Let's Make A Record: High Court On Trans Military Ban

By **Dan Woods** (February 8, 2019)

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On Jan. 22, 2019, in Trump v. Karnoski and Trump v. Stockman, the U.S. Supreme Court granted applications by the government to stay district court orders granting preliminary injunctions barring the government from implementing what amounted to a ban of military service by transgender individuals. The Supreme Court also denied the government's application for immediate review of those decisions, leaving them to percolate in the lower courts. Four justices dissented and would have denied the government's applications and allowed the injunctions to remain in place.

The Supreme Court's order drew fire from advocates for transgender military service. For example, Lambda Legal, co-counsel in the Karnoski case, issued a press release describing the order as "perplexing" and stating: "The Court's decision to allow the Trump-Pence Administration to institute their wanting and discriminatory practices while the litigation proceeds is disappointing — our siblings-in-arms deserve better."

But as explained in this article, the order is not perplexing. It reflects the court's desire to have a factual record on which it can ultimately make a decision on the constitutionality of the ban on military service by transgender individuals. The court is asking the parties to "make a record" it can review on the inevitable appeals from lower courts.

Background

At least until 2016, the military officially excluded transgender people from serving. It based this policy on its position that individuals with mental disorders were unfit to serve, relying on the American Psychological Association's designation, in its Diagnostic and Statistical Manual of Mental Disorders, that transsexual individuals have mental disorders.

The 1980 DSM listed "transsexualism" as a mental disorder; in 1994, the DSM changed the designation to gender identity disorder; in 2013, the DSM referred to it as gender dysphoria. According to the most recent DSM, transgender individuals — individuals who identify with a gender different from their biological sex — do not have a diagnosable mental disorder. But the DSM also provides that a diagnosis of gender dysphoria is appropriate for individuals who experience a "marked incongruence between [their] expressed gender and assigned gender, of at least 6 months' duration," associated with "clinically significant distress or impairment in social, occupational, or other important areas of functioning."

While banning transgender service, the military had since 1993 theoretically permitted homosexual individuals to serve as long as they did not reveal their orientation or engage in any homosexual conduct while serving, under a statute commonly referred to as "don't ask, don't tell." The regulations adopted pursuant to that statute defined homosexual conduct very broadly, however, to include any words or conduct that demonstrated a propensity to engage in homosexual conduct. The military discharged thousands of servicemembers under this policy.

Many constitutional law challenges to that statute were unsuccessful but, in 2010, following a court trial (in which I was the plaintiff's counsel), U.S. District Judge Virginia Phillips of the Central District of California ruled, in Log Cabin Republicans v. United States, that "don't ask, don't tell" violated the due process clause and the First Amendment, and she issued a permanent injunction against its enforcement. Following that ruling, Congress repealed the statute in 2011 and homosexuals were for the first time allowed to serve openly.

Open service by homosexuals prompted greater awareness of transgender military service. In 2015, then-Secretary of Defense Ashton Carter convened a working group to examine military service by transgender individuals and to develop recommendations for future policies. In June 2016, after receiving recommendations from the working group, Carter declared that "transgender individuals shall be allowed to serve in the military." He ordered the military to adopt policies and standards for accession of transgender individuals by July 1, 2017.

The accession standards would allow enlistment of transgender individuals with exceptions for individuals with a history of gender dysphoria and individuals in the midst of gender transition surgery or medical treatment. Carter also announced standards for retention with immediate effect. These standards prohibited the discharge of transgender individuals due to their gender identity or an intent to transition. The retention standards also established a process allowing servicemembers to undergo gender transition at the military's expense and to serve in their preferred gender upon completion of the transition.

Following the election of Donald Trump, James Mattis replaced Carter. On June 30, 2017, the day before the Carter accession standards were set to take effect, Mattis deferred their implementation until Jan. 1, 2018, stating that the military needed additional time to study the issues.

On July 26, 2017, President Trump tweeted that "the United States Government will not accept or allow" transgender individuals "to serve in any capacity in the U.S. Military." On Aug. 15, 2017, President Trump issued a memorandum directing Mattis to submit a plan for implementing the "return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have … negative effects on the military." He asked that the plan be completed by February 2018.

Mattis then sent the president a memorandum and report regarding "Military Service by Transgender Individuals." Among other information, the report indicated that about 1 percent of the active duty force, or nearly 9,000 individuals, identify as transgender. According to the government, the policy contained in the Mattis report provided that "transgender persons should not be disqualified from service solely on account of their transgender status," and drew several distinctions among transgender individuals.

Those without a history of gender dysphoria would be required to serve in their biological sex. Those with a history of gender dysphoria would be allowed to enlist if they had not undergone gender transition and could show 36 months of stability before enlisting. Those diagnosed with gender dysphoria while in service would be permitted to continue serving if they did not seek to undergo gender transition and served in their biological sex. Those with gender dysphoria who had undergone gender transition or sought to do so would be ineligible to serve, absent a waiver.

The Mattis policy also allowed service members diagnosed with gender dysphoria who remained in service following the 2016 Carter policy to continue to receive medically

necessary treatment and to continue to serve in their preferred gender.

The plaintiffs in the litigation, however, view the Mattis policy differently. They view it as a "multi-pronged approach to ensure that all transgender individuals are barred from military service." They contend that it excludes anyone who does not live in their biological sex; anyone who requires or has undergone gender transition; and anyone with gender dysphoria or a history of gender dysphoria who requires a change in gender.

The Litigation

Individuals, LGBTQ advocacy groups and others sued in federal courts almost immediately after the president's July 2017 tweet. Four cases worked their way through the federal courts: Jane Doe v. Trump (District of Columbia, filed Aug. 9, 2017); Stone v. Trump (District of Maryland, filed Aug. 28, 2017); Karnoski v. Trump (Western District of Washington, filed Aug. 29, 2017); and Stockman v. Trump (Central District of California, filed Sept. 5, 2017). All four cases challenged the constitutionality of the ban on transgender service contained in the president's tweet based on due process, equal protection, and first amendment grounds of free expression and association and privacy.

While the procedural history of each of the four cases differs, the district courts in all four cases issued preliminary injunctions against the enforcement of the 2017 ban and the government appealed all of these rulings against it.

In March 2018, the president issued a new memorandum, revoking his 2017 memorandum and permitting the military to implement the 2018 Mattis policy. After this announcement, the government moved to dissolve the preliminary injunction in the Stockman case; in September 2018, the district court denied that motion, finding that the 2017 and 2018 policies were "fundamentally the same." In January 2019, however, the U.S. Court of Appeals for the District of Columbia Circuit lifted the injunction in the Jane Doe case, finding that the Mattis policy substantially revised the earlier ban.

By the end of 2018, the four cases were at various levels of progress.

The Government's Applications to the Supreme Court

On November 2018, the government asked the Supreme Court to accept Karnoski and Stockman for immediate review, without waiting for the Ninth Circuit to rule on appeals from the preliminary injunctions. In addition, the government moved to stay of the injunctions in both cases if the court did not grant immediate review.

The government's applications argued that the district courts lacked authority to issue nationwide preliminary injunctions and that the injunctions threaten military readiness and unit cohesion and burden the military, citing precedent requiring that courts defer to the military. The plaintiffs opposed both applications, arguing that the scope of the injunctions was proper, that transgender service poses no threat to military readiness or unit cohesion, and that the balance of the equities favored the plaintiffs. The parties also disagreed as to the appropriate standard of review: The government argued for a rational basis standard; the plaintiffs argued for a higher level of scrutiny.

The Supreme Court's Orders

The Supreme Court's Jan. 22, 2019, orders in Karnoski and Stockman consists only of a single paragraph, staying the injunctions and, in effect, denying the government's

applications for immediate review. The orders do not explain their reasoning but it is not difficult to fathom why the Supreme Court ruled as it did.

With respect to nationwide injunctions, presidents from both political parties abhor them, as they limit their executive power. In the "don't ask, don't tell" case, for example, the Obama administration argued vehemently, but unsuccessfully, against the worldwide permanent injunction Judge Phillips issued. The Trump administration's arguments in the transgender cases mirror closely those same arguments.

The parties' briefs in the transgender cases cited many examples of nationwide injunctions granted and denied. But unlike "don't ask, don't tell," the injunctions in the transgender cases were preliminary injunctions, not permanent injunctions issued after a final decision on the merits. The authority of a single district court in one case, with perhaps only one plaintiff, to enjoin the conduct of the government throughout the country, or even the entire world, before a final decision on the merits, is an important issue with ramifications in many other areas of the law.

It is not surprising or perplexing that the Supreme Court will not want to decide this issue unless and until it has a case that presents that issue squarely and with a fully developed factual record that includes an evidence-based weighing of the benefits and harm of a nationwide injunction.

In addition, the appropriate standard of review of claims by transgender individuals is an open issue, and the Supreme Court presumably would prefer to rule on that issue after it has had an opportunity to study the reasoning of lower courts addressing the issue.

Furthermore, the Supreme Court routinely denies review in cases where it believes the factual record has not been sufficiently developed in the lower courts. A decision on transgender service will benefit from a fact-based record showing whether allowing transgender individuals to serve poses any threat to military readiness, unit cohesion or troop morale, and whether it would burden the military.

In the "don't ask, don't tell" case, we presented at trial servicemembers from all branches of the service to testify about their experiences serving the country to show that homosexual military service did not weaken unit cohesion or troop morale and, indeed, their discharges weakened the military. Log Cabin Republicans also presented testimony from expert witnesses on the psychological underpinnings of the concept of unit cohesion, the experiences of foreign militaries that allowed open service, the history of homosexual service in the military, and the unique effects that policy had on women in the military.

The government deposed and cross-examined these witnesses at trial and had the opportunity to present any contrary evidence. In that way, the district court could base a decision on the constitutional law questions on facts and evidence, not just the parties' arguments in a vacuum about the wisdom of the policy.

Similarly, in Hollingsworth v. Perry, the federal court decision from the Northern District of California in which U.S. District Judge Vaughn Walker held California's ban on same-sex marriage to be unconstitutional, a trial developed a fact-based record for higher court review.

The Supreme Court's orders in the transgender cases suggest that the parties follow the same fact-finding process. The differences between the parties as to the consequences and constitutional implications of the Mattis policy demonstrate the need for developing a fact-

based record. A trial could include testimony from transgender servicemembers who have served our country with valor, experts on gender dysphoria, experts on the experiences of foreign militaries, including our allies, that allow transgender service, and experts on the military who can testify for both sides as to the effects of allowing transgender services. Lay and expert witnesses for both sides could be cross-examined and through the traditional fact-gathering process, courts can make informed decisions on the issues.

Decisions based on fact-based records allow reviewing courts to make better decisions and also strengthen the public's confidence in the decision, as it is the facts, not judges' personal views, that are seen to be decisive.

While we do not know with absolute certainty, it is apparent that Chief Justice John Roberts wanted to have a better developed, fact-based record before deciding such a politically charged issue as transgender military service. The 5-4 ruling on the recent orders may or may not suggest how the court will ultimately rule on the merits, if and when the cases get to the court. The four votes to allow the injunctions to continue may hint at how those justices are likely to rule on the merits but the factual record to be developed in the lower courts will likely determine how Chief Justice Roberts — and the court — will rule.

Finally, one must wonder whether the Supreme Court would have ruled differently if Justice Anthony Kennedy were still on the court. He was the key vote and author of the court's landmark decisions in Bowers v. Hardwick, Lawrence v. Texas, and Obergefell v. Hodges. He did not need a factual record to decide in Obergefell that the due process and equal protection clauses guaranteed a fundamental right to same-sex marriage. That decision prompted Justice Roberts, in his dissenting opinion, to complain: "Five lawyers have closed the debate and enacted their own vision of marriage as a matter of constitutional law." The orders in the transgender cases are consistent with his judicial philosophy but, had Justice Kennedy remained a member of the court, Justice Roberts might have been on the short end of a 5-4 decision instead of being in a 5-4 majority.

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Disclosure: While a partner in White & Case LLP, Dan Woods was lead trial counsel for Log Cabin Republicans in the 2010 trial of Log Cabin Republicans v. United States. See 716 F.Supp.2d 884 (C.D. Cal. 2010).