

**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. 17-cv-1597 (CKK)

**PARTIES’ JOINT STATUS REPORT IN RESPONSE TO OCTOBER 30, 2017 ORDER**

In its Order dated October 30, 2017 regarding Plaintiffs’ Application for Preliminary Injunction and Defendants’ Motion to Dismiss, the Court ordered the parties to “file a Joint Status Report indicating how they propose to proceed in this matter by no later than November 10, 2017.” ECF No. 60. The parties have conferred numerous times and do not agree as to how this matter should proceed. Accordingly, they set out their respective positions below.

## DEFENDANTS' POSITION

On October 30, 2017, the Court issued a Memorandum Opinion and Order preliminarily enjoining the Government from enforcing the directives related to accessions and retention in the President's August 25, 2017 Memorandum. The Court also dismissed the plaintiffs' challenges to the Presidential Memorandum's directive that the Government will not pay for 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, for lack of standing. *Id.* The Court explained that "[t]he effect of the Court's Order is to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum." *Id.* In sum, under that *status quo*, no currently serving transgender persons is subject to discharge based solely on gender dysphoria or transgender status, and revisions to the accessions policy for transgender persons made in June 2016 are scheduled to take effect on January 1, 2018.

Although Defendants disagree with the Court's Opinion and Order, and are considering whether to appeal the preliminary injunction, they are complying with the Order. In these circumstances, Defendants' position is that the Court should stay further proceedings in this case while the preliminary injunction remains in place. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Id.* at 254-55. Under the current circumstances, the balance weighs heavily in favor of a stay of proceedings in this case.

As an initial matter, because the Court has already granted Plaintiffs a preliminary injunction, they will not be injured by a stay for as long as the preliminary injunction remains in place. And if the preliminary injunction is lifted on appeal, the Court can resume its consideration of the case. In addition, a stay would further the orderly course of justice and could preserve the resources of the Court and the parties. The Court expressly did not enjoin the Defendants from completing the review directed by the Presidential Memorandum, under which the Secretary of Defense shall make a policy recommendation to the President on February 21, 2018. If the preliminary injunction remains in place until the military adopts a final policy early next year, the issues presented by this case may either become moot or will focus on the policy adopted after that process to the extent it remains applicable to the Plaintiffs.

Finally, a stay of proceedings is particularly appropriate in this case, where permitting the case to proceed into discovery would likely implicate important issues of executive privilege and separation of powers that “should be avoided whenever possible.” *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 390 (2004). Defendants strongly object, for example, to the type of discovery into the President’s decision-making process proposed by Plaintiffs in this Joint Status Report. *See Morgan v. United States*, 304 U.S. 1, 18 (1938) (emphasizing that it is “not the function of the court to probe the mental processes” of Executive Branch officials). In these circumstances, while the policy concerning military service by transgender persons is under review, and while the preliminary injunction remains in place, further proceedings would make little sense. Because Plaintiffs will not be harmed by a stay in these circumstances and a stay could conserve the resources of the Court and the parties, the Court should stay this action while the preliminary injunction remains in place.

In the alternative, this Court should at least stay proceedings until Defendants have decided whether or not to appeal the Court's injunction and revisit the question of how to proceed at that time after conferring with the parties.

### **PLAINTIFFS' POSITION**

Plaintiffs submit that, now that Defendants' Motion to Dismiss has been denied in part, the parties should hold the conference required by Federal Rule of Civil Procedure 16 no later than November 17, 2017, with discovery to commence immediately thereafter. Although the parties can meet and confer to arrive at mutually agreeable interim dates, Plaintiffs propose to complete discovery and summary judgment motion practice no later than a date that would allow the Court to rule on the merits no later than March 23, 2018, the date when key provisions of the ban are scheduled to go into effect. While the ban has been preliminarily enjoined, Plaintiffs maintain that this case should be resolved finally and expeditiously on the merits to conclusively address the harms they currently suffer.

Accordingly, Plaintiffs oppose Defendants' request that proceedings before this Court be stayed. Notwithstanding the injunction, Plaintiffs continue to suffer under the pall of the President's discriminatory directive. Given that the relief provided by the Court is by its nature temporary and Plaintiffs still may become subject to separation on the basis of their transgender status, Plaintiffs continue to face the erosion of bonds of trust with their fellow service members and risk the loss of opportunities for assignments, promotion, training, and deployment that are contingent on certainty regarding their future service. Only a conclusive determination that the policy is unconstitutional and cannot be implemented—ever—will alleviate these harms. That the Secretaries of Defense and Homeland Security will make their recommendation to the President regarding the implementation of the ban on February 21 is immaterial. Following the

Court's denial of the motion to dismiss Plaintiffs' claims that the accessions and retention bans are unconstitutional, Plaintiffs are entitled *now* to discovery regarding the genesis of those bans and the President's justification for his statements that transgender service members "hinder military effectiveness and lethality," "disrupt unit cohesion," and "tax military resources." There is no reason to stay that discovery.

November 10, 2017

Respectfully submitted,

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