the 34-page CMR Special Report presented here:

- Trump Transgender Policy Promotes Military Readiness, Not Political Correctness

Ignoring all facts that don't fit their narrative, Plaintiffs in the various lawsuits insist that President Trump did not rely on military advice when he announced a change in policy. They argue that Trump was motivated by "animus," so the new transgender policy does not deserve judicial "deference." Historically, federal courts have shown deference to the elected branches of government when considering matters of national security. [7]

Due to four district court orders starting in 2017, the 2018 Trump/Mattis policy has not gone into effect. This is happening even though **Articles I** and **II** of the **U.S. Constitution** assign power to make military policies to the **Congress** and the **Executive Branch**, not the **Judiciary**, which operates under **Article III**.

***Supreme Judicial Commanders of the Military***

In subsequent "Motions to Dissolve" Preliminary Injunctions blocking implementation of Trump's transgender policies, the Department of Justice has submitted the Trump/Mattis policy and facts backing it up to the various district courts. In July, CMR summarized and analyzed arguments presented in the **Washington, D.C.** ***Jane Doe v. Trump*** case, being heard by **Judge Colleen Kollar-Kotelly**, in this CMR Policy Analysis:

- Presidential Authority vs. Activist Judges –Which Side Will Prevail?

The Department of Justice made strong arguments, stressing the military readiness and medical consequences of accommodating persons who suffer from gender dysphoria.

Nevertheless, trial Judges Kollar-Kotelly and Pechman, who decided the Washington, D.C. *Doe* and Seattle *Karnoski* cases, respectively, effectively threw out the new Trump policy and the fact-based Mattis/DoD report that supports it. Neither judge recognized significant differences between the new policy and intentions that President Trump announced with informal tweets in July and a formal Memorandum in August 2017.

Both judges applied unprecedented higher standards of review and treated the transgender persons' claims as matters of civil rights. Previous court rulings on issues such as this have only required that the government show a "rational basis" for policies in dispute. [8]

No one can predict the outcome of future court rulings, but a review of the government's arguments clearly show that the Justice Department is vigorously defending sound policy and prerogatives in the federal courts. Ultimately, the **U.S. Supreme Court** will decide.

***No Need for Information from Outside "Non-Parties"***

Plaintiffs are pressing for the opportunity to rummage through CMR's "communications" with the **White House** and **Pentagon** over the past *three years*, in the hope that they might find something that proves a baseless conspiracy theory going something like this:

a) The Center for Military Readiness harbors "animus" toward transgenders, and CMR President Elaine Donnelly communicated that animus to White House and Pentagon officials in the Trump Administration.

b) Those officials, in turn, relayed CMR's animus to President Trump, who relied upon CMR's animus when he issued his July 26, 2017, tweets calling for change in the previous administration's military transgender policies.

c) The same animus-laden tweets infected all subsequent policy considerations, including formal changes in policy that President Trump approved in March 2018.

None of these points are credible, logical, or true. Contrary to claims of LGBT activists, CMR had no official or unofficial role in developing or implementing the military transgender policies that plaintiffs are challenging. The real goal here is not justice; it is harassment of CMR.

***Conspiracy Theory Defies Logic and Reality***

On July 27, 2018, Judge Pechman in Seattle denied the government's Motion for a Protective Order and granted the Plaintiffs' Motion to Compel production of documents from the Executive branch. She rejected the government's claims of a **"deliberative process"** privilege and ordered the government to submit a more detailed privilege log to justify their withholding of documents under the **"presidential communications"** privilege.

**Judge Pechman also ordered the Defendants** (Trump *et. al.*) **to produce all documents demanded by the Plaintiffs in the ongoing process of discovery**. In view of this ruling, which the government is appealing, LGBT Plaintiffs cannot justify subpoena demands on CMR, a non-party in the case.

On August 14, in another military transgender case titled ***Stone v. Trump,*** a Baltimore magistrate rejected the government's argument that the "deliberative process privilege" justified the withholding of documents that transgender Plaintiffs and the **ACLU** are demanding.

Even before Judge Pechman's latest ruling, the CMR legal team's July 17 Motion for a Protective Order explained the issues in question:

> ". . . **Plaintiffs' entire case rests upon the President's state of mind on July 26, 2017, when he [President Trump] issued his tweets, and on August 25, 2017**, when he issued his memorandum to the Secretaries of Defense and Homeland Security . . . Plaintiffs cannot logically explain how [CMR President] **Elaine Donnelly**'s state of mind over an extended period of time both before and after July 2017 and August 2017 has any tendency to reveal Donald Trump's state of mind on the critical dates because **their theory defies logic. The logical disconnect destroys their relevance theory."** (pp. 3-4)

> " . . . Plaintiffs have court-ordered access to the deliberative process materials they claim are critical to their case. **Enforcement of the subpoena against CMR will serve no legitimate purpose** and will simply be a means to **unreasonable and unnecessary financial and personnel burdens on CMR simply because it had the temerity to express an opinion on national defense issues."** (pp. 6-7)

CMR's Motion for a Protective Order summarizes the illogic of the Plaintiffs' subpoena:

> "First, CMR's information does not address or pertain to the point they wish to establish: the **President's state of mind**. Second, Mrs. Donnelly does not have personal knowledge of the President's state of mind. Third, CMR is not a party to this lawsuit. Fourth, in light of the points made above, **it appears that the real purpose of the subpoena is not to advance Plaintiffs' case, but to harass, intimidate, and to divert CMR and its resources from its stated mission and purpose.** This factor weighs in favor of denying the discovery." [9] (p. 23)

The TMLC Motion on behalf of CMR 'also cites numerous precedents supporting key arguments:

- The information Plaintiffs seek **is not relevant** to their underlying claims against the Defendants [President Trump and Defense Department officials];

- The burden of producing CMR's private, internal communications on CMR is **out of proportion** to the Plaintiffs' needs; and

- The breadth, scope, and intrusiveness of the discovery would unreasonably infringe CMR's **First Amendment** rights.

For these reasons and more, Plaintiffs should not be allowed to force discovery of non-party CMR's private, internal communications:

***Declarations in Support of CMR's Position***

The government, as the Defendant in the case, submitted a brief in support of CMR's position and asking the court to consider it in determining whether to order CMR to produce the subpoenaed documents. [10]

> "Plaintiffs contend that because CMR is "well known to oppose" looser restrictions on military service for transgender individuals, any evidence that the Government consulted with CMR would mean that the Government's decisions were infected with animus. The implications of this theory are startling . . . It is a

normal and essential governmental function to consult with members of the public who may hold a variety of views. **This is especially so here, where the position CMR is alleged to support was, until just recently, the policy of the United States military for decades."** (pp. 19-20)

Both documents filed on behalf of CMR included Declarations from President Elaine Donnelly, which set forth numerous facts that contradict the Plaintiffs' conspiracy theories and allegations of collusion with President Trump. [11]

Donnelly's first Declaration noted that CMR's views on military personnel policies, including the transgender policy, are easily available on the CMR website, www.cmrlink.org. While CMR hopes that the organization's comprehensive reports and analyses were considered by the decision-makers, there is no way to know whether anyone in the administration relied upon CMR's publications when addressing the issue.

Donnelly explained that if the court enforces the Seattle Plaintiffs' Motion to Compel production, CMR would have to pay thousands of dollars for professional services to isolate and redact hundreds of emails to certain White House and Pentagon addresses over three years. "[Such an order] would seriously impede CMR's ability to accomplish its purpose: reporting on and analyzing military personnel policies." (p. 7)

She also drew attention to the consequences of publicly disclosing the identity of private email correspondents. Known but confidential sources of information would be deterred from communicating with CMR if their privacy could not be protected from subpoenas demanding production of private emails.

Donnelly's second declaration invited the court to examine examples of CMR's body of work, which contradict the Plaintiffs' baseless characterizations of "hostility" and other assumptions underlying their case:

> "[P]laintiffs ignore the fact that CMR reports on, analyzes, and often criticizes the actions of civilian and military policy-makers – not the uniformed people who must live or sometimes die under policies that the authorities make. I hope that the court will recognize CMR's First Amendment right to hold accountable all civilian and military authorities and, in this case, outside pressure groups demanding highly questionable programs and remedies for persons who identify as transgender or have been diagnosed with gender dysphoria." (p. 3)

***Hearing Scheduled for September 25***

CMR has not produced any documents in any of the pending cases. A hearing to consider both Plaintiffs' and non-party CMR's Motions will take place in a Detroit federal courtroom on September 25.

A court order enforcing the intrusive subpoena would impose heavy up-front expenses and force CMR to devote countless hours to a burdensome document production project with no relevance to the underlying litigation. All of this would have a serious "chilling effect" on CMR's First Amendment rights to petition the government and to keep reporting on and analyzing military/social policies.

This result may be the true reason for all subpoenas filed against CMR – an independent public policy organization that reports on and analyzes government policies that make military life more difficult or more dangerous.

CMR refuses to be intimidated, silenced, or deterred from the mission established 25 years ago. The First Amendment guards CMR's right to advocate for sound policies that strengthen our military, and that is a constitutional right that is worth fighting for.

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*The Center for Military Readiness is an independent, non-partisan public policy organization that reports on and analyzes military/social issues. CMR is grateful to Prof. William "Woody" Woodruff and* ***Richard Thompson****, President & Chief Counsel of the Thomas More Law Center, for their assistance in defending First Amendment rights. More information on this and related issues is available at www.cmrlink.org.*

## Endnotes:

[1] *Karnoski v. Trump* Subpoena, May 2, 2018. LGBT activist groups and plaintiffs expanded their 2017 lawsuits against President Trump by serving subpoenas on the Center for Military Readiness and other non-party organizations, including the **Heritage Foundation**, **Family Research Council**, and **Liberty Counsel**. The Seattle case, titled ***Karnoski v. Trump***, involves eight transgender individuals and **LAMDA Legal**, **OutServe–SLDN (Servicemembers Legal Defense Network)**, the **Human Rights Campaign**, the **Military Partner Association (AMPA),** and Intervenor **Washington** state.

[2] LGBT activist group lawyers moved to block any change in Obama-era policies by filing lawsuits against President Trump in four courts: **Washington, D.C.**, **Baltimore, MD**, **Seattle, WA**, and the **Central District of California (Riverside)**. Plaintiffs claimed that President Trump's statements in 2017 were motivated not by concerns about military readiness, but by "animus" against transgenders.

[3] Law Professor Emeritus William A. Woodruff, a former colonel in the Army Judge Advocate General Corps, has represented CMR since February 2018. Woodruff sent a letter objecting to the *Karnoski v. Trump* subpoena. He also filed objections to two previous subpoenas served on CMR in Washington, D.C., lawsuit titled *Doe v. Trump*.

[4] TMLC News Release, including link to Motion for Protective Order: Thomas More Law Center Asks Federal Court to Stop LGBT Groups from Harassing the Center for Military Readiness

[5] Non-Party Center for Military Readiness' (CMR) Reply in Support of Motion for Protective Order, July 31, 2018.

[6] According to **Military Health System** records gathered since 2016, **994** service members seeking treatment for gender dysphoria showed a **300 percent increase** in medical costs and accounted for **30,000** mental health visits – **nine times** more than other servicemembers. The Mattis/DoD report also found little evidence in studies that gender "reassignment" surgery improves health outcomes for persons suffering from gender dysphoria. High rates of suicide ideation, attempts, and completion occured **eight times** more often than among other servicemembers. *See* Defense Secretary Mattis' Memo to the President, February 22, 2018, and Department of Defense Report and Recommendations on Service by Transgender Persons, February 2018. Also see the April 2018 CMR Special Report Trump Transgender Policy Promotes Military Readiness…Not Political Correctness, 34 pages.

[7] In June 2017, the AP reported that **three of four military service leaders** wanted one or two years more time before implementing Obama-era transgender mandates. AP: Military Chiefs Seek Delay in Transgender Enlistments. In April 26, 2018, testimony before the House Armed Services Committee, Secretary Mattis said that when military leaders expressed concerns about implementation questions early in the Trump administration, he called for an in-house study of the issue on June 30, 2017. That review began weeks before President Trump first expressed his intent to change Obama-era policies with July tweets and his presidential Memorandum in August 2017.

[8] In the *Doe* case, Judge Kollar-Kotelly applied "heightened scrutiny" as her standard of review, and dismissed the government's Motion to Dissolve her Preliminary Injunction on August 6. In the *Karnoski* case, Judge Pechman applied "strict scrutiny." Both judges refused to use the "rational basis" standard that other courts have applied in previous similar cases.

[9] Non-Party Center for Military Readiness' (CMR) Motion for a Protective Order, *Ryan Karnoski v. Donald J. Trump*, filed in the U.S. District Court of the Eastern District of Michigan, July 17, 2018.

[10] Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Compel Discovery from the Center for Military Readiness, filed in the U.S. District Court for the Eastern District of Michigan, July 24, 2018. The court has not yet ruled on the government's request. Defense Department regulations included gender dysphoria on a long list of disqualifying psychological conditions that detract from deployability, mission readiness, and combat lethality. *See* DOD Instruction 6130.03, Medical Standards for Appointment, Enlistment, or Induction in the Military Services, April 28, 2010, Incorporating Change 1, September 13, 2011. This document has since been changed to omit transgender conditions from the list of disqualifying psychiatric and behavioral factors.

[11] Declaration of Elaine Donnelly, July 17, 2018, and second Declaration, July 31, 2018.