

Supreme Court Revives Transgender Ban for Military Service

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By Adam Liptak

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WASHINGTON — The Supreme Court on Tuesday granted the Trump administration’s request to allow it to bar most transgender people from serving in the military while cases challenging the policy make their way to the court.

The administration’s policy reversed a 2016 decision by the Obama administration to open the military to transgender service members. It generally prohibits transgender people from military service but makes exceptions for those already serving openly and those willing to serve “in their biological sex.”

The vote to lift two injunctions blocking the policy issued by lower courts was 5 to 4, with the Supreme Court’s five conservative members in the majority.

Lawyers questioning the new policy said there was no need to enforce it while the cases challenging it moved forward.

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“Transgender people have been serving openly in all branches of the United States military since June 2016, including on active duty in combat zones,” their brief said. “Transgender individuals

have been permitted to enlist in the military since January 2018.”

“The government has presented no evidence that their doing so harms military readiness, effectiveness or lethality,” the brief said.

In granting stays of injunctions issued by Federal District Court judges in California and Washington State, the justices in the majority may have been influenced by the complaint by the administration that lower courts have been able to frustrate its policies by the issuance of injunctions applying to the entire country.

“It is with great reluctance that we seek such emergency relief in this court,” Solicitor General Noel J. Francisco wrote. “Unfortunately, this case is part of a growing trend in which federal district courts, at the behest of particular plaintiffs, have issued nationwide injunctions, typically on a preliminary basis, against major policy initiatives.”

“Such injunctions previously were rare, but in recent years they have become routine,” he wrote. “In less than two years, federal courts have issued 25 of them, blocking a wide range of significant policies involving national security, national defense, immigration and domestic issues.”

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The administration also asked the justices to hear immediate appeals from the two trial court rulings blocking the policy before the United States Court of Appeals for the Ninth Circuit, in San Francisco, rules on whether to affirm one of them. But the court turned down those requests without comment.

Advocates for transgender rights welcomed the court’s decision not to hear the appeals from the trial courts, which could have led to an expedited decision on the administration’s policy.

“In declining to hear these cases, the Supreme Court saw through the administration’s contrived efforts to gin up a national crisis,” said Jennifer L. Levi, the director of the Transgender Rights Project of GLBTQ Legal Advocates and Defenders.

“Unfortunately,” she added, “the court’s stay of the lower courts’ preliminary orders means that courageous transgender service members will face discharges while challenges to the ban go forward. The Trump administration’s cruel obsession with ridding our military of dedicated and capable service members because they happen to be transgender defies reason and cannot survive legal review.”

The transgender policy — and refined by Defense Secretary Jim Mattis — is complicated, and there is some dispute about its precise effect and timing. Broadly speaking, transgender people already serving openly may continue to serve once the injunctions are lifted. But those who seek to transition or serve openly after that happens risk discharge.

The Supreme Court's rules say it will review a federal trial court's ruling before an appeals court has spoken "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this court."

"This case satisfies that standard," Mr. Francisco wrote.

"It involves," he wrote, "an issue of imperative public importance: the authority of the U.S. military to determine who may serve in the nation's armed forces."

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He told the justices that prompt action was required to ensure that the Supreme Court could rule before its term ends in June. The alternative, he said, was to defer Supreme Court arguments in the matter to the term that starts in October, with a decision probably not coming until 2020.

Kerri Kupec, a Justice Department spokeswoman, welcomed the Supreme Court's revival of the policy.

"We are pleased the Supreme Court granted stays in these cases, clearing the way for the policy to go into effect while litigation continues," she said. "The Department of Defense has the authority to create and implement personnel policies it has determined are necessary to best defend our nation."

In a statement released Tuesday, a Pentagon spokeswoman said that the program was not a complete ban and that transgender troops would be treated with respect and dignity.

"It is critical," the spokeswoman, Lt. Col. Carla M. Gleason, said, that the Defense Department "be permitted to implement personnel policies that it determines are necessary to ensure the most lethal and combat effective fighting force in the world."

The department's "proposed policy," she said, "is based on professional military judgment."

Some veterans groups said the Supreme Court's move would complicate the jobs of military commanders who lead transgender service members.

"Based on earlier policy, they've openly declared themselves transgender, and now we're going to kick them out for being honest, only to possibly see this ban reversed at a future time," said Jon Soltz, an Iraq war veteran who is now chairman of VoteVets.org, a liberal veterans advocacy group. "The Supreme Court has made it harder for every commander in the military today. They're literally going to have to look at some of the best troops we have and kick them out for being honest about who they are."

Aaron Belkin, the director of the Palm Center, a research and advocacy group that focuses on sexuality and the military, said the military officials retained discretion over personnel policies.

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"While it is unfortunate that the Supreme Court has allowed military discrimination to be reinstated, it's critical to understand that the military is not required, and has no need, to reinstate the transgender ban, which would cause destabilizing whipsaws in personnel policy," Mr. Belkin said.

"The Defense Department should not reinstate the transgender ban," he said, "because it would undermine readiness, cause significant disruptions and uncertainty, deprive the military of much-needed talent, and wreak havoc with the lives and careers of the 14,700 transgender troops bravely protecting our nation's security."

Jody Davis, a transgender woman who is trying to join the Ohio National Guard, said she found it absurd that she may not be able to, since she had already served for eight years.

She joined the National Guard at 17 and became a sergeant in an armor crew. Now 48 and a nurse, she wants to rejoin the Guard as a part-time officer and social worker.

"It's ironic," she said. "I've already proved myself, and now they say I'm disqualified." As part of her yearlong effort, she lost 53 pounds and submitted reams of medical records.

"I might be able to slip in just under the wire, before the ruling takes effect," she said. "If so, it will provide a bit more stability for my family, but that's not why I'm doing it — I want to serve my country again."

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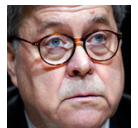
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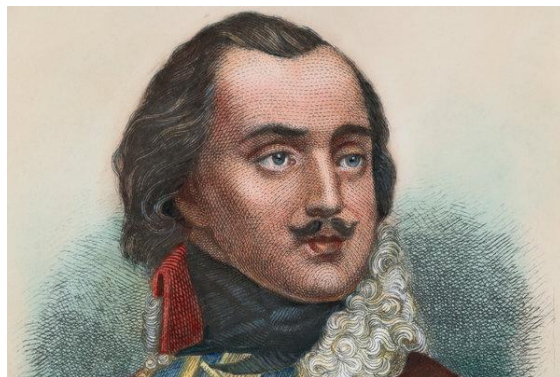


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