



THE CASE FOR INCLUSION

News and Legal Analysis on Issues Related to Diversity and Inclusion

Transgender Men and Women in the U.S. Military: The Effect of the Presidential Memorandum

BY TERRENCE J. BRIGGS • OCTOBER 24, 2017

What exactly is the effect of the Presidential Memorandum? Let's take this step-by-step:

To which military services does it apply?

It applies to the military services of the Department of Defense—Air Force, Army, Marines, Navy, National Guard, and Reserves—and the Coast Guard, which is within the Department of Homeland Security.

What has been the policy until this Memorandum?

Issues regarding military service of transgender individuals was long-considered and studied by the Department of Defense during the Obama administration. There was considerable pushback from many military leaders and conservative political activists. Ultimately, the administration determined that there was no empirical basis for such discrimination.

Since June of 2016, active duty transgender service members could no longer be involuntarily discharged simply for that fact—they could begin to serve openly. Beginning in October of 2016, these individuals could begin to receive medical care related to their gender dysphoria. The question of newly enlisting transgender volunteers was delayed until July 1, 2017 to give the services time to review their intake and basic training programs. This latter policy never took effect as Defense Secretary Mattis, in consultation with the Secretary of Homeland Security, delayed its implementation until January 1 2018.

How will those policies be changed?

All three of these strands of the policy on transgender people in the military will be rolled back to the policies that applied prior to June 1, 2016. If transgender individuals disclose their transgender identification, they may not enlist; if

they are already serving, they will not be discharged; and no medical treatment related to gender dysphoria will be provided or paid for by the military. However, none of the changes have yet to take effect.

No new enlistments of transgender people will be permitted after January 1, 2018.

No medical care related to gender dysphoria will be permitted after March 23, 2018 except as needed to protect the health of anyone who had already begun a course of gender reassignment treatment.

Current transgender service members will not be able to serve openly after March 23, 2018, “until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above.” These negative effects were that permitting openly transgender people to serve would hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources.

What else is in the Memo?

Secretary Mattis after consulting with DHS must submit a plan to implement the policies set out in the Memo to the President by February 21, 2018. That implementation plan “shall determine” how currently serving transgender people should be treated. As a lawyer I would say that the words, “shall determine” mean that Secretary Mattis’s implementation plan could provide that these transgender people may remain in military service. As an editorial comment, however, I will add that the Memo is not a model of clarity or careful drafting, so I would not count on the administration to read it the same way. The Memo also says that until Secretary Mattis has made that determination, no action against current transgender service members may be taken.

Is there an administrative process for changing these policies?

There does not seem to be a process for reconsideration of the ban on gender reassignment and related medical treatment.

As I described above, Sec. Mattis does seem to have the authority to determine what will be the policy toward current transgender troops.

Beyond that, the Memo says Secretary Mattis may advise the President in writing that a change is warranted in the policies of involuntary discharge of currently serving transgender people and permitting such individuals to voluntarily enlist. The final decision will be made by the President.

How likely is it that litigation will force the administration to delay or rescind these actions?

This question has been admirably addressed by my colleague Jen Garner here: [link](#)