

[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 17-5267

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

JANE DOE 1 et al.,
Plaintiffs-Appellees,

v.

DONALD J. TRUMP, President of the United States, et al.
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**BRIEF OF RETIRED MILITARY OFFICERS
AND FORMER NATIONAL SECURITY OFFICIALS
AS AMICI CURIAE IN SUPPORT OF APPELLEES' RESPONSE TO
APPELLANTS' EMERGENCY MOTION FOR ADMINISTRATIVE STAY
AND PARTIAL STAY PENDING APPEAL**

Harold Hongju Koh
Matthew S. Blumenthal
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932
harold.koh@ylsclinics.org

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart Street #2112
Baltimore, MD 21230
202-277-8173

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*¹

Amici are retired military officers and former national security officials, who have collectively devoted countless decades to strengthening U.S. security interests. Amici appreciate the critical importance of military expertise to the security of our nation, and the need for the judiciary to defer to that expertise when the circumstances demand. They submit this brief pursuant to Fed. R. App. P. 29(a)(3) to offer their view that the President should not be allowed to hide a capricious and discriminatory act that involved no considered consultation, professional military decision-makers, or evidentiary basis and review behind a cloak of deference when it will do grievous harm not only to the service-members immediately affected, but also to the national security and foreign policy interests of the United States.

ARGUMENT

Throughout its history, the U.S. military has exercised great care in the selection, training, and retention of qualified personnel as an integral aspect of military readiness. Significant changes to its personnel policies—particularly those involving the categorical exclusion of entire groups from military service—have been subjected time and again to a process that includes: 1) a searching policy

¹ No counsel for any party authored this brief in whole or in part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no person, other than amici, their members, and counsel, contributed money that was intended to fund preparing or submitting this brief.

review, 2) involving senior military officials, 3) that thoroughly examines the best available evidence regarding the impact and consequences of the change. This practice reflects the gravity of such decisions and a realization that even incremental changes in military policy can dramatically affect our Armed Forces' overall readiness to protect our country. But such a process was entirely missing in this case. Absent such careful process, the flawed, discriminatory outcome it produced warrants no deference from this Court in evaluating this motion.

I. The President's actions departed sharply from decades of practice involving similar military policy changes.

The paradigmatic case of a major personnel change in the U.S. military is President Truman's decision seven decades ago to integrate African Americans into the Armed Forces. Prompted by growing concern about racial inequality and unrest in the United States, on December 5, 1946 President Truman issued an Executive Order appointing the President's Committee on Civil Rights, a presidential commission comprised of senior defense officials, religious leaders, and civil rights activists to study, *inter alia*, the desegregation of the military.² Over nearly a year, the Committee deliberated across ten meetings, undertook multiple studies, heard from numerous witnesses in public and private hearings, received hundreds of communications from private organizations and individuals,

² Harry S. Truman Library and Museum, *Records of the President's Committee on Civil Rights* (2000), <http://www.trumanlibrary.org/hstpape/pccr.htm>.

and was assisted in its work by twenty-five agencies across the federal government.³

In December 1947, the Committee issued its final report. It found that the military's practice of excluding African-Americans was "indefensible" and had "cost[] lives and money in the inefficient use of human resources," "weaken[ed] our defense" by "preventing entire groups from making their maximum contribution to the national defense," and "impose[d] heavier burdens on the remainder of the population."⁴ As a result, the Committee called for an immediate end to discrimination and segregation based on "race, color, creed, or national origin, in the organization and activities of all branches of the Armed Services."⁵ Several months later, President Truman issued an executive order declaring that it would be the policy of the United States to require equality of treatment and opportunity for all persons in the U.S. Armed Services without regard to race. The order also convened a Committee on Equality of Treatment and Opportunity in the

³ President's Committee on Civil Rights, *To Secure These Rights: The Report of the President's Committee on Civil Rights XI* (1947), <http://www.trumanlibrary.org/civilrights/srights1.htm>.

⁴ *Id.* at 46-47, 162-63.

⁵ *Id.* at 163.

Armed Services to “recommend revisions in military regulations in order to implement the government’s policy of desegregation of the armed services.”⁶

The Obama Administration’s repeal of the Don’t Ask, Don’t Tell directive, which allowed gay, lesbian and bisexual people to serve openly in the military, followed a similarly searching process. The repeal came on the heels of a comprehensive Pentagon review that began in March 2010 when Secretary of Defense Gates convened a working group co-chaired by General Counsel of the Department of Defense Jeh Charles Johnson and General Carter F. Ham of the U.S. Army and comprised of senior civilian and military leaders from across the Armed Services to study the impact of a repeal of the law.⁷ The working group conducted 95 “information exchange forums” at 51 bases and installations around the world, conducted 140 focus groups, solicited input from nearly 400,000 active duty and reserve service-members, engaged the RAND Corporation to update its earlier 1993 analysis of the topic, studied foreign militaries’ integration of gays and lesbians, and conducted a thorough legal review.⁸

On November 30, 2010, the working group issued a 256-page report rejecting the contention that allowing gays to serve openly in the military would

⁶ Harry S. Truman Library and Museum, *Records of the President’s Committee on Equality of Treatment and Opportunity in the Armed Services*; Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

⁷ U.S. Dep’t of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of “Don’t Ask, Don’t Tell,”* Nov. 30, 2010.

⁸ *Id.* at 33-39.

result in long-lasting and detrimental effects on unit cohesion or the ability of units to conduct military missions.⁹ It also offered a series of recommendations for implementing a repeal of the law in the areas of leadership, training, education and the management of moral and religious objections.¹⁰ Shortly thereafter, Secretary Gates and Chairman of the Joint Chiefs Admiral Mullen called on Congress to immediately repeal the Don't Ask, Don't Tell law. Congress passed just such a bill, which President Obama signed into law. Seven months later, President Obama, newly confirmed Secretary of Defense Leon Panetta (a signatory to this brief), and Admiral Mullen formally certified under the new statute that the American military was ready to repeal the old policy.¹¹

Finally, the very opening of military service to transgender personnel that President Trump now seeks summarily to reverse emerged from its own rigorous policymaking process. In July 2015, Secretary of Defense Ashton Carter issued a directive creating a formal working group to study the “policy and readiness implications of welcoming transgender persons to serve openly” in the military.¹² Over the course of the following year, the working group engaged in what one senior member described as a “detailed, deliberative, [and] carefully run

⁹ *Id.* at 119.

¹⁰ *Id.* at 3.

¹¹ Jody Feder, “*Don't Ask, Don't Tell*”: A Legal Analysis, CRS Rep. R40795, Aug. 6, 2013.

¹² U.S. Dep't of Defense, *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy*, July 13, 2015.

process.”¹³ Each military service was represented in the working group by a senior uniformed officer, a senior civilian official, and various staff members.¹⁴ The working group created sub-groups to investigate specific issues, consulted with medical, personnel, and readiness experts, and spoke with health insurance companies and commanders of transgender service-members.¹⁵ At the end of this comprehensive process, the working group unanimously concluded that transgender individuals should be permitted to serve openly in the Armed Forces.¹⁶

Meanwhile, the Department also commissioned a separate, independent study from the RAND Corporation. The study focused on seven broad research questions, among them the cost of providing medical coverage to transgender individuals, the readiness implications of the proposed policy, and any applicable lessons from the eighteen foreign militaries that already allowed openly transgender individuals to serve.¹⁷ RAND laid out its findings in a 71-page report, which concluded that allowing transgender people to serve openly would place an “exceedingly small” burden on health care expenditures and have a “minimal

¹³ Decl. of Raymond Edwin Mabus, Jr. at 3, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. 28 Aug. 2017).

¹⁴ Decl. of Brad R. Carson at 3, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. 28 Aug. 2017).

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 7.

¹⁷ RAND Corp., *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* ix (2016).

impact” on readiness.¹⁸ Based on the thorough review carried out by these two groups, Secretary Carter announced the policy change in June 2016. For more than a year after that change, transgender individuals currently in the military were able to serve openly alongside their fellow service-members. The Department released a 71-page handbook specifying implementation strategies, and issued guidelines for both in-service medical transition procedures and treatment of gender dysphoria. Absent President Trump’s abrupt about-face, this studied, measured, and incremental process would have concluded on January 1, 2018 with the accession of openly transgender individuals into the U.S. military.

Each of the above personnel decisions was the product of a rigorous policy review involving senior military officials and an evidence-based examination of the likely impact of the proposed change. In sharp contrast, on the morning of July 26, 2017, President Trump suddenly announced a ban on transgender persons serving in the military in a series of three tweets. No effort was made—nor evidence presented—to show that this pronouncement resulted from any analysis of the cost or disruption allegedly caused by allowing transgender individuals to serve openly in the military. The Joint Chiefs of Staff were not consulted at all on the decision before the President issued the tweet. Secretary of Defense James Mattis, who was on vacation at the time, was given only a single day’s notice that

¹⁸ *Id.* at xi and 47.

the decision was coming.¹⁹ The decision was announced so abruptly that White House and Pentagon officials were unable to explain the most basic details about how it would be carried out.²⁰

About four weeks later, President Trump followed the tweets with a Memorandum entitled “Military Service by Transgender Individuals,” directed to the Secretary of Defense and the Secretary of Homeland Security.²¹ This Memorandum summarily instructs the Department of Defense to return to the earlier policy of discrimination against transgender service-members, including by involuntary or dishonorable discharge, and maintains and extends in time the current bar on accession of transgender individuals into the military. The Memorandum points to no policy process that led to the decision, cites no consultations with any military officers, and does not identify a single piece of evidence to support the decision. The Memorandum suggests in passing that the Departments would “continue to study the issue,” even as it declares an imminent sweeping change affecting thousands of transgender service-members.

¹⁹ Barbara Starr et al., *US Joint Chiefs blindsided by Trump’s transgender ban*, CNN (July 27, 2017); Julie Hirschfeld Davis & Helene Cooper, *Trump Says Transgender People Will Not Be Allowed in the Military*, N.Y. Times (July 26, 2017).

²⁰ Davis & Cooper, *supra* note 19.

²¹ Memorandum from the President of the United States to Secretaries of Defense and Homeland Security, 82 Fed. Reg. 41,319 (Aug. 25, 2017) [hereinafter “Presidential Memorandum”].

The President now seeks to shield this decision from judicial scrutiny by invoking the “deferential review” that the Constitution has historically afforded to national security and military judgments.²² But there is no sign of respect for military decision-making or professional military judgments to be found anywhere in the President’s actions. Not only has he entirely failed to involve senior military officials in his decision, he now seeks to displace the considered judgment of military officials regarding the treatment of transgender individuals from just a year earlier. The Supreme Court has given “great deference to the *professional judgment of military authorities* concerning the relative importance of a particular military interest,” *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (emphasis added) (quotations and citations omitted), and the “*considered professional judgment*” of “appropriate military officials,” *Goldman v. Weinberger*, 475 U.S. 503, 508-09 (1986) (emphasis added). But the record in this case hints at nothing remotely resembling such a considered or professional judgment.

²² Appellants’ Mot. at 17.

II. The President’s actions will harm the national security and foreign policy interests of the United States.

The Memorandum asserts that a ban on transgender service-members is necessary to avoid “hinder[ing] military effectiveness and lethality, disrupt[ing] unit cohesion, or tax[ing] military resources.”²³ But the Memorandum offers not a single piece of evidence to support these assertions. In fact, all evidence overwhelmingly points to the contrary.

First, the President’s actions will negatively impact military readiness. Imposing a ban on transgender troops will significantly disrupt and distract from the core mission of the military services by pulling people out of mission-ready, mission-critical units. President Trump proposes expanding the number of active duty Army and Marine Corps service-members by 70,000 personnel—but to accomplish such an ambitious goal without degrading the effectiveness of our troops, the U.S. military will need to recruit all qualified individuals, not exclude entire groups from service based on rank prejudice and sweeping generalizations that do not evaluate each individual’s capacity to serve.²⁴

Second, these actions pose a serious threat to unit cohesion. They order transgender troops to live a lie, authorize discriminatory behavior among fellow service-members, and place troops in the unconscionable position of having “to

²³ Presidential Memorandum, *supra* note 21.

²⁴ K.K. Rebecca Lai et al., *Is America’s Military Big Enough?*, N.Y. Times (Mar. 22, 2017).

choose between reporting their comrades or disobeying policy.”²⁵ Transgender service-members have long been allowed to serve openly in the militaries of such close United States allies as Israel and the United Kingdom without any evidence of harm to unit cohesion. Indeed, these transgender service-members have already served alongside U.S. troops in NATO units without any demonstrated adverse effect. In fact, the RAND study looked at the experiences of the 18 foreign countries that permit openly transgender troops to serve and found that such a policy did not negatively affect unit cohesion.²⁶

Third, the President’s decision will deplete the military of valuable funds at a moment of budget austerity. According to one estimate, the financial cost to recruit, replace, and retrain the estimated 12,800 service-members who would be ejected from the military under the new policy would be \$960 million.²⁷ On the other side of the ledger, the RAND report found that even in “the most extreme scenario that we were able to identify using the private health insurance data, we expect only a 0.13-percent (\$8.4 million out of \$6.2 billion) increase in active

²⁵ Palm Center, Fifty-Six Retired Generals and Admirals Warn That President Trump’s Anti-Transgender Tweets, If Implemented, Would Degrade Military Readiness 1 (Aug. 1, 2017), <http://www.palmcenter.org/wp-content/uploads/2017/08/56-GOFO-statement-2.pdf>.

²⁶ RAND Corp., *supra* note 17, at 44 (internal citations omitted).

²⁷ Palm Center, Discharging Transgender Troops Would Cost \$960 Million (Aug. 2017), <http://www.palmcenter.org/wp-content/uploads/2017/08/cost-of-firing-trans-troops-3.pdf>.

component health care spending” as a result of incorporating openly transgender troops into the military.²⁸

Finally, judicial deference to the President’s actions would send a troubling signal to those abroad, showing both allies and adversaries that the United States military is willing to distort its justly admired personnel policies to serve prejudice and political expediency. That message undermines longstanding efforts of the U.S. government to advance principles of non-discrimination and equality throughout the world as a central tenet of its foreign policy. This ill-considered ban will erode the credibility of the United States as a global human rights leader, which is critical to building coalitions that both hold governments accountable to their human rights obligations and promote peace and security by addressing humanitarian crises around the globe.

CONCLUSION

For the foregoing reasons, Appellants’ motion for a stay should be denied.

²⁸ RAND Corp., *supra* note 17, at xi-xii.

Respectfully submitted,

/s/ Harold Hongju Koh
D.C. Cir. Bar # 31446

Harold Hongju Koh
Matthew S. Blumenthal
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932
harold.koh@ylsclinics.org

Phillip Spector
MESSING & SPECTOR LLP
1200 Steuart Street #2112
Baltimore, MD 21230
202-277-8173

*Counsel for Amici Curiae**

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APPENDIX

LIST OF AMICI

1. Brigadier General (Ret.) Clara L. Adams-Ender, USA
2. Brigadier General Ricardo Aponte, USAF (Ret.)
3. Vice Admiral Donald Arthur, USN (Ret.)
4. Major General (Ret.) Donna Barbisch, USA
5. Michael R. Carpenter served as Deputy Assistant Secretary of Defense for Russia, Ukraine, Eurasia from 2015 to 2017.
6. Brigadier General Stephen A. Cheney, USMC (Ret.)
7. Brigadier General (Ret.) Julia Cleckley, USA
8. Derek Chollet served as Assistant Secretary of Defense for International Security Affairs from 2012 to 2015.
9. Rear Admiral Christopher Cole, USN (Ret.)
10. Major General J. Gary Cooper, USMC (Ret.)
11. Rudy DeLeon served as Deputy Secretary of Defense from 2000 to 2001. Previously, he served as Under Secretary of Defense for Personnel and Readiness from 1997 to 2000.
12. Rear Admiral Jay A. DeLoach, USN (Ret.)
13. Brigadier General John W. Douglass, USAF (Ret.) served as Assistant Secretary of the Navy for Research, Development and Acquisition from 1995 to 1998.
14. Major General (Ret.) Paul D. Eaton, USA
15. Major General (Ret.) Mari K. Eder, USA

16. Andrew Exum served as Deputy Assistant Secretary of Defense for Middle East Policy from 2015 to 2017.
17. Brigadier General (Ret.) Evelyn "Pat" Foote, USA
18. Lieutenant General Walter E. Gaskin, USMC (Ret.)
19. Vice Admiral Kevin P. Green, USN (Ret.)
20. General Michael Hayden, USAF (Ret.), served as Director of the Central Intelligence Agency from 2006 to 2009, and Director of the National Security Agency from 1995 to 2005.
21. Chuck Hagel served as Secretary of Defense from 2013 to 2015. From 1997 to 2009, he served as U.S. Senator for Nebraska.
22. Kathleen Hicks served as Principal Deputy Under Secretary of Policy from 2012 to 2013.
23. Brigadier General (Ret.) David R. Irvine, USA
24. Lieutenant General Arlen D. Jameson (USAF) (Ret.), served as the Deputy Commander of U.S. Strategic Command.
25. Brigadier General (Ret.) John H. Johns, USA
26. Colin H. Kahl served as Deputy Assistant to the President and National Security Advisor to the Vice President. Previously, he served as Deputy Assistant Secretary of Defense for the Middle East from 2009 to 2011.
27. Rear Admiral Gene Kendall, USN (Ret.)
28. Lieutenant General (Ret.) Claudia Kennedy, USA
29. Major General (Ret.) Dennis Laich, USA
30. Major General (Ret.) Randy Manner, USA
31. Brigadier General (Ret.) Carlos E. Martinez, USAF (Ret.)

32. General (Ret.) Stanley A. McChrystal, USA, served as Commander of Joint Special Operations Command from 2003 to 2008, and Commander of the International Security Assistance Force and Commander, U.S. Forces Afghanistan from 2009 to 2010.
33. Kelly E. Magsamen served as Principal Deputy Assistant Secretary of Defense for Asian and Pacific Security Affairs from 2014 to 2017.
34. Leon E. Panetta served as Secretary of Defense from 2011 to 2013. From 2009 to 2011, he served as Director of the Central Intelligence Agency.
35. Major General (Ret.) Gale S. Pollock, CRNA, FACHE, FAAN.
36. Rear Admiral Harold Robinson, USN (Ret.)
37. Brigadier General (Ret.) John M. Schuster, USA
38. David Shear served as the Assistant Secretary of Defense for Asian and Pacific Security Affairs from July 2014 to June 2016.
39. Rear Admiral Michael E. Smith, USN (Ret.)
40. Brigadier General (Ret.) Paul Gregory Smith, USA
41. Julianne Smith served as Deputy National Security Advisor to the Vice President of the United States from 2012 to 2013. Previously, she served as the Principal Director for European and NATO Policy in the Office of the Secretary of Defense in the Pentagon.
42. Admiral James Stavridis, USN (Ret.), served as the 16th Supreme Allied Commander at NATO.
43. Brigadier General (Ret.) Marianne Watson, USA
44. William Wechsler served as Deputy Assistant Secretary for Special Operations and Combating Terrorism at the U.S. Department of Defense from 2012 to 2015.
45. Christine E. Wormuth served as Under Secretary of Defense for Policy from 2014 to 2016.

46. Rear Admiral Dick Young, USN (Ret.)

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Amicus Brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 2592 words. This Amicus Brief complies with the typeface and the type style requirements of Fed. R. App. P. 32(a)(5)(A) because this brief has been prepared in a proportionally spaced typeface using Word 14-point Times typeface.

Respectfully Submitted,

 /s/ Harold Hongju Koh

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932
harold.koh@ylsclinics.org

CERTIFICATE OF SERVICE

I, Harold Hongju Koh, hereby certify that on December 15, 2017, the foregoing document was filed and served through the CM/ECF system.

Respectfully Submitted,

_____/s_____

Harold Hongju Koh
RULE OF LAW CLINIC
Yale Law School
127 Wall Street, P.O. Box 208215
New Haven, CT 06520-8215
203-432-4932
harold.koh@ylsclinics.org