

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

JANE DOE 1, JANE DOE 2, JANE DOE 3,
JANE DOE 4, JANE DOE 5, JOHN DOE 1,
REGAN V. KIBBY, and DYLAN
KOHERE,

Plaintiffs,

v.

DONALD J. TRUMP, in his official
capacity as President of the United States;
JAMES N. MATTIS, in his official capacity
as Secretary of Defense; JOSEPH F.
DUNFORD, JR., in his official capacity as
Chairman of the Joint Chiefs of Staff; the
UNITED STATES DEPARTMENT OF
THE ARMY; RYAN D. MCCARTHY, in
his official capacity as Secretary of the
Army; the UNITED STATES
DEPARTMENT OF THE NAVY;
RICHARD V. SPENCER, in his official
capacity as Secretary of the Navy; the
UNITED STATES DEPARTMENT OF
THE AIR FORCE; HEATHER A.
WILSON, in her official capacity as
Secretary of the Air Force; the UNITED
STATES COAST GUARD; ELAINE C.
DUKE, in her official capacity as Secretary
of Homeland Security; the DEFENSE
HEALTH AGENCY; RAQUEL C. BONO,
in her official capacity as Director of the
Defense Health Agency; and the UNITED
STATES OF AMERICA,

Defendants.

Civil Action No. 1:17-cv-01597 (CKK)

**DEFENDANTS' NOTICE REGARDING CONSOLIDATION OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION AND THE MERITS OF
PLAINTIFFS' CLAIMS**

In a Minute Order entered on September 1, 2017, the Court directed the parties to file a notice with the Court indicating their positions as to whether the Court's consideration of Plaintiffs' preliminary injunction application should be consolidated with its final determination of the merits of the case. Pursuant to the Court's Order, Defendants submit this notice setting forth their position. In sum, Defendants' position is that the Court should not consolidate consideration of the preliminary injunction motion with its final determination on the merits of the case, unless consolidation is deferred until after March 2018, when the challenged policy may be implemented.

In this case, Plaintiffs are challenging a Presidential Memorandum entitled *Military Service by Transgender Individuals* that states explicitly that it does not take effect until at least January 1, 2018.¹ The Memorandum provides a delayed implementation date so that the Secretary of Defense can study implementation of the President's policy regarding military service by transgender individuals consistent with military effectiveness and lethality, budgetary constraints and applicable law. The Memorandum directs the Secretary of Defense, in consultation with the Secretary of Homeland Security, to submit an implementation plan by February 21, 2018. At this point, therefore, it is unclear how the policy regarding service by transgender service members will be implemented. In particular, the President's Memorandum specifically charges the Secretary of Defense, in consultation with the Secretary of Homeland Security, to determine how to address transgender individuals currently serving in the military. *See* Pres. Mem. § 3.

¹ A copy of the Presidential Memorandum has been included as an exhibit to this notice.

Because Plaintiffs are challenging a policy that is still being actively studied by the Secretaries of Defense and Homeland Security, has not been implemented, and for which the implementation plan is not even due until February 21, 2018, their claims are subject to dismissal on ripeness and standing grounds, which Defendants expect to raise in a motion to dismiss and in opposition to the entry of a preliminary injunction. The D.C. Circuit has explained that, “[p]rudentially, the ripeness doctrine exists to prevent the courts from wasting our resources by prematurely entangling ourselves in abstract disagreements, and, where, as here, other branches of government are involved, to protect the other branches from judicial interference until their decisions are formalized and their ‘effects felt in a concrete way by the challenging parties.’” *Nat’l Treasury Employees Union v. United States*, 101 F.3d 1423, 1431 (D.C. Cir. 1996) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, (1967)). Here, the military’s ultimate policy on service by transgender individuals has not been finally resolved, but Plaintiffs are asking the Court to intercede now, while a study is being conducted by the Secretaries of Defense and Homeland Security, and to render judgment based on speculation about what the final policy will be, how that policy will be implemented, and how the final policy will impact the Plaintiffs before this Court.

For similar reasons, Plaintiffs’ claims are subject to dismissal on standing grounds because, at this stage, it is speculative as to whether or how Plaintiffs may be injured by a policy that has not been finalized. As the Supreme Court has “repeatedly reiterated,” a threatened injury must be “certainly impending” to constitute an injury-in-fact, and “allegations of possible future injury are not sufficient.” *Clapper v. Amnesty Int’l*, 568 U.S. 398, 409 (2013). At this point, it is uncertain whether, after the Secretaries of

Defense and Homeland Security study the issue, the policy that is ultimately adopted and implemented will have any appreciable effect on the Plaintiffs in this case.

For these reasons, it would be premature for the Court to reach the merits of the constitutional questions raised in the Amended Complaint, which seeks to challenge policies concerning service by transgender individuals in the military that have not yet been finally resolved. Rather, the Court is being asked to issue an advisory opinion on possible future impacts of policies that have not yet been finalized, and before the further development of a record on implementation of the President's Memorandum – a key purpose of the study now underway. Indeed, the Amended Complaint refers to alleged injuries that might occur *if* the new policy results in harm to a Plaintiff, such as discharge. *See, e.g.*, Am. Compl. ¶ 22, 36, 40. Accordingly, at this juncture, the Presidential Memorandum at issue has not even taken effect and the policy Plaintiffs are challenging is still being studied. In these circumstances, the parties cannot adequately brief and the Court cannot properly adjudicate the constitutionality of a future policy that has not been finalized.²

Alternatively, to the extent judicial economy could be achieved by combining consideration of Plaintiffs' preliminary injunction and the merits of their claims, the Court could defer briefing on both the preliminary injunction motion and the merits until after the Secretary of Defense issues his implementation report, which is currently due by February 21, 2018. Thereafter, the parties should be able to address the merits as it may

² To the extent Plaintiffs allege that they face certain harms in the interim period, before the challenged policies are finally resolved and implemented in 2018, those are the type of issues that could be addressed by seeking preliminary relief. Such allegations, however, would not require a final resolution on the merits of the overall policy at this early stage.

impact both Plaintiffs' motion for a preliminary injunction and final judgment in the case. Following the issuance of the Secretary's report, both the parties and the Court will have a better understanding of the military's final policy regarding service by transgender individuals, how the policy will be implemented, and how it will impact Plaintiffs, if at all.

Accordingly, the Court should either proceed with briefing on Plaintiffs' motion for preliminary injunction and other threshold jurisdictional issues, like standing and ripeness, on a motion to dismiss, or deal solely with a motion to dismiss and, to the extent the case is not dismissed, delay consideration of Plaintiffs' motion for a preliminary injunction until after the Secretary of Defense has issued his implementation plan in early 2018, and at that time consolidate the pending motion with merits proceedings, assuming any of the Plaintiffs' claims remain thereafter.

Dated: September 6, 2017

Respectfully submitted,

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ANTHONY J. COPPOLINO
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/s/Ryan B. Parker
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Counsel for Defendants

THE WHITE HOUSE

WASHINGTON

August 25, 2017

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Section 1. Policy. (a) Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. The Secretary of Defense and the Secretary of Homeland Security have since extended the deadline to alter the currently effective accession policy to January 1, 2018, while the Departments continue to study the issue.

In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.

(b) Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists

upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted.

Sec. 2. Directives. The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

(a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and

(b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.

Sec. 3. Effective Dates and Implementation. Section 2(a) of this memorandum shall take effect on January 1, 2018. Sections 1(b) and 2(b) of this memorandum shall take effect on March 23, 2018. By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.

Sec. 4. Severability. If any provision of this memorandum, or the application of any provision of this memorandum, is held to be invalid, the remainder of this

memorandum and other dissimilar applications of the provision shall not be affected.

Sec. 5. General Provisions. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

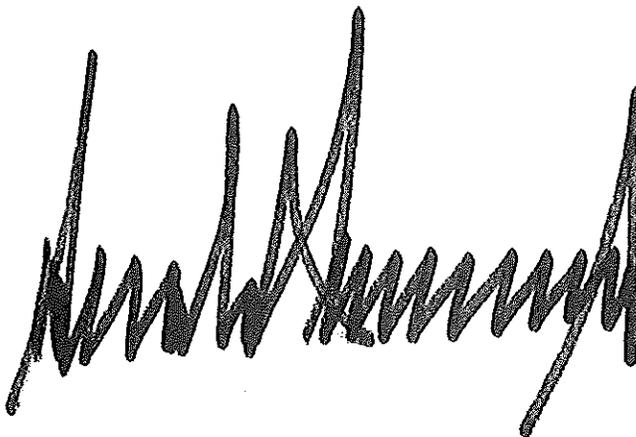
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.

A large, stylized handwritten signature in black ink, appearing to be the signature of the Secretary of Defense, is positioned at the bottom center of the page.