Judge blocks ban on transgender in military

Ruling that transgender people probably have a constitutional right to be treated equally by the government, a federal judge in the nation’s capital temporarily blocked the Trump Administration on Monday from barring them from serving in the military.

In a 76-page opinion, U.S. District Judge Colleen Kollar-Kotelly gave transgender individuals now in the military a temporary right to remain in the ranks, and gave those who seek to enlist a temporary right to do so after next January 1. The ruling was only a tentative one, but will stay in place while the case moves on to a full trial on the validity of the ban suddenly announced by President Trump in late July – unless the Administration gets the order set aside by a higher court.

Although other federal judges have issued similar rulings suggesting that the Constitution’s guarantee of legal equality does apply to transgender people, the Washington jurist’s ruling was the first to do so in a case involving the nation’s military.

The Supreme Court has never ruled on the constitutional status of transgender people, but now has a case awaiting its attention, an appeal by an Illinois public school district. The Justices will consider that case later, probably early in the new year.

The practical effect of Monday’s decision by Judge Kollar-Kotelly was to put military policy on the issue back to where it was at the end of the Obama Administration, protecting transgender people already serving from being discharge and setting the stage to later allow enlistments. Enlistments, however, will not be allowed until after January 1, because the judge gave effect to an order by the Trump Administration – by Defense Secretary James Mattis – putting off until then that part of the Obama policy, to allow time for a new study of the issue.

Monday’s order will apply nationwide, and is effective immediately.

Although Judge Kollar-Kotelly based her ruling on a number of factors, the central point she made was that President Trump had dictated what the military’s transgender policy would be when he announced, via Twitter last June 26, that the military would no longer allow any transgender person to serve.

While the Defense Secretary has since taken some steps to ease that flat ban, the judge said it was the President’s call as the head of the military that set the policy. However, she did accept Secretary Mattis’ order to implement the presidential policy, though only so far as it set a January 1 date on enlistment opportunity. Under the ban as Mattis adopted it, discharges could begin as early as next March 23; that part of the ban is now on hold.

The judge’s temporary ruling on the constitutional rights of transgender people was based upon the finding that, when the challenge to the Trump ban is decided in a final way, there is a strong likelihood that it will be struck down as a violation of the Fifth Amendment’s promise that the people of America will enjoy equal protection under the laws of the federal government. (The Constitution’s Fourteenth Amendment also guarantees such equality, but that only restricts laws and policies of state and local government.)

In ruling that the challengers are ultimately likely to win, on both the question of continuing to serve and seeking to enlist, the judge said that those policies were adopted to exclude “an entire category of people from military service” solely because they are transgender, and that approach punishes them “for failing to adhere to gender stereotypes.”

The judge applied a middle-level constitutional test that the Supreme Court has followed for years in judging claims of discrimination based on sex. Not as rigorous as the test for judging claims of race bias, the middle-level test does require a strong justification for a challenged government policy.

Two facets of the decision went against the challenges filed by the active-duty and potential enlistees who sued. The judge refused to rule on whether the Pentagon’s new ban on sex-reassignment medical treatment or surgery for transgender servicemembers was unconstitutional, saying the challengers had not yet shown that they would personally be affected by that. And she rejected, with the understanding that the challengers could raise the issue again later, the claim that in changing the transgender policy, the government violated a promise that had enticed the transgender individuals to reveal their gender status and to seek to continue or begin serving.

In finding a strong chance of success for the challengers on their equality argument, the judge said she reached her conclusion based on several factors, none of which was persuasive by itself but were when viewed in combination. She stressed that, because she was judging an action by the military, she needed to be cautious, Ultimately, though, she found the military arguments wanting, as a group.

First, she treated as too broad and hypothetical the government claims that the ban was necessary because some transgender people have medical conditions that would impede their ability to perform military duty, that it might be difficult and could be costly to deploy transgender troops in some military situations, and that their presence in the ranks might cause disruption of “unit cohesion.”

Second, she said the argument by government lawyers about the negative impact on the military of such individuals in the ranks had been directly contradicted by studies that the military itself had done before the Obama Administration decided to end the services’ long-standing ban on transgender servicemembers.

Third, she was critical of the way that President Trump had initiated the new ban this year, an “abrupt” change announced via Twitter and “without any of the formality or deliberative process that generally accompany the development and announcement of major policy changes that will gravely affect the lives of many Americans.” That, she wrote, added support for the challengers’ claim that the ban “was not driven by genuine concerns regarding military efficacy.”

On that third point, Judge Kollar-Kotelly imitated an approach used by a number of other federal judges in barring the Trump Administration from enforcing much of its repeated attempt to curb immigration of foreign nationals from Mideast nations: relying on the statements of the President himself, either in tweets or in other public statements.

Although the judge’s order does block much of the transgender ban, she stressed that the order in no way stopped the Pentagon from conducting new studies on the transgender question.