No. 20-72793

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re DONALD J. TRUMP, *et al.*,
Petitioners.

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

v.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
Respondent,

RYAN KARNOSKI, *et al.*,
Real Parties in Interest-Plaintiffs,

STATE OF WASHINGTON,
Real Party in Interest-Plaintiff-Intervenor.

REAL PARTIES IN INTEREST-PLAINTIFFS AND PLAINTIFF-INTERVENOR'S SUPPLEMENTAL ADDENDUM VOLUME I

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Subject: FW: [EXT] Fwd: FW: attachments
Attachments: j.1365-2265.2009.03625.x.pdf

From: Paul McHugh
Sent: Tuesday, February 13, 2018 12:34 PM
To: 'Bushman, William CIV SD' [redacted]
Subject: RE: attachments

Mr. Bushman I've attached a copy of the study you wanted. Also I realize that I sited Tom Wise in Fairfield. I of course meant Fairfax Virginia. Sorry Paul McHugh

From: Bushman, William CIV SD [mailto:[redacted]
Sent: Monday, February 12, 2018 6:00 PM
To: Paul McHugh [redacted]
Subject: RE: attachments

Thank you, sir. This is most helpful.

One additional question: do you have access to a copy of the following study?

- Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of qualify of life and psychosocial outcomes," Clinical Endocrinology 72 (2010): 214-231.

Thank you again for your help.

Best,
Will

William G. Bushman

Office of the Secretary of Defense

Office: [redacted]

Cell: [redacted]

NIPR: [redacted]

SIPR: [redacted]

JWICS: [redacted]

From: Paul McHugh [mailto[redacted]
Sent: Monday, February 12, 2018 2:12 PM
To: Bushman, William CIV SD [redacted]
Subject: RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

From: Bushman, William CIV SD [mailto:[redacted]
Sent: Sunday, February 11, 2018 3:30 PM
To: Paul McHugh [redacted]
Subject: RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,

Will Bushman

William G. Bushman

Office of the Secretary of Defense

Office: [redacted]

Cell: [redacted]

NIPR: [redacted]

SIPR: [redacted]

JWICS: [redacted]

From: Paul McHugh [mailto[redacted]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD <[redacted]>
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

From: SecDef26
Sent: Monday, January 29, 2018 5:34 PM
To: 'Greg Newbold'
Subject: RE: Information

Many thanks!

From: Greg Newbold [redacted]
Sent: Monday, January 29, 2018 5:03 PM
To: SecDef26 <[redacted]
Subject: Information

One additional thought in amplifying the hypocrisy -- for good reason, we don't accept enlistments from people who need extensive dental work or have a knee that needs surgery, but the medical obligations of this are beyond the pale. Then add the suicide rates and other psychological issues that disrupt cohesion and consume time (and make one non-deployable). Then check out the real letter attached.

- Dr. Paul McHugh:

https://www.washingtonpost.com/national/health-science/long-shadow-cast-by-psychiatrist-on-transgender-issues-finally-recedes-at-johns-hopkins/2017/04/05/e851e56e-0d85-11e7-ab07-07d9f521f6b5_story.html?utm_term=.d7ec937610d6

Former Chief Psychiatrist Johns Hopkins University. Among other facts avoided on transgender issues, he points out that the suicide rate among those who have had a sex change operation is 20 times that of non-transgenders.

- Ret COL/Professor Woody Woodruff:

https://news.campbell.edu/articles/campbell-law-professor-woodruff-retire-may/

https://directory.campbell.edu/people/william-woody-a-woodruff/

- Walt Hyer (a transgender who made a mistake and now studies the issue):

http://www.thepublicdiscourse.com/2017/04/19080/

From: Woodruff, William A. <[redacted]
Sent: Tuesday, February 06, 2018 10:13 PM
To: Bushman, William CIV SD
Subject: Re: Phone Call
Attachments: Bushman memo.pdf

Will: Thanks for talking with me this morning. I've attached a memo that summarizes my thoughts on this matter. I hope it will be helpful. It doesn't cover everything we discussed, but I think it hits the main points.

Having been through the gauntlet on similar issues in the past, I understand the pressures and the difficulties. I note that Secretary DeVoss at DoE rescinded the Obama "Dear Colleague" letter that caused so much strife in schools around the country. Of course, she wasn't faced with preliminary injunctions and the critical mission of national defense. I do not envy you or Secretary Mattis but making tough decisions to accomplish important missions is what we train for. If it was easy anyone could do it.

Please let me know how I can help as things move forward.

Woody

William "Woody" Woodruff
Professor of Law
Campbell University School of Law
225 Hillsborough St.
Raleigh, NC 27603
[redacted]

From: "Bushman, William CIV SD" <[redacted]>
Date: Friday, February 2, 2018 at 4:13 PM
To: "William A. Woodruff" <[redacted]>
Subject: RE: Phone Call

Thank you for your email. How does Tuesday at 10:00 am my time work (I think 8:00 am your time)?

I look forward to speaking with you. Thanks again.

- Will

From: Woodruff, William A. [redacted]
Sent: Friday, February 2, 2018 3:16 PM
To: Bushman, William CIV SD <[redacted]
Subject: Re: Phone Call

Mr. Bushman:

Thank you for your email. I can arrange to be available next week. First thing Monday morning probably works best for me. I am in the Mountain Time zone so I am two hours behind you. I'm usually up by 6:00am my time, which would be 8:00am for you. Let me know what day and time works best in your schedule. I have a dental appointment Tuesday at 11:00am but am otherwise open. I would prefer to get our call scheduled so I can commit to some volunteer work I do at the National Ability Center. But, our call will take priority over other matters. Other than the dental appointment whatever time works best for you I can arrange to be available.

William "Woody" Woodruff
Professor of Law
Campbell University School of Law
225 Hillsborough St.
Raleigh, NC 27603
[redacted]

From: "Bushman, William CIV SD" <[redacted]
Date: Friday, February 2, 2018 at 12:38 PM
To: "William A. Woodruff" <[redacted]
Subject: Phone Call

Professor Woodruff,

My name is Will Bushman and I am a special assistant for Secretary Mattis. I am working the transgender policy review for the Secretary, and your name came up as a potential reference. I'd like to get your perspective on the issue.

Are you available next week to discuss over the phone? I'm generally free early next week (Monday-Wednesday).

Thanks in advance for your assistance.

Best,
Will Bushman

William G. Bushman
Office of the Secretary of Defense
[redacted]

To: William Bushman, OSD
From: Woody Woodruff
Date: 6 Feb 2018
Subject: Transgender Issues

The Constitution vests control and operation of the Armed Forces in the Legislative and Executive branches of government. Article I, § 8, clause 11, gives Congress the power to "declare war." Clause 12 places the responsibility and authority in Congress to "raise and support armies." Clause 13 extends that authority and responsibility to "provide and maintain a navy." Clause 14 gives Congress the plenary authority to "make rules for the government and regulation of the land and naval forces." Clause 15 extends Congress' military authority to "provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions." Clause 16 vests in Congress the power to "provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress." Finally, Clause 17 grants to Congress the power to "exercise exclusive legislation in all cases whatsoever, . . .over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Congress has exercised its military authority by enacting the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.* and a host of other provisions principally found in Title 10, United States Code. One specific way in which Congress has exercised its military powers is to extend to the President, as Commander in Chief, the power to "prescribe regulations to carry out his functions, powers, and duties under this title." 10 U.S.C. § 121.

In addition to the vast military powers granted to Congress, Article II, § 2 of the Constitution gives the President the title of "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into actual service of the United States." While the Constitution itself does not elaborate on the scope of the President's "Commander in Chief" powers, in *Federalist No. 69* Alexander Hamilton distinguished the role of the Executive as Commander in Chief with that of the King of England:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.

By splitting military authority between the Executive and Legislative branches, and recognizing the State's control over the State militia when not in active federal service, the Framers sought to alleviate some of the then-existing fear of a standing national army. Their recent experience with the King of England's use and command of the British Army and Navy was fresh in their minds and they did not want to implement a model that would allow a single person, the President, to wield the powers of an 18th century European monarch.

Article III of the Constitution, vests the judicial power of the United States in the Supreme Court and the inferior federal courts created by Congress. While not mentioned in the text of Article III, it is well settled that Federal Courts have the power to review acts of Congress and actions of the Executive to determine whether they are constitutional. *Marbury v. Madison,* 5 U.S. 137 (1803).

With regard to the courts' role in reviewing military affairs, the question is one of the scope of judicial review and the deference the judiciary owes to the exercise of constitutional authority of the Legislative and Executive branches. With regard to the President's exercise of his Commander in Chief power, the classic formulation of the scope of executive authority is Justice Jackson's concurring opinion in *Youngstown Sheet and Tube Co. v. Sawyer,* 343 U.S. 579 (1952). In reversing President Truman's direction to the Secretary of Commerce to seize the nation's steel mills in an effort to prevent a labor dispute from disrupting production needed to support the war effort in Korea, Justice Jackson set out a three-tiered paradigm of presidential power:

> (1) When the President acts pursuant to an express authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate . . . .
> (2) When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress have current authority, or in which its distribution is uncertain . . . .
> (3) When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . .
> *Id. at* 635-638.

Over the course of our nation's history both Congress and the Courts have developed restraining devices to preclude judges from becoming too deeply involved in military affairs. For example, Congress specifically exempted military courts-martials, commissions, and military authority exercised in the filed in time of war or in occupied territory from the judicial review provisions of the Administrative Procedure Act. 5 U.S.C. § 701(b)(1)(F)&(G).

As early as 1890, the Supreme Court recognized:

> An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another are impaired if any question be left open as to their attitude to each other.

In re Grimley, 137 U.S. 147, 153 (1890).

In *Orloff v. Willoughby,* 345 U.S. 83 (1953), the Court noted that, "judges are not given the task of running the Army . . . . [o]rderly government requires that the judiciary be . . . scrupulous not to interfere with legitimate Army matters. . . . *Id. at* 93-94.

The Court In *Gilligan v. Morgan,* 413 U.S. 1 (1973), the Kent State shooting case, held that the supervision of the training, equipping, and use of the National Guard was entrusted by the Constitution to the political branches of government and the courts should not substitute their judgment for the judgment of the political branches.

The power of Congress to exercise its authority over military affairs was recognized by SCOTUS in *Rostker v. Goldberg,* 453 U.S. 57 (1981), the case upholding the male-only draft. Rather than attempting to refine the level of scrutiny to be applied to claims of gender discrimination in the military, Justice Rehnquist relied upon the "broad constitutional power" of congress in military affairs and the relative lack of expertise of the judiciary in military affairs. *Id. at* 65. He noted that deference was especially appropriate when Congress exercised its constitutional authority under Art. I, § 8.

The Court has also acknowledged that federal judges are "ill-equipped to determine the impact upon discipline that any particular [judicial] intrusion upon military authority might have." *Chappel v. Wallace,* 462 U.S. 296, 305 (1983) *quoting* Earl Warren, *The Bill of Rights and the Military,* 37 N.Y.U. L. Rev. 181, 187 (1962).

In *Goldman v. Weinberger,* 475 U.S. 503 (1986), Captain Goldman, an ordained Jewish Rabbi and Air Force psychologist, challenged the Air Force regulation that precluded him from wearing a yarmulke while in uniform. The Air Force uniform regulations, he asserted, violated his First Amendment free exercise of religion rights. He argued that wearing an unobtrusive yarmulke did not present a danger to military discipline or *esprit de corps* and claimed the Air Force's assertion to the contrary had no support in actual experience or scientific fact. To support his position, he offered expert testimony that accommodating religious practices such as his would actually improve morale within the military. In rejecting Captain Goldman's First Amendment challenge, the Court first noted that soldiers do not shed their constitutional rights when they don the uniform, but that the unique nature of military service and the requirement for discipline and obedience demands a review by the courts that is "far more deferential than constitutional

review of similar laws or regulations designed for civilian society." *Id at* 507. Importantly, the Court noted that even if the military policy is based on professional military judgment as opposed to scientific or expert studies, this deferential scope of review applies:

> But whether or not expert witnesses may feel that . . . exceptions to . . . [the military policy] are desirable is quite beside the point. The desirability of . . . regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.

Id. at 509.

From the above survey of constitutional allocation of military power and Supreme Court opinions dealing with challenges to the exercise of that power by both the Executive and Legislative branches several principles emerge:

(1) The fundamental responsibility for military matters rests with the Congress and the President;
(2) When the President and Congress act in concert the scope of Presidential power over military affairs is at is maximum;
(3) When the President acts in the absence of congressionally granted authority, his power is limited to that conferred by his title of Commander in Chief;
(4) While individual members of the Armed Forces do not give up the protections of the Bill of Rights when they enter military service, the scope of those rights and the degree to which individual freedom is impacted differs between civilian life and military life;
(5) When called upon to review military policies, courts should give deference to the political branches' judgments because the Constitution vests that authority in the political branches, not the judiciary, and failure by the courts to appreciate that separation of powers principle shows disrespect to coordinate branches of government; and
(6) Professional military judgment is entitled to deference even in light of countervailing "expert" opinion and studies.

In applying the above principles to the current transgender issue, we find the following:

1. In the exercise of its power to raise and support armies and to make the rules and regulations governing the land and naval forces, Congress authorized the Executive branch to promulgate regulations: "The President may prescribe regulations to carry out his functions, powers, and duties under this title." 10 U.S.C. § 121.

2. Pursuant to this delegation of authority from Congress, the President, through the Secretary of Defense, has issued DoD Instruction 6130.03, which establishes medical standards for accession into the military.
3. Evidence of surgical procedures to male or female genitalia to affect a sex change does not meet accession physical standards under DoDI 6130.03.
4. Psychosexual conditions, to include transsexualism, are disqualifying.
5. Late in the Obama administration, DoDI 6130.03 was amended to remove transexualism and evidence of surgical procedures to affect a sex change from the list of disqualifying conditions if the applicant had been medically stable for at least 18 months prior to accession. DTM 16-005, June 30, 2016.
6. The effective date of this change was 1 July 2017, some six months after the Obama administration left office.
7. The power and authority to make this regulatory change was within President Obama's authority under 10 U.S.C. § 121.
8. The Trump administration's Secretary of Defense, James Mattis, delayed the effective date of the change until 1 Jan. 2018. The power and authority to delay the effective date was within the discretion of the Executive Branch.
9. In August 2017, President Trump directed the Secretary of Defense to delay the effective date of the proposed changes to DoDI 6130.03 until Secretary Mattis had an opportunity to study the issue further and to make recommendations to the President as to whether and under what conditions service by those with gender dysphoria was appropriate and furthered the goal of combat readiness.
10. The power and authority to delay the effective date of the proposed change and to require further consideration was within the President's authority under 10 U.S.C. § 121.

Under Justice Jackson's *Youngstown Steel* paradigm, both President Obama and President Trump were acting within the first tier of Executive power. Both acting under the express delegation of power from Congress to issue regulations to govern the military forces and Congress had not placed any restrictions, limitations, or conditions on the exercise of that power by the Executive in the area of the medical qualifications as they pertain to gender dysphoria. The logical conclusion is that if one president had the authority to act in this area, then all presidents have the authority and power to act in this area and the courts are obligated to review any challenge to those decision with deference. This is especially true in this instance since President Trump's directive did not establish the policy but merely postponed the previous administration's proposed policy change until it could be further evaluated.

In reviewing the policy on the merits, whatever it might be, the courts should also apply a scope of review that reflects the constitutional allocation of power over military policy to the political branches and take great care not to substitute its judgment for that of the constitutionally empowered actors in this sensitive and important area of military policy. In other words, the scope of review on the merits

must heed the teachings of the Supreme Court's long line of cases dealing with judicial intervention in military affairs.

In the current litigation over the transgender policy, the courts have overstepped their bounds in entering a preliminary injunction (PI) that disables the current Commander in Chief from exercising his legitimate authority under 10 U.S.C. § 121 and his power under Art. II, § 2, of the Constitution in delaying the effective date of the previous President's policy decision to change the medical accession standards.

A preliminary injunction is designed to preserve the *status quo* while the matter proceeds through litigation in order to prevent irreparable harm to the plaintiff. In order to secure a preliminary injunction, a plaintiff has the burden to establish:

1. There is a likelihood of irreparable harm with no adequate remedy at law;
2. The balance of harm favors the plaintiff;
3. There is a likelihood of success on the merits of the case; and
4. The public interest favors the granting of the injunction.

First, the courts erred in finding irreparable harm. The only harm sustained by the plaintiffs in these actions is a delay in the effective date of the proposed changes to the medical standards. While a delay may inconvenience the plaintiffs, it is not "irreparable." Should the plaintiffs ultimately prevail on the merits the court has the power to order "constructive service" credit to make up for the time that they could have served had the delay not been imposed. Thus, they have an adequate remedy at law and cannot satisfy the first element.

To hold, as the courts did here, that the delay infringes a constitutional right and, thus, is irreparable *per se* assumes the question rather than analyzing it. The ultimate issue in this case is whether the constitution grants those with gender dysphoria a right to serve in the military. The Supreme Court, however, has never held there is a constitutional right to serve in the military. In a matter of first impression to hold that the mere allegation of a novel constitutional right is sufficient to meet the first requirement of the PI standard makes the first element of a PI a nullity. In this regard, the teaching of *Goldman v. Weinberger* is particularly germane. Captain Goldman claimed the Air Force uniform policy forbidding the wearing of a yarmulke while in uniform violated the Free Exercise clause of the First Amendment, a specific provision of the Bill of Rights and a policy that in civilian life would have to pass strict scrutiny. The Court recognized the unique nature of military service and declined to evaluate the policy under the traditional First Amendment scrutiny paradigm. Instead, the Court properly recognized the constitutional authority and responsibility of the political branches for military affairs, as well as the judiciary's lack of expertise in such matters, and deferred to the Executive.

In the transgender litigation the plaintiffs claim that the Trump administration will ultimately promulgate a policy that will exclude them from service based on their diagnosed condition of gender dysphoria and that such a policy warrants heightened scrutiny because it is discrimination based on "sex." Unlike the specific First Amendment claim in *Goldman*, the Supreme Court has never held that one diagnosed with gender dysphoria is a member of a "suspect class" and policy decisions in civilian life, much less in the military setting, based on such a diagnosis must be subject to strict or heightened scrutiny. For the lower courts here to find that plaintiffs allegation raises a constitutional issue to warrant finding irreparable harm *per se* ignores that important element of preliminary injunctions, especially when the challenge is to a military policy.

Second, the balance of harms in this case does not favor the plaintiffs. The only harm at this point is a delay in realizing their individual desires to serve in the military or to secure the medical treatment to facilitate their desired gender change. There is nothing stopping them from pursuing gender transition in the civilian world, so the only harm from the delay ordered by President Trump is the delay in realizing their individual desires to join the military. Even that harm is speculative. There is nothing to guarantee that when the day of induction arrives the applicant will be otherwise qualified. There is no guarantee that the applicant will successfully complete training. In short, the harm experienced by the plaintiffs in these cases is that the government policy communicates to them and society that they are not qualified to serve and it "stigmatizes" them. It does not deny them an education. It does not deny them the opportunity to seek gainful employment outside the military. It does not prevent them from establishing meaningful professional and personal relationships with others. In just frustrates their immediate desire to join.

From the government's perspective, however, the harm is far more significant. To implement the change as ordered by the courts the government will expend time, effort, money, and other resources and access into the military individuals whose medical conditions predict some periods of medical non-deployability and will require other soldiers to sacrifice privacy in the close living quarters typically found in the military setting. The unique, varied, and often austere conditions of military living mean that the entire unit, not just the individual transgendered soldier, will have to adapt to a socially and medically complex condition. All of that will reduce the time and attention that can be paid to preparing for and fighting our nation's wars. A delay to give the current administration time to consider the matter further and to sort through the implications of this novel and complex condition and its impact on national defense is reasonable and consistent with orderly government.

Third, the likelihood of success on the merits is not nearly as clear as the plaintiffs and the courts have said. In looking at the Supreme Court cases dealing with the political branches authority to establish military policy we find an unbroken line of authority that gives considerable deference to the political branches in this important area. To assert that gender dysphoria is a "quasi suspect class" that

demands heightened scrutiny and requires the government to justify its medical qualification standards with scientific and expert evidence to convince a judge of its appropriateness ignores both the teachings of the Supreme Court and the complexity of introducing the condition of gender dysphoria into the unique setting of the military. *Goldman* clearly held that professional military judgment, something the current Commander in Chief has tasked the Secretary of Defense to study prevails over the opinion of experts and activists. *Goldman at* 509. Additionally, there is the issue of the courts' jurisdiction to consider the underlying issue at this stage. The Trump Administration has not formulated its final policy and the impact of that unknown policy on these plaintiffs is not ripe for judicial consideration. The lower courts' assumption that the ultimate policy will disqualify the plaintiffs from military service does not change the fact that the Constitution vests that policy choice in the political branches and whatever the final policy it will still be entitled to a deferential standard of review and not "heightened scrutiny" as the courts here have found.

Finally, the public interest here has to be the interest in operating within the established constitutional framework of separation of powers and recognizing the appropriate roles of the three coordinate branches of government in establishing military policy. If the public interest is to merely give effect to the individual desires of the plaintiffs to serve and to send a message that discrimination on the basis of a medical condition is inappropriate, then we have sacrificed the important on the altar of political correctness. While the appropriateness of service by those with gender dysphoria is the specific topic of debate, the more important issue is who gets to resolve that question and what role in our system of government do the courts play. The PI issued in these cases assumes that the government's interest in preserving the power, authority, and prerogatives of the political branches is not as important as facilitating the desires of individual plaintiffs who wish to serve. The elevation of individual preferences over the constitutional allocation of authority for military policy is not in the public interest. And, ironically, it is inimical to military service, the very result the plaintiffs seek.

It is important to note, that these judicial orders actually require the current administration to change enlistment medical standards and eliminate from the disqualifying list conditions that have been present and uncontroversial for as long as we've had an Army. The Obama-ordered changes in enlistment standards did not take effect while President Obama was the Commander in Chief. Rather, those enlistment standards were ordered to take effect after a new President assumed the duties, obligations, and responsibilities of the Commander in Chief. To hold, as the courts have done here, that a previous Commander in Chief can dictate to a subsequent Commander in Chief what military enlistment policies should be and preclude the subsequent Commander in Chief from exercising his constitutional responsibility as he sees fit ignores the structure of our government and elevates the policy preferences of *individual* presidents over the constitutional allocation of power and responsibility for military affairs to the Executive Branch and to the *office* of the President. Federal courts should be reluctant to substitute their

judgment as to what the policy should be without even giving the incumbent President the opportunity to exercise his constitutional authority in this sensitive area.

Because these injunctions actually impose a new policy on the military and do not merely preserve the *status quo*, they will control military accession standards until the litigation is finally resolved. In other words, as long as the PIs are in place the President and the Secretary of Defense are powerless to implement a new policy that differs in any material respect from the one ordered by the courts. The upshot is that the Obama policy will remain in effect for the next several years as the cases work their way through the courts and those with gender dysphoria are accessed into the force. The military will be the laboratory for social experimentation as it deals with the medical, social, and psychological issues surrounding gender dysphoria and transsexualism. While some may argue that the military is equipped and capable to deal with these issues and can provide useful data and experience for the rest of society in this complex area, the mission of the military is national defense, not advancing scientific knowledge of human sexuality. The only way to avoid this scenario is to seek SCOTUS review of the PIs immediately.

Should SCOTUS stay the PIs, the Administration would be free to develop and implement whatever policies that professional military judgment finds appropriate. While plaintiffs will no doubt challenge those policies in court, the action by SCOTUS in staying the PIs will send an important message to lower courts not to exceed the proper scope of their Art. III powers when reviewing military policy decisions the Constitution vests in the political branches.

Should SCOTUS deny review or affirm the PIs, the Administration will be no worse off than they are operating under the PIs without seeking SCOTUS review. As noted above, the PIs require the Administration to implement and obey the policy preferences of a previous administration until the cases are ultimately resolved. This may take several years. During that time the military will have to spend time, effort, resources, and energy incorporating a complex psychological and medical condition into the unique environment of the military. Not only will the military have to figure out as they go along how the individual transgendered soldier should be accommodated, treated, and cared for, but they must also deal with the privacy concerns of other soldiers in the close quarters of military living. But most importantly, the military must adapt to any potential impact on combat effectiveness caused by non-deployability of transgendered soldiers who are adjusting to their new identities and the complications of medical and/or surgical treatment. To some degree, the military has already assumed that burden by adopting a policy that currently serving transgendered troops can continue to serve and receive necessary medical care. While no litigant wants to receive an adverse ruling from SCOTUS, in this case if there is going to be an adverse SCOTUS decision it would seem better to know it sooner rather than later. In my opinion, the reasons to seek SCOTUS review and the likelihood that SCOTUS will follow its own precedent

in reviewing military policy decisions outweigh the potential downside of an adverse ruling.

We are, however, where we are and absent a willful refusal to comply with court orders the Trump administration must access into service those individuals with gender dysphoria who have been stable in their transition process for at least 18 months.[1] In anticipation of this event, DoD has issued numerous instructions to MEPS personnel in how to process transgender applicants. They even have a rule on what sort of underwear a gender-transitioning applicant for military service must wear. What they have not done, to this point, is think about what happens down the road when the litigation is finally resolved. If the Trump administration loses the case and the Supreme Court either affirms the lower court holdings or refuses to hear the case, the issue is, for all practical purposes, settled; transgender personnel can serve under the terms of the Obama policy. But what if the Trump administration prevails? What if the Supreme Court upholds the power of the current President to review and reject or refine the policies of a previous President? What happens to those individuals who were enlisted under the court-imposed policy but are no longer qualified under a policy promulgated by the current Commander in Chief?

A standard clause in military enlistment contracts notifies the applicant that many laws and regulations impact military service and that changes to those laws or regulations may change the applicant's status. Courts have routinely held that enlistees have no right to rescind their enlistment contract if they do not agree with the subsequent changes to laws or regulations. In this regard, the courts have interpreted enlistment contracts using general principles of contract law. Thus, under the contracts as they exist now a transgender applicant who was enlisted under the court-ordered policy could find himself no longer qualified for service if the government prevails in the litigation and reinstates the long-standing disqualification for gender dysphoria.

While the military could rely upon that general clause in enlistment contracts to subsequently determine whether a given soldier is still qualified to serve, fairness to the person seeking to enlist pursuant to the court order, the sensitive nature of the medical issue itself, the unprecedented order of the courts depriving the sitting Commander in Chief from maintaining the historical *status quo* until he has the chance to fully study the matter, and the need to preserve the prerogatives of the political branches to make military policy, neither the government nor the enlistee should rely on the vague "law and regulations may change" clause of current contracts. Rather, the government should inform the applicant of the uncertain

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[1] The status of currently serving transgendered servicemembers is not impacted by President Trump's directive to delay the implementation of the new accession standards. The President's memo to the Secretary of Defense specifically stated that no action should be taken against those with gender dysphoria who are currently servicing pending the formal promulgation of a policy based on the DoD study of the issue.

nature of his or her continued service should the government prevail in the litigation. Putting the applicant on notice of the uncertain status of his or her qualification to serve is fair to the applicant and clearly communicates that the government is complying with the courts' orders but is also contesting the issue and subsequent events may change the applicant's status. This specific notice allows the applicant to consider whether he or she wishes to enter the service under those conditions and risk an abrupt release should the government prevail and duly promulgated enlistment standards disqualify him or her from service. If the plaintiffs prevail in the litigation, the enlistment standards are set and the applicant will continue to serve under the other terms of the contract.

In summary, an explanation in the enlistment contract of the unusual and uncertain conditions under which the applicant is entering the service is fair, provides the applicant with information upon which to make an informed opinion as to whether to enlist, and clearly communicates the government's position that the Executive Branch, not the Judicial Branch, is responsible for determining enlistment qualifications and standards without defying a court order. It also precludes an applicant, should the government prevail in the litigation, from making the claim that he or she enlisted in good faith in reliance on assurances that stable gender dysphoria was not a disqualification, served honorably, and, therefore, should not be released from active duty and have his or her career cut short due to a subsequent change in medical standards. A suggested Annex to accession documents that would accomplish the above is attached to this memo.

As I mentioned during our phone conversation, I am not a psychiatrist, psychologist, or medical doctor and have no expertise in diagnosing and treating gender dysphoria. I have, however, read some of the medical literature on the subject. In my work with expert medical testimony in federal trials I have some ability to understand the technical medical literature. One thing that seems pretty constant across the published articles is the complexity of gender dysphoria and the almost universal recognition that further studies are needed to develop a better understanding of the condition, its etiology, and treatment. In other words, while medical research in this area has advanced in recent years, we still don't know what we don't know.

What is also recognized almost universally in the published literature is the relatively high rates of depression, suicide, and other adjustment disorders present in this population. Some researchers think this is explained by the discrimination, rejection, and other adverse responses the transgendered experience in society at large. Whether the societal response to the transgendered is the cause of the relatively high rates of depression and suicide or is merely a correlation should not determine military policy. If medical researchers are still trying to find the answers to this admittedly complex problem, if "experts" are still searching for answers, why should the Infantry lieutenant at Ft. Bragg be saddled with the responsibility of integrating this complex medical-social issue into the platoon he's preparing to deploy to a war zone? Once medical research has found the answers and once

society has formulated its response, then the integration of transgendered soldiers into the military will be inconsequential. Until then, however, our military should be focused on the national defense mission and not the complex question of transgenderism and American society.

Annex A to Enlistment/Reenlistment Document Armed Forces of the United States (DoD Form 4) dated _____ pertaining to the Enlistment/Reenlistment of _____

1. I understand that service in the Armed Forces by transgendered personnel or those going through a gender transition is currently subject to litigation in the Federal Courts.
2. I understand that Federal Courts have issued a nation-wide preliminary injunction establishing the following policy for military service by those with a diagnosis of gender dysphoria, with a history of medical treatment associated with gender transition, and/or a history of sex reassignment or genital reconstruction surgery:

   (1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months;
   (2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider: (a) the applicant has completed all medical treatment associated with the applicant's gender transition; and (b) the applicant has been stable in the preferred gender for 18 months; and (c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months;
   (3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider: (a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and (b) no functional limitations or complications persist, nor is any additional surgery required.

3. I understand that the government is challenging the Federal Court orders establishing the above policy regarding service by transgendered personnel or those whose gender identity is other than their biologically determined sex at birth.
4. I understand that my eligibility to serve and my application for enlistment/reenlistment/accession is being processed solely due to the preliminary injunctions issued by the Federal Courts.
5. I further understand that if the government prevails in the pending lawsuits the policy of service by transgendered personnel may change and new regulations and conditions on service by transgendered personnel may be promulgated.
6. I understand that depending upon the outcome of the litigation my eligibility and qualification to serve may be subject to new policies and standards duly promulgated by appropriate officials in the Department of Defense.
7. I understand that should the government prevail in the litigation and if duly promulgated regulations and policies disqualify me for service, my

enlistment/reenlistment/accession into the Armed Services will be voided, I will be immediately released from active duty and/or reserve status, as appropriate, and my eligibility for further or continued service, should I so apply, will be determined under regulations duly promulgated by appropriate authority.

8. With full knowledge that my accession into the Armed Services is conditioned upon the outcome of pending litigation and that I will be released from active duty and/or reserve status should the government prevail in the litigation and my eligibility for further service determined under regulations duly promulgated by appropriate authority, I still desire to enlist/reenlist in accordance with the other terms and conditions of this enlistment/reenlistment contract.

_____ _____
Signature Date

_____ _____
Witness Date

From: Bushman, William CIV SD
Sent: Monday, February 12, 2018 6:06 PM
To: Newman, Ryan D SES (US)
Subject: RE: attachments

Roger. Pentagon library! I'm happy to route things through me though...sometimes faster and they're very discrete about informational inquiries.

-----Original Message-----
From: Newman, Ryan D SES (US) [mailto:[redacted]
Sent: Monday, February 12, 2018 6:04 PM
To: Bushman, William CIV SD <[redacted]
Subject: RE: attachments

Didn't realize we had a library.

Ryan D. Newman
Deputy General Counsel (Legal Counsel)
Office of the General Counsel
U.S. Department of Defense
1600 Defense Pentagon, Rm. 3B688
Washington, D.C. 20301-1600
Direct: [redacted]
Fax: [redacted]
NIPR: [redacted]

Note: This message may contain information protected by the attorney-client, attorney work product, deliberative process, or other privileges. Do not disseminate without approval from the Office of the DoD General Counsel.

-----Original Message-----
From: Bushman, William CIV SD [mailto:[redacted]
Sent: Monday, February 12, 2018 6:01 PM
To: Newman, Ryan D SES (US) <[redacted]>
Subject: RE: attachments

Roger. Sent. Will let you know what I hear back from him. I can also reach out to the library. They sometimes have access to this type of information.

- Will

-----Original Message-----
From: Newman, Ryan D SES (US) [mailto:[redacted]
Sent: Monday, February 12, 2018 5:53 PM

To: Bushman, William CIV SD <[redacted]
Subject: RE: attachments

Will, could you also ask Dr. McHugh for a copy of this study:

Mohammad Hassan Murad et al., "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of qualify of life and psychosocial outcomes," Clinical Endocrinology 72 (2010): 214-231.

Ryan D. Newman
Deputy General Counsel (Legal Counsel)
Office of the General Counsel
U.S. Department of Defense
1600 Defense Pentagon, Rm. 3B688
Washington, D.C. 20301-1600
Direct: [redacted]
Fax: [redacted]
NIPR: [redacted]

-----Original Message-----
From: Bushman, William CIV SD [mailto[redacted]
Sent: Monday, February 12, 2018 4:19 PM
To: Newman, Ryan D SES (US) <[redacted]
Subject: FW: attachments

FYSA.

From: Paul McHugh [mailt[redacted]
Sent: Monday, February 12, 2018 2:12 PM
To: Bushman, William CIV SD <[redacted]
Subject: RE: attachments

Mr. Bushman, You might contact Dr. Chester Schmidt here at Hokins and Dr. Thomas Wise at Fairfield. PM

From: Bushman, William CIV SD [mailto:[redacted]
Sent: Sunday, February 11, 2018 3:30 PM
To: Paul McHugh <[redacted]
Subject: RE: attachments

Dr. McHugh,

Thank you again for speaking to us and providing additional information. During our call, I believe you mentioned there were other individuals who could also serve as resources for our policy review. Do you know of any other persons we should consider reaching out to?

Thanks,

Will Bushman

William G. Bushman

Office of the Secretary of Defense

Office: [redacted]

Cell: [redacted]

NIPR: [redacted]

SIPR: [redacted]

JWICS: [redacted]

From: Paul McHugh [mailto:[redacted]
Sent: Monday, February 5, 2018 2:51 PM
To: Bushman, William CIV SD [redacted]
Subject: attachments

Mr. Bushman, I mentioned these several articles in our conversation The Hayes Directory on evidence for sex reassignment surgery and other medical

treatments , The long term follow-up from Sweden for transgender surgery, My article in Nature Medicine in 1995, and our recent article in the New Atlantis. I've attached them all here . Do tell me if they get through. Paul McHugh

From: Jim Mattis [redacted]
Sent: Saturday, September 30, 2017 7:25 PM
To: SecDef26
Subject: FW: Draft article and more
Attachments: How not to deter a war.docx

- Authoritative people who defy PC doctrine: You can't talk to them, but perhaps someone trustworthy can. Perhaps DSD.
    - Professor of Law William Woodruff. Former Army infantry; former SJA. https://directory.campbell.edu/people/william-woody-a-woodruff/
    - Dr. Paul McHugh. Former Chief Psychiatrist Johns Hopkins University. Among other facts avoided on transgender issues, he points out that the suicide rate among those who have had a sex change operation is 20 times that of non-transgenders. https://www.cnsnews.com/news/article/michael-w-chapman/johns-hopkins-psychiatrist-transgender-mental-disorder-sex-change

From: Beyler, Juliet SES ASN (M&RA), MMP
To: Benedict, Scott F Col M&RA, M&RA, MP Division; Strobl, Michael R MRA, MPDV
CC: Mayer, Douglas S Col M&RA, M&RA/MP; Ingram, Elena P CAPT ASN (M&RA), MMP
Sent: 12/19/2017 2:45:22 PM
Subject: RE: Additional Questions

Eggs, Mike,
Thanks. I had similar thoughts. Mr. Dee told me he recommended the group/PoE not spend any more time collecting data, but rather focus on developing standards. So, not sure how DSD is going to tackle this.

Re- the suggested additional questions, do you know if the ACMC is generating his own additional list given he expressed concern that there had not been enough time to adequately review the matter? Are you developing those questions for him? Happy to push your two questions forward or do they need to be vetted w/ACMC? This is all hazy right now, we're pushing OSD for update on way ahead but nothing helpful heard yet.

SF/J
-----Original Message-----
From: Benedict BGen Scott F [mailto:scott.f.benedict@usmc.mil]
Sent: Tuesday, December 19, 2017 8:59 AM
To: Strobl, Michael R MRA, MPDV; Beyler, Juliet SES ASN (M&RA), MMP
Cc: Mayer, Douglas S Col M&RA, M&RA/MP
Subject: RE: Additional Questions

Thanks, have not seen or heard of these questions.

In addition to Mike's suggestion below, I would also paraphrase the VCNO question: Are TG members providing service that is exceptional, valued above their cisgender peers?, leading us to treat their accession and retention in a category different or above other SMs?

SF
eggs

Brigadier General S.F. Benedict, USMC
Director Manpower Plans and Policy Division

-----Original Message-----
From: Strobl SES Michael R
Sent: Tuesday, December 19, 2017 7:55 AM
To: Beyler SES Juliet M <juliet.beyler@navy.mil>
Cc: Benedict BGen Scott F <scott.f.benedict@usmc.mil>; Mayer Col Douglas S <douglas.mayer@usmc.mil>
Subject: RE: Additional Questions

Thanks Juliet.

My first thought on these questions is that it would take a good deal of time to collect the answers/data; especially with the holidays looming. We might not have that much time.

I'd suggest adding something along the lines of, "Could your service meet its recruiting and retention missions without TG members?"

Regards,
Mike

-----Original Message-----
From: Beyler, Juliet SES ASN (M&RA), MMP [mailto:juliet.beyler@navy.mil]
Sent: Tuesday, December 19, 2017 7:45 AM
To: NOWELL RADM JOHN B JR; Benedict BGen Scott F; Strobl SES Michael R
Cc: Ingram CAPT Elena P; Pizanti CDR Kimberly A
Subject: FW: Additional Questions
Importance: High

Gentlemen,
Sharing in case it's not trickled down yet. I've not heard anything yet on next steps given last week's developments. Will share

when/if I hear.
Vr/J

-----Original Message-----
From: Moran, William F ADM, OPNAV, VCNO
Sent: Monday, December 18, 2017 5:22 PM
To: Wilkie, Robert L Jr HON (US) (robert.l.wilkie4.civ@mail.mil); Kurta, Anthony M SES OSD OUSD P-R (US); Beyler, Juliet SES ASN (M&RA), MMP; Walters, Glenn M LtGen, ACMC; Giordano, Steven S MCPON OPNAV, N00D; Green, Ronald L SgtMaj SMMC, SMMC; Koffsky, Paul S SES OSD OGC (US); Gruber, David J CIV OSD OGC (US); Hebert, Lernes J SES OSD OUSD P-R (US); Gleischman, Rachel CIV SD (Rachel.Gleischman@sd.mil); Donovan, Matthew P HON (US); McConville, James C GEN USARMY HQDA VCSA (US); Wilson, Stephen W Gen USAF AF-CV (US); Walters, Glenn M LtGen, ACMC; Troxell, John W CSM USARMY JS DOM (US); Dailey, Daniel A SMA USARMY HQDA SMA (US); Wright, Kaleth O CMSAF USAF AF-CCC (US); Kepner, Christopher S CSM USARMY NG NGB (US)
Cc: Burke, Robert P VADM CNP, N1; Renshaw, Curt CAPT OPNAV, VCNO
Subject: Additional Questions
Importance: High

Teammates,

Not sure if there's formal tasking out there on providing "questions we would ask if given the opportunity to get additional data on the ~980 Service members self-identified as TG to inform our recommendation to SD", but here are a few to get the conversation going:

- Of the TG Service members who have deployed, how many had to return to CONUS or the nearest Medical Treatment Facility due to medical/hormone treatment issues?
- Of the TG Service members who have transitioned, or are in the process of transitioning, how many have worked with their commands to minimize impact on operations or deployment?
- How many TG Service members have postponed their transition in order to meet career milestones?
- How many TG Service members delayed their transition until their Shore Tour in order to reduce operational impacts?
- How many TG Service members have FITREP/EVALs above average compared to their peers? In the fight to retain talent, how talented are these individuals?
- How much deployed time do TG Service members have as compared to their peers? What is the PERSTEMPO of TG Service members?
- Of the TG veterans who have been treated by the VA, how many have completed their transition? What was the average time it took to complete?

VR, Bill

Message

From: Moran, William F ADM, OPNAV, VCNO [william.moran@navy.mil]
Sent: 1/26/2018 10:08:32 PM
To: Wilkie, Robert L Jr HON OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robert.l.wilkie4.civ086]; McConville, James C GEN USARMY HQDA VCSA (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=James.c.mcconville3.MIL]; Wilson, Stephen W Gen USAF AF-CV (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Stephen.w.wilson18.MIL]; Walters, Glenn M Gen USMC PANDR (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Glenn.m.walters.MIL]; 'Michel, Charles D ADM' [Charles.D.Michel@uscg.mil]; Hokanson, Daniel R LTG USARMY NG NGB (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Daniel.r.hokanson.MIL]; Donovan, Matthew P HON (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Matthew.p.donovan.civ589]; Modly, Thomas HON Under Secretary of the Navy [thomas.modly@navy.mil]
CC: Kurta, Anthony M SES OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Anthony.m.kurta.civ2be]; Hebert, Lernes J SES OSD OUSD P-R (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Lernes.j.hebert.CIV]; Burke, Robert P VADM USN CNO (US) [/O=EASF/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Robert.p.burke1.MIL]
Subject: RE: TG Policy

Robert, we think [redacted]
[redacted] VR, Bill

From: Wilkie, Robert L Jr HON OSD OUSD P-R (US)
Sent: Thursday, January 25, 2018 5:32:57 PM
To: McConville, James C GEN USARMY HQDA VCSA (US); Moran, William F ADM, OPNAV, VCNO; Wilson, Stephen W Gen USAF AF-CV (US); Walters, Glenn M LtGen, ACMC; 'Michel, Charles D ADM'; Hokanson, Daniel R LTG USARMY NG NGB (US); Donovan, Matthew P HON (US); Modly, Thomas HON Under Secretary of the Navy
Cc: Kurta, Anthony M SES OSD OUSD P-R (US); Hebert, Lernes J SES OSD OUSD P-R (US)
Subject: TG Policy

Gentlemen

As you know, we are in the final stages of developing a DoD position on transgender service in order for the Secretary to make his required recommendation to POTUS NLT 21 Feb. The TG Panel has reported their recommendations to the DSD/VCJCS, and to Service Secretaries and Service Chiefs.

We also had a lengthy discussion with the Secretary last Friday on the TG Panel recommendations, the ongoing legal challenges, and the court-ordered accession of transgender applicants we are now operating under. While discussions with the Secretary continue as to his ultimate policy recommendation to POTUS, he asked [redacted]

The Secretary asked [redacted]

Additionally, there seems to be some concern [redacted]

[redacted]

I thank you in advance for your cooperation.

Robert Wilkie

Message

From: Elaine Donnelly [elaine@cmrlink.org]
Sent: 8/15/2017 12:35:37 PM
To: 'Teller, Paul S. EOP/WHO' [Paul.S.Teller@who.eop.gov]
BCC: terry@cmrlink.org
Subject: RE: Anthony Kurta

Paul, I understand the situation's sensitivity. But here's the problem, which you can see in this Military Times article. Secretary Mattis is quoted as saying, " 'I've got my people there in the room to give them any military background that they might need to inform them,' Mattis said. 'They write the policy — we are in a supportive role, of course.' "

Right now the head of that team, according to his title and yet-to-be confirmed nomination to be Principle Deputy for P & R, is Anthony Kurta -- a guy who defied President Trump on an "LGBT Pride" event in June, and is obviously incapable of implementing President Trump's intent.

In general times, what options are there for re-assigning SES employees who are not suited for an important job? Can't his nomination be withdrawn? I would like to know what to ask for, and do whatever can be done to get Bob Wilke "in the room" where he belongs.

Best,
Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Tuesday, August 15, 2017 7:03 AM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

I just have to be real careful here.....

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 10:16 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

I don't understand – please tell me what the problem is before I go public with this.

Military folks who are counting on President Trump to deliver on his promises to end PC in the military did not vote for a committed, insubordinate Obama holdover to stay in a key DoD office that puts Kurta in a position to continue Obama's most radical policies. People are policy, and Kurta is not acceptable.

Again, what is the problem?

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Monday, August 14, 2017 8:08 PM

To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Will keep poking around, but it looks like this could be a steep uphill battle….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 5:41 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

Hi Paul,

I don't understand -- Was Kurta a political or "career reserved" SES appointee in 2014? If he was a political appointee under Carter he has no right to stay there, right? And if he is a career guy, why can't he be assigned elsewhere, to something other than LGBT or WIC issues?

Kurta defied Trump on the LGBT Pride Day controversy – his nomination needs to be withdrawn and someone else reliable – meaning without a record at odds with Trump – needs to take his place.

If not you, who can do something to accomplish this?

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Monday, August 14, 2017 4:05 PM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Well, I hear ya, but there's not much I can do from here, since he is indeed on staff….

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Monday, August 14, 2017 3:51 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>
Subject: RE: Anthony Kurta

Thanks Paul,

Unless something has changed, Obama holdover Anthony Kurta probably is heading the working group that is deciding what President Trump's or Secretary Mattis' positions will be when he gives new orders re transgenders. The review taks is assigned to the Under Secretary P & R position where Kurta is right now. RAND praised Kurta's work with them on their 2016 pro-transgender report, which had been prepared

months before Carter announced his mandate to recruit transgenders. It was not a "for study" – it was another tax-funded pro-LGBT RAND polemic.

Even if Bob Wilke is confirmed for the top position in September, he might get into the office too late. And since Kurta was nominated for the Principal Deputy position, where he can play the "Lawrence Korb" (Reagan appointee) role, he could get confirmed while Wilke is blocked – a scenario similar to what we have at the DoJ with Sessions recused.

What would you suggest we do? Kurta is unacceptable – either he is withdrawn, in view of President Trump's stated position, or there will have to be a fight that everyone would rather avoid. I've been working on various ways to thank Trump for his position on the transition issue. But media and pro-LGBT forces continue to double-down and they have a key man in the Pentagon to do their work for them.

I look forward to hearing from you -- More in a minute –

Elaine

From: Teller, Paul S. EOP/WHO [mailto:Paul.S.Teller@who.eop.gov]
Sent: Sunday, August 13, 2017 6:35 PM
To: Elaine Donnelly <elaine@cmrlink.org>
Subject: RE: Anthony Kurta

Sorry for my delay—thanks for this....

Paul Teller
Special Assistant to the President for Legislative Affairs
The White House
Paul.S.Teller@who.eop.gov

From: Elaine Donnelly [mailto:elaine@cmrlink.org]
Sent: Friday, August 4, 2017 3:03 PM
To: Teller, Paul S. EOP/WHO <Paul.S.Teller@who.eop.gov>; Makin, Sarah E. EOP/OVP <Sarah.E.Makin@ovp.eop.gov>; MarcTShort@who.eop.gov; John.mashburn@who.eop.gov
Subject: Anthony Kurta

Hello Paul and Friends,

The AP article I just sent you in a separate email mentions a DoD "working group" on the military transgender issue. This renews concerns about Obama holdover Anthony Kurta, and like-minded contractors at RAND, running this show and sabotaging its results.

The SASC website indicates that the nomination of Robert Wilke to be Under Secretary of Defense for Personnel & Readiness has not been acted upon. It also indicates that Obama holdover Anthony Kurta is awaiting confirmation as the Principal Deputy Under Secretary of Defense for P & R. (I thought that principal deputies did not require confirmation, but a SASC staffer just informed me that P & R is different.)

Now that President Trump has announced his intentions regarding transgenders in the military, Mr. Kurta has a conflict of interest that disqualifies him for promotion to Principal Deputy in the office of the Under Secretary for P & R. Nor should he be allowed to control or participate in the defense Department transgender working group project.

Mr. Kurta is more than an Obama holdover. He organized and participated in an LGBT Pride event on June 12, without presidential authorization. Because Mr. Kurta has shown a willingness to be insubordinate to President Trump, it is obvious that he should not be in position to "prove" the value of transgender policies he himself helped to write during the Obama years.

In view of election results and President Trump's stated intent re persons with gender dysphoria, Anthony Kurta is not a suitable nominee. I and many others would appreciate anything you can do to persuade the administration to withdraw the nomination.

What can we do to support Wilke's nomination, while keeping the self-interested Mr. Kurta out of the policy-making process?

All the best,
Elaine

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