



Center for Military Readiness – Policy Analysis –

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District Judges Challenge Trump’s Authority on Military Transgender Issues

“Supreme Judicial Commanders” Should Not Run the Military

On October 30, U.S. District **Judge Colleen Kollar-Kotelly** threw all protocols to the wind when she issued a **Memorandum Opinion** and preliminary injunction (PI) favoring six transgender plaintiffs in a case titled *Jane Doe 1 v. Donald J. Trump*. Acting as “**Supreme Judicial Commander of the Military**,” the judge issued an **Order** directing President Trump and Defense Secretary **James Mattis** to fully enforce Obama-era mandates to retain and induct new transgender recruits by **January 1, 2018**.¹

On November 21, **Judge Marvin Garbus of Baltimore, MD**, handed down a similar preliminary ruling, suggesting that he intends to order the **Defense Department** to retain currently-serving transgendered personnel and to pay for what the court called “medically-necessary” transgender surgeries.²

The administration can and should defend presidential prerogatives as well as sound policies to strengthen our military, but the problem requires immediate attention at the administration’s highest levels.

The **U.S. Constitution** does not grant to any federal judge powers to make policy for the military. (See **Article 1, Section 8**, and **Article II, Section 2**.) It would be dangerous to sacrifice the President’s constitutional military powers, and to disregard Supreme Court precedents, while allowing judges to make military policy.

The judges’ bizarre rulings favoring transgender plaintiffs were issued without any constitutional authority, and they are a direct affront to the authority of the **Commander-in-Chief**.

The *Washington Examiner* reported that the Trump Administration is appealing the D.C. District Court order, “*but did not say whether it may seek a stay blocking the recruiting portion of the order.*” The *Examiner* further reported that the Pentagon is preparing to accept transgender recruits on January 1, 2018.³

The apparent hesitation to ask for a stay in both cases makes no sense. If the **Department of Justice** fails to obtain stays and the military complies with orders to begin enlistment of professed transgender people on New Year’s Day – something the military has never done – there will be no going back.

Failure to act would shift control of our military to unaccountable, activist judges, and convey the devastating message that the administration does not have the political will to do what President Trump promised the voters he would do – end political correctness in the military.

Stays of the courts’ rulings are essential to protect presidential prerogatives. Dropping the legal ball would impose enormous costs and consequences on all branches of the armed forces and, eventually, every institution in civilian life.

Background and Overview

Until **President Barack Obama** politicized the issue, longstanding Defense Department regulations precluded enlistment or retention of transgendered persons. **Gender identity disorder**, renamed **gender dysphoria**, was on a long list of psychological and physical conditions that negatively affect personal readiness and deployability, and therefore disqualify a person for military service.⁴

Waivers are sometimes available in individual cases with special circumstances, but people who suffer from illnesses, defects, or conditions requiring extensive medical treatments that detract from personal readiness and deployability are among those who are considered ineligible to serve in the military.

Contrary to boiler-plate LGBT rhetoric in the judges' opinions, individuals who are confused about their gender identity are not being singled out for unfair, adverse treatment. Rather, LGBT activist groups representing them have been using perceived political clout to demand *special* treatment.

In the final year of President Barack Obama's second term in office, Secretary of Defense **Ashton Carter** directed that transgenders already on active duty could reveal their status and remain in uniform. He also directed the Defense Department to pay for all "medically necessary" treatments, including surgeries, with no protections for medical personnel who object on ethical grounds.⁵ Carter further ordered that enlistment of open transgenders would begin on **July 1, 2017**.⁶

The 2016 **Republican National Platform** and presidential candidate Donald Trump called for an objective review of all Obama-era LGBT policies and appropriate administrative, legal, or legislative action to restore sound priorities: mission readiness and combat lethality.⁷

On **June 30, 2017**, Secretary of Defense **James Mattis** ordered a six-month delay in the enlistment part of Carter's directives. Mattis also put his final decision off until **January 2018**, ordering a full review of transgender mandates over a period of six months.⁸

Secretary Mattis' six-month delay of Obama's order to start recruiting new transgenders to serve was welcome but still problematic. Obama policies were left in place, triggered to go into effect on January 1, 2018.⁹

This happened even though three of the four military services originally had asked for two more years before implementation of the enlistment mandate.¹⁰ But Deputy Defense Secretary **Robert O. Work**, a key Obama Administration holdover who was responsible for implementing Ashton Carter's transgender policies, reduced the delay time to only six months.

Work also limited the proposed six-month study to future effects of inducting new transsexuals, not the results of policies already in effect. This action took advantage of the fact that military leaders were duty-bound to follow orders, and had no additional opportunity to dissent or explain reasons why delay was warranted.

President Trump, to his credit, officially asserted his authority as Commander-in-Chief with his August 25 **Memorandum on Military Service by Transgender Individuals**.¹¹ The document provided formal guidance for the Secretaries of Defense and **Homeland Security** (representing the **Coast Guard**), directing them to:

- a) Return to the longstanding policy and practice on military service by transgender individuals that was in place prior to **June 2016**;
- b) Halt all use of Defense Department or Homeland Security resources to fund sex-reassignment surgical procedures for military personnel; and

- c) By **February 21, 2018**, determine how to address the status of transgender individuals currently serving in the United States military. ¹²

President Trump's Memorandum also stated, "*Until the Secretary has made that determination, no action may be taken against [transgender] individuals . . .*" ¹³

On September 14, Defense Secretary Mattis responded with an **Interim Guidance Memorandum**. ¹⁴ Secretary Mattis also announced that a "panel of experts" would review policies affecting transgenders currently serving in the military, and he would make recommendations to the President by February 21, 2018.

Judges Seize Power They Don't Have

U.S. District Judge Kollar-Kotelly, a **Bill Clinton** appointee, issued a **preliminary injunction (PI)** granting most demands of the six transgender plaintiffs, who are identified with names or pseudonyms.

The PI did not address payments for "gender reassignment" surgeries because none of the six plaintiffs had requested that option. However, Maryland District Judge Marvin J. Garbis, a **George H.W. Bush** appointee, did suggest that he will order Defense Department payments for transgender treatments, including surgeries.

At this early stage in legal proceedings, the Department of Justice's motions to dismiss both lawsuits addressed only three threshold issues: standing to sue, court jurisdiction, and whether the cases were "ripe" for a decision.

All plaintiffs claimed they would be irreparably harmed if President Trump revokes President Obama's late-administration orders to accommodate transgenders in the military. They also cited President Trump's informal statements and official orders to end Obama-era policies.

Department of Justice attorneys argued for dismissal of the lawsuits because Secretary of Defense James Mattis has yet to make recommendations on the future status of active-duty transgenders who identified themselves in the closing months of the Obama Administration.

Judge Kollar-Kotelly heard no oral arguments, and the only documents and declarations before her came from transgender plaintiffs, LGBT activist groups, and former Obama Administration officials with an interest in defending their own record as implementers of Obama's transgender policies. ¹⁵

The judge used contradictory logic to justify denial of the Justice Department's motion to throw out the case on the threshold issues. On one hand, she acknowledged that military officials must follow orders. In the same opinion, however, she suggested that the opinions of Obama military officials who followed Obama's orders were definitive and essentially the last word.

The judge's preliminary injunction relied on her prediction that plaintiffs would win when she hears merits of the case later on. Judge Kollar-Kotelly also built her ruling on the novel claim that implementation of President Trump's directives would deny the transgender plaintiffs' right to "*equal protection of the law.*"

Judge Kollar-Kotelly reached that controversial conclusion by applying "*heightened scrutiny,*" a more stringent judicial standard of review that has not been used in previous cases involving social issues, such as gays in the military. Her rationale for doing so did not explain why the transgender case is different from previous cases involving homosexual personnel, which were settled under a "rational basis" standard of review.

Both district courts' opinions virtually ignored **Supreme Court** precedents that repeatedly have established the principle of judicial "deference" to the legislative and executive branches in matters involving military policy.

National Defense or Civil Rights?

Judge Kollar-Kotelly's 76-page opinion, which cited principles and precedents relevant to civilian institutions, erroneously characterized the military as just another equal opportunity employer. The Court failed to recognize that even though the **All-Volunteer Force (AVF)** provides many jobs, medical benefits, and career opportunities, civil rights statutes do not apply to the armed forces, and there is no constitutional right to serve in uniform. The military defends individual rights, but it must be governed by different rules.¹⁶

The Obama Administration invited the judge's error in 2015, when Secretary of Defense **Ashton Carter** announced a directive stating that "sexual orientation" would be added to **military equal opportunity (MEO)** non-discrimination categories.¹⁷ The policy change disregarded recommendations of the **Comprehensive Review Working Group (CRWG)**, an advisory panel co-chaired by then-Defense Department General Counsel **Jeh Johnson** and Army **General Carter Ham** in 2010.¹⁸

Contrary to denials at the time, the change in legal status led directly to Obama Administration mandates to accommodate transgenders in the military.

District Court Did Not Consider Medical and Military Realities

Confusion about gender identity is a psychological condition requiring compassion and competent psychiatric treatment. It must be very difficult to go through life feeling confusion about something as basic as gender identity. But in a military environment, individuals who suffer from gender dysphoria require unusual accommodations that are costly, demoralizing, and harmful to military readiness.

The condition requires intense psychological treatments, sometimes including powerful hormone therapies with side effects affecting performance. Body-altering surgeries involve extensive counseling and time off for recovery from procedures that many medical professionals consider unethical and ineffective. Alleged benefits center on individual desires, not military readiness or the interests of national defense.

The **Center for Military Readiness** has analyzed the full array of Obama-era directives and mandatory training programs, which were written in consultation with named LGBT activist groups. For example:¹⁹

- Defense Department and military service implementation plans defy science and common sense while enforcing Pentagon PC groupthink. All insist that gender is "assigned" at birth and can be "re-assigned" with changes in appearance.
- Military commanders and medical personnel must approve or provide hormone treatments or surgical operations that do not change gender-determining human **DNA** or reduce psychological risks, regardless of their own convictions or concerns about medical ethics.
- Implementation mandates authorize extended time off for "**real-life experience**" (**RLE**) living in one's "preferred gender," and costly hormone or surgical treatments that LGBT-approved doctors prescribe as "medically necessary."
- Following treatments, military commanders are required to change the transitioning person's bureaucratic "gender marker," and military personnel must accept without dissent the presence of biologically opposite-sex persons in gender-specific private facilities.

The LGBT-friendly **RAND** Corporation used questionable methodology to suggest in a 2016 report that transgender implementation costs would range between **\$24 million** and **\$84 million** over ten years. In contrast

to these low-ball estimates, more objective calculations predict costs somewhere between **\$1.3 billion** and **\$3.7 billion** over ten years, depending on whether lost time and other expenditures are factored in.²⁰

Potential benefits for persons who suffer from gender dysphoria, including dependent children who also could become eligible for transgender surgeries, are questionable at best and devastating at worst.

Dr. Paul McHugh, the Distinguished Professor of Psychiatry at **Johns Hopkins University**, has explained that in the 1960s, Johns Hopkins pioneered “sex reassignment” surgery for persons who did not identify with their biological sex. The hospital discontinued the practice when follow-up studies in the 1970s found that operations on healthy tissue did not improve psycho-social adjustments.²¹

Dr. Joseph Berger, certified as a specialist in Psychiatry by the **Royal College of Physicians and Surgeons of Canada**, has explained that terms such as “*gender expression*” and “*gender identity*,” are ambiguous and more an emotional appeal than a statement of scientific fact. Claims that transgendered people are “*trapped*” inside a body different from the gender they wish to be, said Dr. Berger, are based on “*feelings, not science*.”

Dr. Berger added that superficial changes in appearance, hormone therapy, and even surgeries cannot change the chromosomes of a human being. There is “*no medical or scientific reason to grant any special rights or considerations to people who are unhappy with the sex they were born into, or to people who wish to dress in the clothes of the opposite sex.*”²²

Higher rates of suicide are a serious concern in the military. According to **Ryan T. Anderson, Ph.D.**, “*Forty-one percent of people who identify as transgender will attempt suicide at some point in their lives, compared to 4.6 percent of the general population. And people who have had transition surgery are 19 times more likely than average to die by suicide.*”²³

The military health system is designed to be a force multiplier for deployable troops. Persons with disqualifying conditions can serve our country in other ways, but they are not eligible for military service.

It has never been necessary for military officials to present facts such as this in federal court. The Trump Administration must step up to fight for presidential prerogatives, and to state the obvious: The issue here is not civil rights; it is military readiness to defend the country.

Where Do Military Leaders Stand, and Who Makes Policy?

Defense Department recommendations are due in February, and President Trump will decide policy by March 23, 2018. In her Memorandum Opinion, however, the District Judge preferred to focus on President Trump’s earlier tweets, citing them as her excuse for disregarding the President’s authority.²⁴

Judge Kollar-Kortelly claimed that President Trump’s statements on the subject make it impossible for the Department of Defense to do an objective study. In her view, Trump’s tweets stating that “*the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military*” precludes any recommendation that transgenders should be retained and recruited for the military.

This thinking led the judge to conclude that since the plaintiffs were facing a near-certain injury in fact; i.e., discharge or denial of enlistment, the case was “ripe” to be heard.²⁵ That position, however, is contradicted elsewhere in the judge’s ruling.

Judge Kollar-Kotelly’s opinion makes much of the notion that Obama-era generals and political leaders in the Pentagon supported the Obama-Carter policy. She argued that since they are the only ones with military

experience on the issue, their opinions and facts assembled by the Obama Administration and Defense Department (meaning RAND) fully justify action to halt Trump's intended changes in policy.

But the judge surely knows that when President Obama and his civilian political appointees announced their intent to change the transgender policy, uniformed military leaders were obligated to follow orders without dissent. It is doubtful that President Obama even asked what they thought of his planned policy change.

The judge nevertheless claimed that military leaders' dutiful implementation of Obama's orders without question proved that Obama's liberal policies were worthy of support. Elsewhere, however, she argued that the Pentagon's pending review of the same matters cannot be objective because President Trump's views are known. This is not logic; it is blatant judicial bias.

These contradictory assumptions are only part of the reason why the judge's opinion should not be allowed to stand. The main reason is the Constitution itself. Federal judges are not qualified or authorized to make policy for the armed forces of the United States.

How the Government Should Respond

President Trump has taken the lead in addressing this issue, even though Congress has not conducted oversight hearings examining the high costs and consequences of Obama transgender mandates. Without question, the Commander-in-Chief has the right – and the responsibility – to restore sound Defense Department policies that were in place long before President Obama took office.

The high-handed Washington, D.C. and Baltimore District Court rulings (and additional ones that may occur) can and must be stayed, and the administration should do everything possible to address this issue in a serious, objective way. Never in our history have the American armed forces enlisted open transgenders in the military, and federal judges should not be allowed to order them to do so.

Here are some comments and suggestions for action:

- In judicial matters Secretary Mattis' hands are tied, since any action on his part could be construed as contempt. The Department of Justice must act to defend President Trump's constitutional prerogatives as well as the best interests of the armed forces.
- The Justice Department should go back to the District Court judges and seek reconsideration and stays of orders to proceed with Obama-era recruitment policies. In view of the pending review of transgender policies, this is a reasonable request to make.
- Pending results of the ongoing review process, the Pentagon might consider forgoing discharges of active-duty transgenders identified under the previous administration's policies, *if* extant policies barring recruitment of new transgenders remain in place.
- If the district judges refuse these reasonable requests, the Trump Administration should take the negative decisions to respective Courts of Appeals and ultimately the **Supreme Court**.

Supreme Court Intervenes on Immigration Cases

The Department of Justice, headed by Attorney General **Jeff Sessions**, sought immediate stays when lower courts in three states tried to overrule the administration's "extreme vetting" immigration travel ban policies, which President Trump established as matters of national security.

The Department of Justice should do in the transgender cases what the department did in the immigration travel ban cases: seek a stay to allow time to make principled arguments based on national security, not social causes. The transgender issue is as important as the travel ban issue for the same reasons: national security and separation of powers.

In a 7-2 vote on December 3, the Supreme Court decided, at least temporarily, that the president's proclamation limiting travel from countries presenting heightened risks of terrorism should be enforced, pending further hearings on the merits of cases working their way through the courts.²⁶

The encouraging ruling affirmed that decisions affecting national security should be made by Congress and the President, not by federal judges. Because the composition of our military is quintessentially a matter of national security, the Justice Department should not hesitate to seek a stay that allows a full and vigorous defense of President Trump's right to re-establish sound policy in our military, on which national security depends.²⁷

President Trump is working to significantly influence the federal judiciary through his appointments, but results won't happen quickly enough to address what could become irreversible mandates being handed down by activist judges who imagine stars on their shoulders instead of judicial robes.

The time to fight has come. LGBT advocates are pursuing long-range plans to use the courts to impose their agenda on the military, regardless of the costs and consequences. That does not mean that their egalitarian philosophy and demands should be allowed to prevail over the needs of the military and a strong national defense. Federal judges do not have the power to run the military, but they will continue to do so unless the Executive Branch takes up the fight.

Endnotes:

¹ *Jane Doe, et al., v. Donald J. Trump*, Civil Action No. 17-1597 (CKK), and [Order](#), October 30, 2017.

² *Brock Stone, et.al. vs. Donald J. Trump*, Civil Action No. MJG-17-2459.

³ Travis J. Tritten, *Washington Examiner*: [Military Ordered to Begin Accepting Transgender Recruits Jan. 1 Despite Trump's Ban](#), Nov. 29, 2017, and [Pentagon Warns It's Getting Ready for Transgender Recruits](#), Dec. 5, 2017.

⁴ Stew Smith, *The Balance*, "[Medical Standards for the Military](#)," Nov. 5, 2017, and *The Balance*, "[Military Medical Standards for Enlistment and Commission – Mental Health Conditions](#)," Jul. 18, 2017, both referencing DoD Directive 6130.3, Physical Standards for Appointment, Enlistment, and Induction. Psychological conditions making a person ineligible for military service include schizophrenia, claustrophobia, chronic sea- or air-sickness, eating disorders (bulimia and anorexia), paranoid and bipolar disorders, enuresis or sleepwalking after the 13th birthday, depression, mood disorders requiring long-term medication, or suicidal behavior. Disqualifying physical conditions include abnormalities of the spine, skin, lungs, heart, vascular systems, hands and feet, advanced dental problems, hearing or vision loss, endocrine and metabolic disorders, tumors, etc.

⁵ [DoD Instruction 1300.28](#), In-Service Transition for Transgender Service Members, approved by Secretary of Defense Ashton Carter, Oct. 1, 2016. Mandates that Secretary Carter issued in June 2016 went into effect on October 1, and the various services were ordered to produce implementation plans by November 1, 2016.

⁶ A directive allowing recruitment of new transgenders deemed "stable" in their gender identity for at least 18 months was scheduled to go into effect on July 1, 2017. For a comprehensive analysis of various Obama directives, instructions, memoranda, and training documents, see CMR Special Report: [Department of Defense & Military Services Should Revoke Problematic Transgender Policy Directives and Instructions](#), July 2017. [Executive Summary](#)

⁷ CMR: [2016 Republican National Convention Opposes Social Experimentation and Political Correctness in the Military](#).

⁸ Defense Secretary James Mattis: [Memorandum re Accession of Transgender Individuals into the Military Services](#), June 30, 2017.

⁹ CMR: [Transgender Mandates Delayed But Still on Auto-Pilot](#), July 5, 2017.

¹⁰ Lolita C. Baldor, *AP*, [Military Chiefs seek Delay in Transgender Enlistment](#), June 23, 2017.

¹¹ Whitehouse.gov: [Presidential Memorandum to the Secretary of Defense and Secretary of Homeland Security, Subject: Military Service by Transgender Individuals](#), August 25, 2017.

¹² Former Acting Personnel & Readiness Under Secretary **Anthony Kurta**, who instigated a June 12 “LGBT Pride Equality Month” celebration even without presidential authorization, has been overseeing Mattis’ “panel of experts.” This is cause for concern.

¹³ White House Q & A: POTUS Memo on Military Service by Transgender Individuals, August 25, 2017.

¹⁴ Defense Media Activity, [Secretary Mattis Issues Interim Guidance on Transgender Personnel Service](#), Sept. 18, 2017. The September 14 Interim Guidance provided for continued medical care for persons diagnosed with gender dysphoria, but that “*no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018,*” absent certain circumstances. At least one transgender surgery occurred during this interim period.

¹⁵ *Jane Doe, et al.*, p. 3, footnote #1. The footnote displays a long list of LGBT activists and former Obama appointees such as former Army Secretary **Eric K. Fanning**, former Air Force Secretary **Deborah L. James**, and former Secretary of the Navy **Ray Mabus**, all of whom were enthusiastic supporters of President Obama’s transgender policies.

¹⁶ [Report of the Presidential Commission on the Assignment of Women in the Armed Forces](#), Nov. 15, 1992, CF 1.32, p. C-40.

¹⁷ DoD Directive 1010.02E, “Diversity Management and Equal Opportunity in the DoD,” Subject: DoD Military Equal Opportunity (MEO) Programs, June 8, 2015. See CMR Analysis: [Secretary of Defense Stumbles Into Transgender Legal Morass](#)

¹⁸ [Report of the Comprehensive Review Working Group \(CRWG\)](#), Nov. 30, 2010, pp. 13-14, 137-138, and separate [Implementation Plan](#), p. 71. The CRWG report warned it would be unwise to add sexual orientation to MEO categories, and claimed that repeal of the 1993 law regarding homosexual in the military (**Section 654, Title 10**), would have “no effect” on military transgender policies. According to background information released in 2015, the change in designation was not intended to make “*sexual orientation a protected class.*” In response to “Q & A” inquiry, a Defense Department spokesman stated, “*Protected classes are designated by federal law.*” When asked whether there were plans to expand coverage to transgender individuals in the MEO system, the spokesman said “*No.*” Nevertheless, the directive led directly to transgender policies announced on June 30, 2016, which interpreted “sexual orientation” to include transgender persons suffering from gender dysphoria.

¹⁹ CMR Special Report: [Department of Defense & Military Services Should Revoke Problematic Transgender Policy Directives and Instructions](#), July 2017. [Executive Summary](#)

²⁰ CMR: [Trump’s Pro-Military Transgender Policy Sparks Media Meltdown](#).

²¹ Dr. Paul McHugh, *Wall Street Journal* – [Transgender Surgery Is Not the Solution](#), May 13, 2016.

²² Dr. Berger continued, “*The medical treatment of delusions, psychosis or emotional happiness is not surgery . . . [W]hat we are talking about, scientifically, is just unhappiness, and that unhappiness is being accompanied by a wish – that leads some people into taking hormones that predominate in the other sex, and even having cosmetic surgery designed to make them ‘appear’ as if they are a person of the opposite sex.*” See [Statement of Dr. Berger](#) before the Canadian House of Commons Standing Committee on Justice and Human Rights, regarding bill C-279.

²³ Ryan T. Anderson, Ph.D., Commentary for The Heritage Foundation and *The Daily Signal*, “[5 Good Reasons Why Transgender Accommodations Aren’t Compatible With Military Realities.](#)” July 26, 2017.

²⁴ CMR: [Trump’s Pro-Military Transgender Policy Sparks Media Meltdown](#).

²⁵ *Jane Doe 1, et al.*, pp. 14-19.

²⁶ Fred Lucas, *The Daily Signal*, [In a Win for Trump, Supreme Court Upholds ‘Extreme Vetting’ Travel Ban](#), Dec. 4, 2017.

²⁷ Similar actions by civilian attorneys representing a **Virginia** school district resisting Obama-era mandates for “open-door” transgender policies in school restrooms led to a Supreme Court stay, but the transgender issue in the military is far more important because lower courts’ rulings are attempting to usurp the constitutional authority of the Commander-in-Chief. *Politico*, [Supreme Court Blocks Ruling that Allowed Transgender VA Student Use Boys Bathroom](#), Aug. 3, 2016.

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