

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,

Plaintiffs,

v.

DONALD J. TRUMP, et al.,

Defendants.

Case No. 1:17-cv-02459

**PLAINTIFFS' OPPOSITION TO DEFENDANTS'  
MOTION TO DISMISS AND REPLY IN SUPPORT OF  
MOTION FOR PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

I. The Court Has Subject Matter Jurisdiction Over Plaintiffs’ Claims. .... 3

    A. The Policy Changes Effected By President Trump’s Binding Directives Cause Plaintiffs To Suffer Injury-In-Fact. .... 3

        1. The Directive to Return to the Pre-2016 Policy, Under Which Transgender Service Members Are Subject to Discharge As Administratively Unfit, Creates Imminent and Ongoing Injuries. .... 4

        2. The Directive Banning Surgical Care for Gender Dysphoria Beginning March 23 Exposes Plaintiffs to Imminent Injuries..... 10

        3. The Directives Harm Plaintiffs by Preventing Their Accessions into the Officer Ranks. .... 13

    B. President Trump’s Binding Directives, Scheduled To Take Effect On January 1 And March 23, Are Ripe For Review. .... 17

II. Plaintiffs’ Claims Are Likely To Succeed On The Merits. .... 21

    A. President Trump’s Directives Violate Equal Protection. .... 21

        1. President Trump’s Abrupt Decision to Override the Military’s Considered Professional Judgment Is Owed No Deference. .... 21

        2. Defendants Do Not Attempt to Justify the President’s Directives to Subject Transgender Service Members to Discharge As Administratively Unfit, and to Deny Them Medical Care. .... 24

        3. Defendants Have Not Offered a Rational Justification for the President’s Decision to Rescind the Military’s Accession Policy. .... 25

    B. President Trump’s Directives Violate Substantive Due Process. .... 29

    C. President Trump’s Directive Banning Surgical Care Violates 10 U.S.C. § 1074..... 30

III. Plaintiffs Will Suffer Irreparable Injury Without An Injunction. .... 31

IV. The Balance Of Equities And The Public Interest Weigh Heavily In Favor Of An Injunction. .... 32

V. The Court Should Enjoin Defendants From Implementing Or Enforcing The Facially Unconstitutional Directives..... 33

CONCLUSION..... 35

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Able v. United States</i> , 88 F.3d 1280 (2d Cir. 1996).....	20, 21
<i>Allen v. Wright</i> , 468 U.S. 737 (1984), <i>abrogated on other grounds</i> , <i>Lexmark Int’l, Inc. v. Static Control Components, Inc.</i> , 134 S. Ct. 1377 (2014). ....	8, 9
<i>Am. Petroleum Inst. v. U.S. EPA</i> , 906 F.2d 729 (D.C. Cir. 1990).....	19
<i>Ariz. Dream Act Coal. v. Brewer</i> , 757 F.3d 1053 (9th Cir. 2014) .....	9
<i>Ariz. Dream Act Coal. v. Brewer</i> , 855 F.3d 957 (9th Cir. 2017) .....	32
<i>Ariz. Dream Act Coal. v. Brewer</i> , 81 F. Supp. 3d 795 (D. Ariz. 2015) .....	34
<i>Bartko v. SEC</i> , 845 F.3d 1217 (D.C. Cir. 2017).....	30
<i>Bassett v. Snyder</i> , 59 F. Supp. 3d 837 (E.D. Mich. 2014).....	27
<i>Bonnette v. D.C. Court of Appeals</i> , 796 F. Supp. 2d 164 (D.C. Cir. 2011).....	9
<i>Cole v. ArvinMeritor, Inc.</i> , 516 F. Supp. 2d 850 (E.D. Mich. 2005).....	32
<i>Commodity Futures Trading Comm’n v. Schor</i> , 478 U.S. 833 (1986).....	20
<i>Cook v. Gates</i> , 528 F.3d 42 (1st Cir. 2008).....	22
<i>Cty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	30
<i>Cty. of Santa Clara v. Trump</i> , 250 F. Supp. 3d 497 (N.D. Cal. 2017), <i>appeal filed</i> , 17-16887 (9th Cir. Sept. 18, 2017).....	<i>passim</i>

*Diaz v. Brewer*,  
656 F.3d 1008 (9th Cir. 2011) .....27

*Dixon v. Edwards*,  
290 F.3d 699 (4th Cir. 2002) .....33

*Elrod v. Burns*,  
427 U.S. 347 (1976).....31

*Elzie v. Aspin*,  
841 F. Supp. 439 (D.D.C. 1993).....31

*Emory v. Sec’y of Navy*,  
819 F.2d 291 (D.C. Cir. 1987).....21

*Equal Access Educ. v. Merten*,  
305 F. Supp. 2d 585 (E.D. Va. 2004) .....15

*Evancho v. Pine-Richland Sch. Dist.*,  
237 F. Supp. 3d 267 (W.D. Pa. 2017).....25

*Fishman v. Paolucci*,  
628 F. App’x 797 (2d Cir. 2015) .....32

*Gen. Accounting Office v. Gen. Accounting Office Pers. Appeals Bd.*,  
698 F.2d 516 (D.C. Cir. 1983).....30

*George Wash. Univ. v. District of Columbia*,  
391 F. Supp. 2d 109 (D.D.C. 2005).....29

*Glenn v. Brumby*,  
663 F.3d 1312 (11th Cir. 2011) .....25

*Goldman v. Weinberger*,  
475 U.S. 503 (1986).....22

*Gov’t Suppliers Consolidating Servs., Inc. v. Bayh*,  
975 F.2d 1267 (7th Cir. 1992) .....18

*Greer v. Spock*,  
424 U.S. 828 (1976).....22

*Guerra v. Scruggs*,  
942 F.2d 270 (4th Cir. 1991) .....20

*Hassan v. City of N.Y.*,  
804 F.3d 277 (3d Cir. 2015) (as amended Feb. 2, 2016) .....7



*Hunt v. Wash. State Apple Advert. Comm’n*,  
432 U.S. 333 (1977).....4

*Int’l Bhd. of Teamsters v. United States*,  
431 U.S. 324 (1977).....14

*Int’l Refugee Assistance Project v. Trump (“IRAP I”)*,  
857 F.3d 554 (4th Cir. 2017) (en banc), *vacated as moot sub nom. Trump v. IRAP*, — S. Ct. —, 2017 WL 4518553 (Oct. 10, 2017) .....21, 22, 33, 34

*Int’l Refugee Assistance Project v. Trump (“IRAP II”)*,  
— F. Supp. 3d —, 2017 WL 4674314 (D. Md. Oct. 17, 2017), *appeal docketed* No. 17-2231 (4th Cir. Oct. 20, 2017) ..... *passim*

*J.E.B. v. Alabama*,  
511 U.S. 127 (1994).....8

*Khan v. Children’s Nat’l Health Sys.*,  
188 F. Supp. 3d 524 (D. Md. 2016).....4

*Kobe v. Haley*,  
666 F. App’x 281 (4th Cir. 2016) (per curiam) .....3, 4

*Lansdowne on the Potomac Homeowners Ass’n v. OpenBand at Lansdowne, LLC*,  
713 F.3d 187 (4th Cir. 2013) .....19

*Lawrence v. Texas*,  
539 U.S. 558 (2003).....29

*Lujan v. Defs. of Wildlife*,  
504 U.S. 555 (1992).....8, 14

*Madsen v. Women’s Health Ctr., Inc.*,  
512 U.S. 753 (1994).....34

*Meinhold v. Dep’t of Defense*,  
34 F.3d 1469 (9th Cir. 1994) .....34, 35

*Miller v. Brown*,  
462 F.3d 312 (4th Cir. 2006) .....17, 20

*N.C. State Conference of NAACP v. McCrory*,  
831 F.3d 204 (4th Cir. 2016) .....34

*In re Navy Chaplaincy*,  
697 F.3d 1171 (D.C. Cir. 2012).....14, 16

*Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*,  
508 U.S. 656 (1993).....16

*Nelson v. NASA*,  
530 F.3d 865 (9th Cir. 2008), *rev'd on other grounds*, 131 S. Ct. 746 (2011).....31

*Obergefell v. Hodges*,  
135 S. Ct. 2584 (2015).....29

*Planned Parenthood of S.C. Inc. v. Rose*,  
361 F.3d 786 (4th Cir. 2004) .....7

*Retail Indus. Leaders Ass'n v. Fielder*,  
475 F.3d 180 (4th Cir. 2007) .....18

*Riva v. Massachusetts*,  
61 F.3d 1003 (1st Cir. 1995).....19, 20

*Roman Catholic Archdiocese of N.Y. v. Sebelius*,  
907 F. Supp. 2d 310 (E.D.N.Y. 2012) .....19

*Romer v. Evans*,  
517 U.S. 620 (1996).....7, 21, 23

*Rostker v. Goldberg*,  
453 U.S. 57 (1981).....22, 25

*Schalk v. Teledyne, Inc.*,  
751 F. Supp. 1261 (W.D. Mich. 1990), *aff'd*, 948 F.2d 1290 (6th Cir. 1991)  
(per curiam).....31

*Simmonds v. Immigration & Naturalization Serv.*,  
326 F.3d 351 (2d Cir. 2003).....20

*Spokeo, Inc. v. Robins*,  
136 S. Ct. 1540 (2016).....3

*Sporhase v. Neb. ex rel. Douglas*,  
458 U.S. 941 (1982).....14

*Thomasson v. Perry*,  
80 F.3d 915 (4th Cir. 1996) (en banc) .....22, 23

*Time Warner Cable, Inc. v. Hudson*,  
667 F.3d 630 (5th Cir. 2012) .....7, 8

*Townes v. Jarvis*,  
577 F.3d 543 (4th Cir. 2009) .....14

*U.S. House of Representatives v. U.S. Dep’t of Commerce*,  
11 F. Supp. 2d 76 (D.D.C. 1998).....19, 20

*United States v. Windsor*,  
133 S. Ct. 2675 (2013).....8

*Virginia v. Am. Booksellers Ass’n*,  
484 U.S. 383 (1988).....13

**Statutes**

10 U.S.C. § 1074.....30, 31

On August 25, 2017, in furtherance of his decision to ban transgender individuals from serving in the Armed Forces “in any capacity,” ECF No. 40-22, President Trump issued a formal memorandum with three directives to the Secretary of Defense. ECF No. 40-21. Effective January 1, 2018, the Secretary is directed to prohibit all men and women who are transgender from enlisting and commissioning, thereby rescinding the open-service accession policy that was scheduled to take effect on that date. *See id.* § 2(a). Effective March 23, 2018, the Secretary is directed to “halt” the use of government resources “to fund sex-reassignment surgical procedures for military personnel.” *Id.* § 2(b). And also effective March 23, the Secretary of Defense is “direct[ed]” to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016” — a policy that “authorize[s] the discharge of such individuals” as administratively unfit. *Id.* § 1.

These three directives, comprising President Trump’s Transgender Service Member Ban, are binding and self-executing. Unless President Trump amends his orders, men and women who are transgender will be permanently barred from enlisting and commissioning on January 1, will be denied any medically necessary surgical care for gender dysphoria on March 23, and will be subject to discharge as administratively unfit on the same date, even if they meet the military’s demanding medical fitness standards. *Id.* §§ 1, 2. On the face of these directives, Secretary Mattis’s discretion is limited to developing an “implementation plan” for “how to address transgender individuals currently serving in the United States military” in light of their new status, *i.e.*, subject to discharge as administratively unfit. *Id.* § 3.

Evading the real issue — the President’s binding directives soon to take effect — Defendants focus on an irrelevant *Interim* Guidance document that will soon expire. *See* ECF No. 60-5. According to defense counsel, there is no injury-in-fact and no ripe dispute because

President Trump has merely ordered a study, and no one can yet know what the final policy on transgender service members will be until that study is completed. The plain text of the President's directives proves otherwise. President Trump ordered sweeping policy changes first, and only asked questions later. Perhaps the military's study will change the President's mind; perhaps it will not. Either way, Plaintiffs do not ask this Court to speculate about what the President may do in the future; Plaintiffs ask only that the Court enjoin the binding directives that President Trump has already issued and that have caused and will continue to cause irreparable harm.

In straining to claim that the President has done nothing but order a study, Defendants actually underscore how anomalous and unjustifiable it was to direct sweeping policy changes *without* study or evidence, and against the recommendations of the Department of Defense ("DoD") and military leadership. Indeed, since the filing of Plaintiffs' motion it has only become clearer how unusual this decision was: the Chairman of the Joint Chiefs of Staff recently testified that his "advice" regarding transgender service members was that anyone who can meet the military's demanding standards "should be afforded the opportunity to continue to serve." Decl. of M. Kies (attached hereto), Ex. 29 at 22. Likewise, by emphasizing the Interim Guidance's temporary prohibition on discharge on the basis of transgender status, Defendants only highlight the significance of President Trump's directive *revoking* that protection and subjecting transgender service members to discharge as unfit as of March 23. Indeed, each of the Plaintiffs' commanding officers has submitted a declaration ominously noting that none of the service members in their respective units will face "separation or discharge due to his or her transgender status or gender dysphoria diagnosis . . . *absent a change in the existing policy.*" ECF No. 52-2 ¶ 4 (re: Stone); ECF No. 52-3 ¶ 4 (re: George); ECF No. 52-4 ¶ 3 (re: Parker);

ECF No. 60 (re: Doe, Cole, Gilbert) (emphasis added). Those careful words betray the illusory nature of the assurance, given that “existing policy” will change on March 23.

Most telling of all is what Defendants do not say. They do not confront the President’s own description of his policy as a categorical ban on transgender individuals serving “in any capacity.” They do not dispute that President Trump took this precipitous action without evidence, against the advice of DoD, and in response to an appeal from lawmakers who are hostile to men and women who are transgender. And incredibly, Defendants do not even attempt to justify President Trump’s decisions to subject transgender service members to discharge and to deny them medically necessary health care during their service.

Plaintiffs and other brave men and women serving their country deserve much better from their Commander-in-Chief. They are already experiencing irreparable harm, and will soon face even greater harm as the new directives take full effect. President Trump’s directives targeting transgender service members are blatantly unconstitutional and should be enjoined.

**I. The Court Has Subject Matter Jurisdiction Over Plaintiffs’ Claims.**

**A. The Policy Changes Effected By President Trump’s Binding Directives Cause Plaintiffs To Suffer Injury-In-Fact.**

Defendants assert that Plaintiffs lack standing because President Trump’s directives have caused them no injury-in-fact. They are wrong.

An injury-in-fact is “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). “Imminent” injuries include future injuries, where “‘the threatened injury is certainly impending, or there is a substantial risk that the harm will occur.’” *Kobe v. Haley*, 666 F. App’x 281, 294 (4th Cir. 2016) (per curiam) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct.

2334, 2341 (2014)); *see also Khan v. Children’s Nat’l Health Sys.*, 188 F. Supp. 3d 524, 529 (D. Md. 2016) (“[A plaintiff] need not demonstrate that it is ‘literally certain’ that they will suffer harm . . . ‘[Courts] have found standing based on a substantial risk [of harm.]’” (quoting *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013))). Plaintiffs face imminent injury, which they will suffer the moment President Trump’s directives go into effect.<sup>1</sup>

Plaintiffs are also suffering actual injury right now. While the Interim Guidance has allowed some Plaintiffs to schedule or receive medically necessary surgery for a limited period, the Guidance does nothing to remedy the ongoing stigma, uncertainty, and other concrete harms all of the Plaintiffs are suffering as a result of President Trump’s directives.

**1. The Directive to Return to the Pre-2016 Policy, Under Which Transgender Service Members Are Subject to Discharge As Administratively Unfit, Creates Imminent and Ongoing Injuries.**

President Trump’s directive targeting the continued service of transgender service members exposes Plaintiffs to imminent and ongoing injuries. This directive exposes Plaintiffs to imminent injury by mandating that on March 23, 2018, all men and women who are transgender currently serving in the Armed Forces will be subject to discharge as administratively unfit. It is also already exposing Plaintiffs to ongoing harm by proclaiming transgender individuals’ unfitness for service, destabilizing Plaintiffs’ lives and livelihoods, and stigmatizing them as less worthy than their fellow service members.

Since June 2016, DoD policy has provided that “no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity.” ECF No. 40-4 at Attach., § 1(a). President Trump

---

<sup>1</sup> Plaintiff ACLU of Maryland has associational standing on the basis of the injuries experienced by Plaintiff Stone, who is its member. ECF No. 39 ¶ 18; *see Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

has directed that on March 23, DoD must “return to” the *pre*-June 2016 policy, which he describes as “authoriz[ing] the discharge” of service members who are transgender. ECF No. 40-21 § 1. And based on the plain terms of that pre-2016 policy, transgender service members will become subject to discharge because they are deemed administratively unfit to serve. *See* Decl. of M. Kies (attached hereto), Ex. 30 (DoDI 1332.38, Enclosure 5) (listing “Sexual Gender and Identity Disorders” among conditions that rendered a service member unfit and subject to administrative separation).<sup>2</sup> On its face, this directive voids a policy under which the military expressly *cannot* discharge service members on the basis of transgender status, and replaces it with one that renders every transgender service member administratively unfit and expressly *subject* to discharge — simply because they are transgender.

Defendants ignore this imminent policy reversal. Instead they contend that Plaintiffs lack standing because “no Plaintiff has been discharged from the military and . . . the *Interim* Policy prohibits individuals from being discharged solely on the basis of transgender status or a diagnosis of gender dysphoria.” ECF No. 52-1 at 13 (emphasis added). As Defendants are compelled to acknowledge on the first page of their brief, however, this protection against involuntary separation is in place only “*for now*.” *Id.* at 1 (emphasis added). Far from defeating standing, this argument recognizes the importance of the existing protection against discharge on the basis of transgender status. That DoD thought it important to codify this protection “for now,” during “the interim period,” only underscores the harm from President Trump’s action eliminating the protection *after* the interim period. And it reveals the emptiness of the promises

---

<sup>2</sup> In 2014, DoDI 1332.38 was replaced by DoDI 1332.18, which permitted individual Services to change the conditions of administrative unfitness. “The service branches retained the[] bars to service by transgender individuals after DoDI 1332.18 replaced DoDI 1332.38.” ECF No. 40-32 ¶ 54; *see generally id.* ¶¶ 47–58.



by Plaintiffs' commanding officers that Plaintiffs will not face discharge "absent a change in the existing policy," *i.e.*, the Interim Guidance. ECF No. 52-2 ¶ 4; ECF No. 52-3 ¶ 4; ECF No. 52-4 ¶ 3; ECF No. 53.<sup>3</sup> Without an injunction, the Interim Guidance will soon be displaced by the President's directive, and "existing policy" will no longer protect Plaintiffs from discharge on the basis of transgender status. Defendants' declarants do not suggest otherwise.

Defendants contend that until Secretary Mattis completes his implementation plan, Plaintiffs can only "speculat[e]" about whether their new status (subject to discharge) will lead to their *actual* discharge. *See* ECF No. 52-1 at 13, 16. But Defendants cannot deny that the President said what he said. He did not announce studies to determine the impact of open transgender service; he announced a categorical ban on transgender individuals serving "in any capacity," ECF No. 40-22, and claimed to be "doing the military a great favor" by "coming out and just saying it," rather than waiting for DoD to study the issue, ECF No. 40-12; *cf. Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 523 (N.D. Cal. 2017) ("The statements of the President . . . belie the Government's argument . . . that the Order does not change the law."), *appeal filed*, 17-16887 (9th Cir. Sept. 18, 2017). Secretary Mattis has the task of determining the time, place, and manner of discharge, but the obvious purpose and inevitable result of declaring transgender service members "authorized [for] discharge" are to actually discharge them. ECF No. 40-21, § 1; *cf. Int'l Refugee Assistance Project v. Trump ("IRAP II")*, — F. Supp. 3d —, 2017 WL 4674314, at \*34 (D. Md. Oct. 17, 2017) (directive ordering Secretary of Homeland Security to recommend list of countries to include in travel ban "does not permit the Secretary to recommend that no nationality-based ban is necessary"), *appeal docketed* No. 17-2231 (4th Cir.

---

<sup>3</sup> Defendants' declaration concerning Staff Sergeant Cole is by a battalion physician assistant, who is not a commanding officer in a position to say whether or not someone will be discharged. *See* ECF No. 60-1.

Oct. 20, 2017). There is at least a substantial risk — and, indeed, a clear likelihood — that Plaintiffs will, in fact, be discharged soon after March 23 simply because they are transgender.

In any event, regardless of when or whether they are ultimately discharged, Plaintiffs are suffering and will continue to suffer serious injury-in-fact simply by being branded subject to discharge as administratively unfit. President Trump’s directive singles out transgender service members for differential treatment, withdraws a guarantee that protects their ability to serve on terms equal to those applied to others, and declares instead that they are subject to discharge as of March 23, even if they meet the same standards of fitness that apply to every other service member. Service members who are transgender are obviously harmed by this impending “disfavored legal status.” *Romer v. Evans*, 517 U.S. 620, 633 (1996). Indeed, the Supreme Court in *Romer* viewed the withdrawal of legal protection against discrimination as making it “more difficult for one group of citizens . . . to seek aid from the government,” which it termed “a denial of equal protection of the laws in the most literal sense.” *Id.* at 633–34.

This differential treatment — a literal revocation of equal protection — is itself an injury. *See Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 790 (4th Cir. 2004) (“Discriminatory treatment is a harm that is sufficiently particular to qualify as an actual injury for standing purposes.”); *see also Hassan v. City of N.Y.*, 804 F.3d 277, 289–90 (3d Cir. 2015) (as amended Feb. 2, 2016) (“[A] ‘discriminatory classification is itself a penalty,’ and thus qualifies as an actual injury for standing purposes, where a citizen’s right to equal treatment is at stake.” (internal citations omitted) (quoting *Saenz v. Roe*, 526 U.S. 489, 505 (1999))); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 636 (5th Cir. 2012) (“Discriminatory treatment at the hands of the government is an injury . . . [that is] recognizable for standing irrespective of whether the

plaintiff will sustain an actual or more palpable injury as a result of the unequal treatment under law or regulation.” (quotation marks omitted)).

Moreover, by branding them as administratively unfit, President Trump’s directive is inflicting irreparable dignitary harms on Plaintiffs *now* and will continue to do so beyond March 23. President Trump proclaimed on Twitter that the military “cannot be burdened” with the “tremendous medical costs and disruption that transgender [*sic*] in the military would entail.” ECF No. 40-22. His binding directives further declared that service by men and women who are transgender might “hinder military effectiveness” and “disrupt unit cohesion.” ECF No. 40-21, § 1(a). The President’s directives thus announce to Plaintiffs, their fellow service members, their chain of command, and all the world that their service and sacrifice are unwanted. *Cf. United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (refusal to recognize marriages of same-sex couples “tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition”); *J.E.B. v. Alabama*, 511 U.S. 127, 142 (1994) (when juror is excluded based on sex, “[t]he message it sends to all those in the courtroom, and all those who may later learn of the discriminatory act, is that certain individuals, for no reason other than gender, are presumed unqualified”). This “[s]tigmatizing injury” is “one of the most serious consequences of discriminatory government action” and gives rise to standing to “those persons who are personally denied equal treatment.” *Allen v. Wright*, 468 U.S. 737, 755 (1984) (quotation marks omitted), *abrogated on other grounds, Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). On the face of President Trump’s directives, Plaintiffs are among “those persons” personally affected. *See Lujan*, 504 U.S. at 561–62 (“[If] the plaintiff is himself an object of the action . . . at issue . . . there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing or requiring the action will redress it.”).

These harms are not limited to the period after March 22 — they are happening right now. As an expert in military personnel policy, military sociology, and military psychology explains, the directives necessarily cast a shadow over transgender service members by “negatively impact[ing] their day-to-day relationships with co-workers and other service members.” Decl. of M. Eitelberg (filed herewith) ¶ 6; *see also* Decl. of R. Mabus, former Secretary of the Navy (filed herewith) ¶ 14 (“Banning a segment of the [military] community from service . . . sends a message that [that] segment[] . . . [is] not within the scope of the mission.”); Decl. of D. James, former Secretary of the Air Force (filed herewith) ¶ 11 (“[T]he President’s ban” has “deleterious effect” on the Air Force because it “creates a sub-class of service members” and “suggest[s] that [they] are unworthy of their comrades’ trust and support”); Decl. of E. Fanning, former Secretary of the Army (filed herewith) ¶ 11 (directives “degrade[] the value of transgender individuals not only to those service members themselves, but gives license to their leaders and fellow service members to do the same”). Plaintiffs are experiencing stigma due to their new disfavored status. *See* ECF No. 40-40 ¶ 14; ECF No. 41 ¶¶ 12–13; ECF No. 40-42 ¶ 16; ECF No. 40-43 ¶ 14; ECF No. 40-44 ¶ 15; ECF No. 40-45 ¶¶ 14–15. As individuals “personally denied equal treatment” on the face of the President’s directives, they properly assert these injuries. *Allen*, 468 U.S. at 755.

President Trump’s directive limits Plaintiffs’ career opportunities in additional concrete ways, even before they are deemed subject to discharge based on transgender status (or suffer actual discharge). *Cf. Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (plaintiffs suffered injury in the form of harm to their career prospects); *Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 186–87 (D.C. Cir. 2011) (lost opportunity to engage in one’s preferred occupation and imposition of professional stigma are actionable injury). Commanding

officers’ “discretionary judgments or decisions” regarding “service opportunities,” levels of responsibility, and “career events” such as duty location and trainings depend in part on “expectations regarding a service member’s future in the military,” and so they are “reluctant to invest significant resources in the training or development of individuals who might leave military service in the near future.” Eitelberg ¶¶ 7–8; *see also* Mabus ¶¶ 9–12; James ¶¶ 9–10.

## **2. The Directive Banning Surgical Care for Gender Dysphoria Beginning March 23 Exposes Plaintiffs to Imminent Injuries.**

DoD provides a wide range of surgical care to service members. President Trump has nonetheless directed that, effective March 23, DoD “shall . . . halt all use of [government] resources to fund sex-reassignment surgical procedures for military personnel.” ECF No. 40-21 § 2(b). The Interim Guidance on which Defendants rely confirms that, pursuant to President Trump’s directive, “no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018.” *See* ECF No. 60-5 at 3.

Plaintiffs Cole, Doe, Gilbert, and Stone are expecting to receive medically necessary transition-related surgical care as part of their treatment for gender dysphoria. *See* ECF No. 40-40 ¶ 11; ECF No. 41 ¶ 12; ECF No. 40-43 ¶ 4; ECF No. 40-45 ¶¶ 9–10. But in light of the time it takes to work with military medical personnel to develop a treatment plan and proceed to surgery, it is virtually certain that they will not receive all of the surgical treatment they need for their diagnosed gender dysphoria before March 23. *See* Suppl. Decl. of K. Cole (filed herewith) ¶¶ 4–6; ECF No. 41 ¶ 12; ECF No. 40-43 ¶ 6; ECF No. 40-45 ¶ 10.

Petty Officer Stone, for example, has worked diligently with medical providers for over a year to develop a treatment plan, but still does not have a finalized plan in place. *See* Suppl. Decl. of B. Stone (filed herewith) ¶¶ 2–11. He first sought treatment in June 2016, but due to delays within the military, his endocrinologist only began to develop a plan in May 2017. *Id.*

¶¶ 3–5. Petty Officer Stone had to restart this process when he was transferred to Fort Meade in July 2017, and he proceeded to a series of appointments with doctors. *Id.* ¶¶ 7–11. The treatment plan eventually developed now awaits approval, per Navy protocol, from review panels first at Walter Reed, and then Navy Medicine East, and finally from Petty Officer Stone’s commanding officer. *Id.* ¶ 11. Even after Petty Officer Stone receives all of these approvals, the two surgeries he requires must be scheduled, taking into account his obligations to his command and the availability of qualified surgeons — who are in high demand as other service members rush to receive the care they need before it is cut off. *Id.* ¶¶ 12–15. In these circumstances, it is highly likely that Petty Officer Stone will not receive one or both of his medically-necessary surgeries before March 23.

It is true, as Defendants note, that the cancellation of one surgery scheduled for another plaintiff, Staff Sergeant Cole, has been remedied. *See* ECF No. 50-2 at 9; Suppl. Cole ¶ 4. That cancellation occurred because individuals under Defendants’ supervision apparently moved to enforce President Trump’s restrictions on transgender service members’ health care even before the directives were to take effect. ECF No. 40-40 ¶ 11; Suppl. Cole ¶ 4. After being sued, Secretary Mattis issued the Interim Guidance to stop such premature actions. But Staff Sergeant Cole’s treatment plan calls for two additional surgeries, neither of which she will be able to undergo before March 23, and one of which she is not even eligible for until after that date. Suppl. Cole ¶¶ 6–10. If anything, the role this litigation played in stopping premature application of the surgical care ban confirms the importance of having a preliminary injunction in place the day Plaintiffs lose their right to medically necessary treatment under President Trump’s directives.

In a footnote (ECF No. 52-1 at 20 n.10), Defendants cite an exception to the President’s directive banning the use of government resources to fund “sex-reassignment surgical procedures” (ECF No. 40-21 § 2(b)). According to the directive, government funds may still be used “to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.” *Id.* This exception appears to refer to situations in which complications arise from surgery performed before March 23. Defendants, however, vaguely insinuate that the exception might be broader, stating in general terms that “medically necessary procedures will be accommodated.” ECF No. 52-1 at 20 n.10.

Whatever these carefully chosen words mean, it is telling that Defendants do *not* state plainly that any service member with a medical need for surgery will receive that surgery — even if he or she received no surgical treatment before March 23. Nor is it plausible to read the “exception” as swallowing the announced rule banning provision of surgical treatment for transgender service members. Any such reading would render the directive a nullity, and would contravene President Trump’s stated (though inaccurate) premise that providing surgical care under current policy is too expensive. *See* ECF No. 40-21 § 1(a); ECF No. 40-22. Defendants may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that both is implausible and would fatally undercut the President’s announced policy. *See Cty. of Santa Clara*, 250 F. Supp. 3d at 515 (rejecting Government’s attempt to avoid review by advancing “a construction so narrow that it renders a legal action legally meaningless” and would be “clearly inconsistent with the Order’s broad intent”).<sup>4</sup>

---

<sup>4</sup> Moreover, even if there were a plausible reading of the directive that preserved the availability of all medically necessary surgeries, “a narrow construction does not limit a plaintiff[’s] standing (continued...)”

**3. The Directives Harm Plaintiffs by Preventing Their Accessions into the Officer Ranks.**

President Trump has further directed DoD to extend indefinitely the ban on transgender accessions, which had been set to expire on December 31, 2017. ECF No. 40-21 § 2(a). Plaintiffs explained in their opening brief that the accession ban will harm at least Plaintiffs George and Gilbert by denying them the opportunity to commission as officers. *See* ECF No. 40-2 at 31–32. While Defendants offhandedly refer to Plaintiffs’ position as a “belie[f],” *see* ECF No. 52-1 at 13, they conspicuously do not deny that the accession ban has precisely this consequence.

Instead, Defendants assert that Plaintiffs cannot be harmed by the accession ban because it is merely a continuation of a policy already in effect. *See* ECF No. 52-1 at 21. That misunderstands both the nature of Plaintiffs’ claims and the reality of the President’s actions. Following a rigorous study, DoD adopted the Open Service Directive, which permitted new accessions of transgender service members who could satisfy stringent medical requirements. *See* ECF No. 40-4. Secretary Mattis postponed the effective date of that policy from July 1, 2017 to January 1, 2018 to permit continued study. ECF No. 40-11. In doing so, however, he expressly stated that *he was not prejudging the outcome of that review* — in other words, that the Open Service Directive remained the current policy, and there was no plan to *disallow* accessions beginning on January 1. President Trump abruptly went on Twitter to preempt and prejudice his own DoD’s study. He even claimed to be “doing the military a great favor” by “coming out and just saying it,” rather than waiting for DoD to study the issue. ECF No. 40-12.

---

to challenge a law that is subject to multiple interpretations.” *Cty. of Santa Clara*, 250 F. Supp. 3d at 515; *see also Virginia v. Am. Booksellers Ass’n*, 484 U.S. 383, 392 (1988).



What Plaintiffs challenge is thus not the “longstanding” accession ban or even Secretary Mattis’s delay of accessions. Plaintiffs challenge the President’s decision to preempt DoD’s study, rescind the accession standard the military adopted, and ban accessions indefinitely. The injury from this directive is straightforward: under previous policy, Plaintiffs George and Gilbert would have been eligible to commission after January 1. Now, they are not.<sup>5</sup>

Defendants also assert that Plaintiffs’ claim of harm is too speculative because they have not “even applied to access into their targeted positions, let alone had an application denied.” ECF No. 52-1 at 21–22. Defendants cite no authority for this crabbed view, and it is clearly wrong. “The law does not require [] a futile act.” *Townes v. Jarvis*, 577 F.3d 543, 547 n.1 (4th Cir. 2009); *see also, e.g., Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) (“failure to submit application” for permit did not defeat standing to challenge permit requirement because plaintiffs “would not have been granted a permit had they applied for one”); *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012) (chaplains challenging discrimination in promotion process had standing because their “promotions will likely be considered by future selection boards”); *cf. Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977) (“If an employer should announce his policy of discrimination by a sign reading ‘Whites Only’ on the hiring-office door, his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs.”).

While vague “some-day intentions” are not sufficient for standing, government action that disrupts a plaintiff’s “concrete plans” causes an injury-in-fact. *Lujan*, 504 U.S. at 564. Thus, for example, a plaintiff had standing to challenge a university’s admissions policies even

---

<sup>5</sup> Any suggestion that these accessions would have been denied or further delayed as a result of Secretary Mattis’s review process is entirely speculative and cannot defeat standing.

though he did “not intend to apply . . . until next year,” after completing a necessary “prerequisite.” *Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 595–96 (E.D. Va. 2004).

Plaintiffs George and Gilbert have much more than “some-day intentions” to commission as officers. Senior Airman George planned to seek his commission after completing his current educational program, from which he is scheduled to graduate this December. *See* Suppl. Decl. of S. George (filed herewith) ¶ 5. Confirming the seriousness of these plans, in late 2016 Senior Airman George completed an application for conditional release from the Air National Guard in order to commission in the Army, including obtaining approval from the General in command of the 127th Wing. *Id.* ¶ 2. He has confirmed letters of recommendation from a former Navy Nurse and a recently-retired Lieutenant Colonel. *Id.* ¶¶ 7–8. Senior Airman George is prepared to finalize and submit his application for a direct commission as an Army Health Services Administration Officer on January 1, when the accession rules of the Open Service Directive would have taken effect. It is hard to imagine more concrete plans than this.<sup>6</sup>

Petty Officer Gilbert likewise has firm plans to seek a commission. She has just three semesters left to complete in her undergraduate degree, and after she satisfies that prerequisite she will apply to Officer Candidate School. *See* Suppl. Decl. of T. Gilbert (filed herewith) ¶¶ 6–8. Those plans are so concrete that Petty Officer Gilbert has already received a commitment for

---

<sup>6</sup> Senior Airman George had also postponed filing his application for a direct commission pending processing of his request to have his gender marker in the Defense Enrollment Eligibility Report System (DEERS) updated to accurately reflect his male gender, which request has been pending since at least December 2016. Suppl. George ¶ 4. At the time his prior declaration was filed, Senior Airman George understood that he had submitted all requisite materials and that his request would be granted well in advance of his December graduation. *Id.* ¶¶ 3–4. The military subsequently requested additional information, which Senior Airman George promptly provided. *Id.* ¶ 4. Given that his request has been pending for nearly a year, Senior Airman George expects that it will be granted by January 1, 2018, when he intends to apply for a direct commission. *Id.*

a letter of recommendation. *Id.* ¶ 8. She is also in the process of reenlisting in the Navy for an additional term of six years to prepare for commissioning. *Id.* ¶ 9. These firm plans are more than sufficient to establish injury-in-fact as a result of President Trump’s directive on accessions.

Defendants further argue (still without citation to authority) that Plaintiffs are not injured by the accession ban because waivers are theoretically available. *See* ECF No. 52-1 at 22. But a waiver request would be futile as well. Plaintiffs and several former Service Secretaries are aware of no case in the history of the ban on transgender service in which such a waiver was granted. *See* Fanning ¶ 17 (former Secretary of Army unaware of any instance before or after June 2016 in which a person who is transgender was granted a waiver); Mabus ¶ 15 (Navy); James ¶ 13 (Air Force). Moreover, transgender individuals seeking a waiver must persuade the highest levels of the Service of “extraordinary” circumstances.<sup>7</sup> Even if grant of a waiver were not fanciful, Plaintiffs would be injured by this extra hurdle placed in their path, simply because they are transgender. *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“The ‘injury in fact’ in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.”); *In re Navy Chaplaincy*, 697 F.3d at 1174 (plaintiffs had standing to challenge promotion process that made it “more likely” — though not certain — that non-liturgical Protestants would not be promoted).

---

<sup>7</sup> *See, e.g.*, Army Reg. 40-501, Standards of Medical Fitness (Dec. 14, 2007, rev. Aug. 4, 2011), at ¶ 1-6(h), [http://www.apd.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/ARN3801\\_AR40-501\\_Web\\_FINAL.pdf](http://www.apd.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN3801_AR40-501_Web_FINAL.pdf) (waivers “will not be granted” if applicant does not meet “retention standards,” absent “extraordinary circumstances” and approval from The Surgeon General of the Army).

**B. President Trump’s Binding Directives, Scheduled To Take Effect On January 1 And March 23, Are Ripe For Review.**

In a further attempt to postpone review, Defendants insist that it is premature for Plaintiffs to challenge “a possible future policy.” ECF No. 52-1 at 16. This ripeness objection, like Defendants’ standing arguments, is based on a fundamental unwillingness to confront the actual policy directives President Trump has issued. This is not a case about a “possible future policy” still being studied. Plaintiffs challenge sweeping directives that, absent judicial intervention, will take effect on January 1 and March 23.

The ripeness doctrine “balance[s] ‘the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration.’” *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006) (quoting *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002)). “A case is fit for judicial decision when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties.” *Id.* The validity of President Trump’s directives is fit for review, and withholding review would impose significant hardship on Plaintiffs — who will be imminently and irreparably harmed if the directives take effect as scheduled. *See, e.g., IRAP II*, 2017 WL 4674314, at \*16 (“Where this case centers on legal issues arising from the Proclamation, which has been issued in its final form, and is not dependent on facts that may derive from application of [an aspect of the Proclamation], it is now fit for decision.” (citing *Miller*, 462 F.3d at 319)).

Defendants cannot evade review of these binding directives on the ground that President Trump ordered the Secretary of Defense to prepare an “implementation plan.” ECF No. 40-21 § 3. Courts do not delay review of harmful government action simply because some details remain to be filled in. The Fourth Circuit, for example, has held that when a statute establishes clear requirements, it is ripe for challenge even if regulations under the statute have not yet been

promulgated, because “[r]egulations could not alter the Act’s provisions.” *Retail Indus. Leaders Ass’n v. Fielder*, 475 F.3d 180, 188 (4th Cir. 2007). Similarly, the Seventh Circuit has rejected a ripeness objection to a challenge to a statute requiring certain entities to post a surety bond and pay fees, even though the amount of the fees, the amount of the bond, and the time for payment were not yet determined. *Gov’t Suppliers Consolidating Servs., Inc. v. Bayh*, 975 F.2d 1267, 1275–76 (7th Cir. 1992). Because the plaintiffs would face “immediate damag[e]” “once enabling rules are promulgated,” the court of appeals held, there was “no need to wait for regulations or specific applications to evaluate and make a conclusive determination as to the legal issue presented.” *Id.*

Here the contours of President Trump’s directives and the harms they will impose (and are currently causing) are even more definite. Whatever “plan” the Secretary of Defense develops cannot alter the fact that, on March 23, Plaintiffs will immediately become subject to discharge as administratively unfit on the basis of their transgender status, and will be denied medically necessary care. *See* ECF No. 40-21 §§ 1(b), 2(b). Nor can it change the fact that Plaintiffs eligible for commissions will be blocked from commissioning as of January 1. *See id.* § 2(a). Even on the question of “how to address transgender individuals currently serving,” *id.* § 3, the Secretary has simply been directed to prepare a plan that would address the timing and manner of separation. Unless the President’s own words are to be ignored, the endpoint of the directive is foreordained: a categorical end to men and women who are transgender serving in the military “in any capacity.” ECF No. 40-22; *supra* Part I.A.1; *cf. IRAP II*, 2017 WL 4674314, at \*34 (directive to Secretary of Homeland Security “telegraphed the expected recommendations” of a study by “indicat[ing] that the President had decided” the outcome “even before the study had been conducted”).

Defendants' suggestion that Secretary Mattis's study might theoretically persuade the President to change his mind in the future cannot insulate from challenge his current, binding policy directives and the harms that flow from them today. The Constitution "does not require citizens to accept assurances from the government that, if the government later determines it has made a misstep, it will take ameliorative action." *Roman Catholic Archdiocese of N.Y. v. Sebelius*, 907 F. Supp. 2d 310, 331 (E.D.N.Y. 2012); *see also Riva v. Massachusetts*, 61 F.3d 1003, 1011 (1st Cir. 1995) (reasoning that "theoretical possibility" of repeal of statute does not defeat ripeness); *Am. Petroleum Inst. v. U.S. EPA*, 906 F.2d 729, 739–40 (D.C. Cir. 1990) ("If the possibility of unforeseen amendments were sufficient to render an otherwise fit challenge unripe, review could be deferred indefinitely."); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 92 (D.D.C. 1998) ("To ask the court to stay its hand because Congress hypothetically may amend the statutory framework of the Census Act as it now exists . . . is asking the court to stay its hand based upon nothing more than mere speculation.").

Moreover, if the lawfulness of President Trump's binding directives is not determined before they take effect on January 1 and March 23, Plaintiffs will suffer severe hardship. The "hardship prong is measured by the immediacy of the threat and the burden imposed on the plaintiff[s]." *Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187, 199 (4th Cir. 2013) (quotation marks omitted). Immediacy depends not just on timeframe but on "the inevitability of the operation of a [challenged policy] against certain individuals." *U.S. House of Reps.*, 11 F. Supp. 2d at 92 (quotation marks omitted). Plaintiffs are already experiencing harm from the directives, and those harms will multiply when they are subjected to the new policies in just a few months. These impending changes are far closer in time than what other courts have held to be a ripe challenge. *See, e.g., Riva*, 61 F.3d at 1011

(age discrimination claim ripe five years before benefit reduction takes effect, because even though “distant in time,” the reductions “seem[] highly probable”); *U.S. House of Reps.*, 11 F. Supp. 2d at 92 (claim ripe where “twenty months will pass between this date and [the effective date of the statute]”).

The burden imposed on Plaintiffs is also great. To say that a claim is not ripe “means that the case will be *better* decided later and that the parties *will not have constitutional rights undermined by the delay.*” *Simmonds v. Immigration & Naturalization Serv.*, 326 F.3d 351, 357 (2d Cir. 2003) (second emphasis added). That is emphatically not the case here. As explained above, President Trump’s directives will imminently revoke DoD’s protection against discharge and subject service members to discharge on the basis of transgender status. The directives will deny service members medically necessary surgical care. They will block new commissions and other accessions. And the directives — all of which violate Plaintiffs’ constitutional rights to equal protection and substantive due process — are already undermining military careers to which Plaintiffs have devoted their lives. *Supra* Part I.A. These “immediate harm[s] to [Plaintiffs’] constitutionally protected rights” require immediate judicial review. *Miller*, 462 F.3d at 321.<sup>8</sup>

---

<sup>8</sup> Defendants’ remaining two attempts to evade review are readily dispatched. First, Defendants seek to misapply the constitutional avoidance doctrine (*see* ECF No. 52-1 at 22), which is a canon of statutory construction teaching that legislation should, if possible, be read to avoid serious constitutional concern. *See, e.g., Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 841 (1986). The doctrine is not an all-purpose device for postponing a constitutional challenge that is otherwise properly presented. Second, Plaintiffs are not required to “exhaust[] . . . available intraservice corrective measures” (ECF No. 52-1 at 16) before a court can rule on their claims. Exhaustion is not required where “the outcome would predictably be futile.” *Guerra v. Scruggs*, 942 F.2d 270, 276 (4th Cir. 1991) (quotation marks omitted). Here, military administrative boards would have no authority to grant relief from the Commander-in-Chief’s facially unconstitutional directives. *Cf. Able v. United States*, 88 F.3d 1280, 1289 (2d continued...)

## II. Plaintiffs' Claims Are Likely To Succeed On The Merits.<sup>9</sup>

### A. President Trump's Directives Violate Equal Protection.

On their face, the three directives comprising President Trump's Transgender Service Member Ban treat service members who are transgender differently than those who are not. This discrimination lacks a legitimate, rational explanation. Indeed, the extraordinary context of President Trump's abrupt decision to reverse a thoroughly-studied policy — an anomaly Defendants do not and cannot dispute — confirms that the decision is “inexplicable by anything but animus toward the class it affects.” *Romer*, 517 U.S. at 632. Plaintiffs' equal protection claim is therefore likely to succeed.

#### 1. President Trump's Abrupt Decision to Override the Military's Considered Professional Judgment Is Owed No Deference.

Defendants' arguments boil down to a plea for blind deference. *See* ECF No. 52-1 at 23–25. But deference, even regarding decisions related to national security, is neither automatic nor absolute. “The military has not been exempted from constitutional provisions that protect the rights of individuals. It is precisely the role of the courts to determine whether those rights have been violated.” *Emory v. Sec'y of Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) (per curiam) (citations omitted). The mere invocation of national security does not permit courts “to ignore evidence, circumscribe [their] own review, and blindly defer to executive action.” *Int'l Refugee Assistance Project v. Trump (“IRAP I”)*, 857 F.3d 554, 587 (4th Cir. 2017) (en banc) (“The

---

Cir. 1996) (exhaustion not required in facial constitutional challenge to “Don't Ask, Don't Tell”).

<sup>9</sup> Defendants assert (without citation) that the amended complaint should be dismissed under Rule 12(b)(6) “[f]or the same reasons that Plaintiffs cannot establish a likelihood on the merits.” ECF No. 52-1 at 18 n.9. Defendants ignore the difference between the motion to dismiss standard and the determination of likelihood of success for purposes of a preliminary injunction. In any event, as explained below, Plaintiffs are likely to succeed on the merits of their claims.



deference we give the coordinate branches is surely powerful, but even it must yield in certain circumstances, lest we abdicate our own duties to uphold the Constitution.”), *vacated as moot sub nom. Trump v. IRAP*, — S. Ct. —, 2017 WL 4518553 (Oct. 10, 2017).<sup>10</sup>

The cases upon which Defendants rely for a “highly deferential form of review,” ECF No. 52-1 at 23–26, share a crucial element that is missing in this case: the exercise of “considered professional judgment,” *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). In *Rostker*, for example, the Supreme Court found it important that in limiting the selective service to males, “Congress did not act ‘unthinkingly’ or ‘reflexively and not for any considered reason.’” *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (citation omitted). The Court emphasized Congress’s “extensive[] consider[ation] . . . [through] hearings, floor debate, and in committee[,] . . . adduc[ing] extensive testimony and evidence concerning the issue.” *Id.* Because “[t]he issue was considered at great length,” the Court rejected “undertaking an independent evaluation of th[e] evidence, rather than adopting a[] [] deferential examination of Congress’ evaluation of that evidence.” *Id.* at 74, 82–83 (emphasis omitted); *see also Weinberger*, 475 U.S. at 508 (relying on Air Force’s “considered professional judgment”); *Greer v. Spock*, 424 U.S. 828, 839 (1976) (“What the record shows, therefore, is a considered [military] policy, objectively and evenhandedly applied[.]”); *Cook v. Gates*, 528 F.3d 42, 58–60 (1st Cir. 2008) (“The circumstances surrounding the Act’s passage lead to the firm conclusion that Congress and the Executive studied the issues intensely and from many angles, including by considering the constitutional rights of gay and lesbian service members.”); *Thomasson v. Perry*, 80 F.3d 915,

---

<sup>10</sup> Although *IRAP I* was vacated as moot, the Supreme Court did not express any disagreement with its holdings, and it remains persuasive as the views of the *en banc* Fourth Circuit.

922–23 (4th Cir. 1996) (en banc) (military policy “dr[ew] on the combined wisdom of [an] exhaustive examination in the Executive and Legislative branches”).

Defendants cannot demand deference to a “considered professional judgment” here, because there was none. As Plaintiffs have established, President Trump issued his abrupt directives without “consult[ing] any experts on th[e] issue”; he did not receive or rely on “any new evidence”; he “startled DoD”; and he made his abrupt announcement immediately following a direct appeal from legislators with a track record of animus toward and moral disapproval of men and women who are transgender. ECF No. 40-2 at 3, 10, 27–28. These are serious charges, so it is all the more remarkable that *Defendants do not deny* them. Defendants instead assert that it is “hardly evidence of animus” for “the current Commander in Chief” to disagree with “the approach preferred by former Secretary Carter.” ECF No. 52-1 at 30. The only reason for Defendants to argue so transparently against a straw-man is that they have no response to the much more significant indicia of animus that Plaintiffs presented. President Trump’s animus-driven decision is not a proper subject of judicial deference; it is “something the Equal Protection [guarantee] does not permit.” *Romer*, 517 U.S. at 635.

Indeed, the only considered military judgment at issue here is the one reflected in the 2016 Open Service Directive. *See* ECF No. 40-37 ¶¶ 1, 8–27 (military working group “formulated its recommendations by collecting and considering evidence from . . . all available scholarly evidence and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, [] commanders, . . . [and the] RAND Report”); ECF No. 40-38 ¶¶ 10–24 (“Working Group’s process . . . was deliberative and thoughtful, involved significant amounts of research and education, and in the end resulted in a policy that all services supported”). If any deference is due, it is to *that* decision.

**2. Defendants Do Not Attempt to Justify the President's Directives to Subject Transgender Service Members to Discharge As Administratively Unfit, and to Deny Them Medical Care.**

Pursuant to President Trump's directives, on March 23, 2018, transgender service members will become subject to discharge as administratively unfit, and the military will no longer provide them with medically necessary surgical treatment. ECF No. 40-21 §§ 1, 2(b); *see supra* Part I. Neither action has even a rational basis and, as a consequence, both are unconstitutional under any standard of review.

Strikingly, Defendants have no answer. Nowhere in their brief do they argue that a decision to subject transgender service members to discharge, and to deny them medical treatment, is consistent with the Constitution's guarantee of equal protection. Instead they try to change the subject, defending only the "Interim Guidance" that will soon be *superseded* by the directives they fail to defend. *See* ECF No. 52-1 at 19–22; ECF No. 60-5 (Interim Guidance).

Defendants' reliance on the Interim Guidance is nevertheless revealing. Defendants emphasize that the Interim Guidance, which they call "current operative policy," "*prohibits* disparate treatment of existing service members based on [transgender] status," and argue that "[a] law forbidding disparate treatment obviously cannot violate the Equal Protection Clause." *Id.* at 20. That is indeed a compelling defense of the policy that is about to end. It is also a damning indictment of President Trump's directives, under which this "prohibition on disparate treatment" will disappear on March 23, and be replaced with a *mandate* to discriminate against Plaintiffs and other service members who are transgender.

Defendants' silence on President Trump's directives authorizing discharge and halting medically necessary surgeries speaks volumes. They do not deny that these policy changes were made without justification. To the contrary, Defendants correctly observe that the Court "does not have before it" any "justifications" for the new policy. ECF No. 52-1 at 16. But that is not,

as Defendants suggest, because no policy change has issued. It is because President Trump imposed a discriminatory policy without any justification Defendants are willing to defend. That amounts to a concession that Plaintiffs' claims are likely to succeed on the merits.

**3. Defendants Have Not Offered a Rational Justification for the President's Decision to Rescind the Military's Accession Policy.**

As Plaintiffs explained in their opening memorandum, discrimination against transgender individuals is subject to heightened scrutiny for purposes of equal protection. Defendants briefly argue that President Trump's accession ban — the only component of his directives they actually defend — is not subject to heightened scrutiny. ECF No. 52-1 at 26. But they do *not* dispute that transgender status meets all of the factors traditionally warranting heightened scrutiny. *See, e.g., Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); *see generally* ECF No. 40-2 at 19. Nor do they dispute that discrimination against men and women who are transgender is a form of discrimination on the basis of sex. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *see generally* ECF No. 40-2 at 19–20. Defendants' entire argument is that discrimination is subject to a different constitutional standard in the military context. But the Supreme Court has rejected this view. In *Rostker*, a sex discrimination case, the Court refused to “apply a different equal protection test because of the military context,” cautioning that courts must “not abdicate [their] ultimate responsibility to decide the constitutional question.” 453 U.S. at 67, 69–71.

Even if only rational basis review applied here, Defendants cannot muster a rational justification for President Trump's accession ban. Their effort to justify the accession ban rests on two fictional premises. The first fiction is that Plaintiffs are challenging a “longstanding accession policy.” ECF No. 52-1 at 23. Not so. Prior to President Trump's startling tweets and directives, the military's accession policy was set forth in the Open Service Directive, under

which a rigorous framework regulating new accessions by individuals who are transgender was in place and accessions were set to begin on July 1, 2017. ECF No. 40-4 at Attach., § 2. Secretary Mattis delayed implementation until January 1, 2018, but he expressly did *not* change the policy and disclaimed any preconceived plan to do so. ECF No. 40-11. What Plaintiffs challenge is not the historical ban that the Open Service Directive ended, but a decision to reverse existing military policy *without waiting* for DoD to conduct the very study that Secretary Mattis had just announced.

The second fiction underpinning Defendants’ argument is that President Trump has done nothing but “order[] a further study.” *See* ECF No. 52-1 at 1; *see also, e.g., id.* at 27 (“[I]t was not irrational for the President to maintain the status quo *pending [an expert] panel’s review.*” (emphasis added)); *id.* at 22, 29–30. Plaintiffs are not challenging a decision to order a study — and indeed did not file a lawsuit when Secretary Mattis did just that on June 30, 2017, before President Trump attacked transgender service members on Twitter. *See* ECF Nos. 40-11, 40-22. This case arises because President Trump *preempted* the study that his Secretary of Defense had just commenced regarding accession of men and women who are transgender, and claimed to be “doing the military a great favor” by “coming out and just saying it,” rather than waiting for DoD to study the issue. ECF No. 40-12. Plaintiffs challenge the abruptly declared categorical ban on transgender service “in any capacity,” which was first tweeted by the President and then formalized in a series of directives blocking the Open Service Directive from taking effect as scheduled. *See* ECF Nos. 40-21, 40-22.

All of Defendants’ purported justifications about military readiness, cost, and unit cohesion, *see* ECF No. 52-1 at 27–29, have been thoroughly studied and refuted or otherwise addressed by the military itself, *see* ECF No. 40-2 at 6–7, 21–25. The military’s previous

determination already accounted for Defendants’ concern that “at least some transgender individuals suffer from medical conditions that could impede the performance of their duties, . . . [including by] limit[ing] the[ir] ability . . . to deploy,” ECF No. 52-1 at 27. The Open Service Directive broadly *disqualified* from accession those transgender individuals diagnosed with gender dysphoria — *unless* they could meet demanding medical criteria specifically designed to ensure readiness and deployability, as well as the fitness criteria all service members must meet. ECF No. 40-4 at Attach., § 2. Defendants never explain why transgender individuals who have *already* completed surgery and been stable for extended periods of time, or who do not experience gender dysphoria or have any expected surgical needs — the accession standards set by the Open Service Directive — are somehow unfit to deploy and serve more generally.

The military’s previous determination also addressed and rejected the contention that costs associated with service by men and women who are transgender justify a ban on their service or commission. *See* ECF No. 40-2 at 24–25. Defendants do not dispute that the military had previously found such costs to be *de minimis*, and they offer no competing estimate; although they vaguely refer to “other costs,” Defendants never say what those are. ECF No. 52-1 at 28. Defendants’ argument is essentially that President Trump may decide to discriminate against a group of service members he disfavors, so long as doing so might redistribute a trivial amount of money within the defense budget. *See* ECF No. 52-1 at 28. But reducing costs cannot justify arbitrary distinctions between similarly situated groups. *See Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 854-55 (E.D. Mich. 2014).

Finally, the military’s previous determination rejected the hypothesis that accession by men and women who are transgender would somehow undermine military readiness and unit cohesion. ECF No. 40-37 ¶¶ 10, 22–26; ECF No. 40-38 ¶ 23. Unlike President Trump, the

military cited evidence regarding the favorable experience of militaries of allied countries that permit such service, as well as extensive interviews of service members and commanders. The directive, by contrast, appears to be based on nothing more than an assumption that non-transgender troops share President Trump’s own biases (or those of his political allies). And indeed, the reality is that the President’s ban actually undermines readiness and unit cohesion. As former Secretary Mabus explains, “[t]he military is designed to be a meritocracy where individuals receive opportunities and tackle assignments based on their ability to do the job. The institution is weakened when people are denied the ability to serve not because they are unqualified or because they cannot do the job but because of who they are.” Mabus ¶ 13. Secretary James concurs that “[t]he USAF, and the military in general, are weakened” by “suggesting that service members should be judged based on characteristics having nothing to do with their ability to perform their job.” James ¶ 12. President Trump’s “sudden reversal undermines the confidence of all service members that important military policy decisions will be made under careful review and consistent with established process” and “creat[es] a culture of fear that is anathema to the stability and certainty that makes for an effective military.” Mabus ¶¶ 17–18; *see also* ECF No. 40-17 (letter from 56 retired generals and admirals stating directives “would cause significant disruptions, deprive the military of mission-critical talent, [] compromise the integrity of . . . non-transgender [service members] who would be forced to choose between reporting their comrades or disobeying policy[,]. . . [and] harm [] readiness and morale”).

The supposed justifications that Defendants trot out are no more than *post hoc* attempts to rationalize President Trump’s evidence-free decision to override the military’s thorough and considered determinations. His speculative assertion that a categorical ban on transgender

individuals *might* be warranted is plainly not a rational basis to change the policy on accessions *before* any such study has occurred. Although Defendants claim that “there is room for the military to think otherwise,” ECF No. 52-1 at 28, they put forward no evidence that anyone in “the military” actually so advised President Trump before he issued the directives. The determination that DoD has made, after an exhaustive, expert-driven review, has been to embrace service and accession by men and women who are transgender as “consistent with military readiness and with strength through diversity.” *See* ECF No. 40-4 at 3; Attach., § 5.

**B. President Trump’s Directives Violate Substantive Due Process.**

The Government may not single out a group of individuals for special disfavor in matters central to the maintenance of personal autonomy and dignity. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015); *see also Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (explaining the “link[]” between “[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty”). Defendants do not challenge this well-established proposition. Their only response is that “[t]he President has provided [constitutionally sufficient] reasons for maintaining the status quo while the military studies the policy on military service by transgender individuals.” ECF No. 52-1 at 30. That is doubly wrong. President Trump has not “maintained the status quo” but rather stripped transgender service members of protection and exposed them to special disfavor. *See supra* Part I. And the reasons President Trump identified for this dramatic change are irrational and are apparent pretexts for animus-driven action. *See supra* Part II. For the reasons discussed at length above and in Plaintiffs’ opening brief, Defendants’ conduct fails even a rational-basis test. *See George Wash. Univ. v. District of Columbia*, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (rational basis tests under equal protection and due process are “almost indistinguishable”).



This Due Process violation is compounded by a shocking bait-and-switch. The military announced that transgender status would no longer be a basis for discharge, *see* ECF No. 40-4, and then *affirmatively encouraged* service members to reveal their transgender status to their commanders and peers, *see* ECF No. 40-9 at 21. Plaintiffs did so in reasonable reliance on that combined assurance and encouragement. *See* ECF No. 40-40 ¶ 3; ECF No. 41 ¶ 4; ECF No. 40-42 ¶ 3; ECF No. 40-43 ¶ 5; ECF No. 40-44 ¶ 3; ECF No. 40-45 ¶ 3. Now the President has directed DoD to treat Plaintiffs as subject to discharge because of a fact about themselves that the military encouraged them to reveal — with a promise that it would *not* be used against them.

The unconstitutionality of this bait-and-switch does not depend on any argument that “a federal agency is estopped from changing its generally applicable policies.” ECF No. 52-1 at 31. It simply reflects that “[t]he touchstone of due process is protection of the individual against arbitrary action of government.” *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (citation omitted). Estoppel principles, which can overlap with due process concerns, *see Bartko v. SEC*, 845 F.3d 1217, 1227 (D.C. Cir. 2017), only confirm the illegitimate nature of the President’s action, *see Gen. Accounting Office v. Gen. Accounting Office Pers. Appeals Bd.*, 698 F.2d 516, 526 (D.C. Cir. 1983) (“Estoppel generally requires that government agents engage — by commission or omission — in conduct that can be characterized as misrepresentation or concealment, or, at least, behave in ways that have or will cause an egregiously unfair result.”).

**C. President Trump’s Directive Banning Surgical Care Violates 10 U.S.C. § 1074.**

As Plaintiffs have explained, the military has a statutory obligation to provide medically necessary treatment to service members, and in some cases surgical procedures are necessary to treat transgender individuals who have been diagnosed with gender dysphoria. ECF No. 40-2 at 29–30. Defendants do not dispute either point. ECF No. 52-1 at 31–32.

Instead they focus, yet again, on Interim Guidance that will soon be superseded. Indeed, the Guidance states that “no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018.” ECF No. 60-5 at 3. Defendants’ response is essentially that the President’s directive will not violate the statute until a few months from now.

Defendants also attempt to evade review on the ground that it is “unclear” whether the President’s directive will bar any surgical treatments at all. ECF No. 52-1 at 31. As explained above, the straightforward reading of the directive — and the only one that gives it any effect and fulfills its stated purpose — is that many service members, including most of the Plaintiffs, will be denied medically necessary care. *Supra* Part I.A.2. Half-hearted suggestions that the directive might not amount to anything do not change the fact that Defendants have essentially admitted that the planned denial of care violates Section 1074.

### **III. Plaintiffs Will Suffer Irreparable Injury Without An Injunction.**

Defendants argue that Plaintiffs cannot establish irreparable harm “for much the same reasons they lack standing.” ECF No. 52-1 at 18. To the contrary, the very real injuries that support Plaintiffs’ standing also establish their irreparable harm. *Supra* Part I. The discrimination inherent in being made subject to discharge as administratively unfit on the basis of transgender status is itself irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976). So is the stigma that Plaintiffs now face, and will continue to face after March 22, even if they are not discharged soon thereafter. *See, e.g., Elzie v. Aspin*, 841 F. Supp. 439, 443 (D.D.C. 1993). So is the stress and uncertainty stemming from Plaintiffs’ loss of protection from discharge. *See, e.g., Nelson v. NASA*, 530 F.3d 865, 882 (9th Cir. 2008), *rev’d on other grounds sub nom. NASA v. Nelson*, 562 U.S. 134 (2011); *Schalk v. Teledyne, Inc.*, 751 F. Supp. 1261, 1268 (W.D. Mich. 1990), *aff’d*, 948 F.2d 1290 (6th Cir. 1991) (per curiam). So is the loss of professional opportunities because commanders are anticipating the service member’s discharge.

*See, e.g., Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 978 (9th Cir. 2017). So is loss of the professional opportunity — and distinct honor and privilege — of serving as a commissioned officer. *See, e.g., id.* So is the denial of needed medical care. *See, e.g., Fishman v. Paolucci*, 628 F. App'x 797, 801 (2d Cir. 2015). And so are the many losses — livelihood, benefits, career opportunity, health care, the ability to support one's family, and of course the intrinsic value of serving one's country — associated with actual discharge, once the categorical ban on service is fully implemented. *See, e.g., Cole v. ArvinMeritor, Inc.*, 516 F. Supp. 2d 850, 876–77 (E.D. Mich. 2005); *see generally* ECF No. 40-2 at 30–33 (identifying discrete harms suffered by particular Plaintiffs).

Defendants demean the value of Plaintiffs' service by characterizing “all” of Plaintiffs' injuries as merely “employment-related,” as though they could be fully remedied by “back pay and time in service credit.” ECF No. 52-1 at 18. As the above list of harms illustrates — and common sense confirms — this case is much more than a mundane employment dispute. The constitutional rights to equal protection and substantive due process are at stake, and the harms Plaintiffs face are irreparable.

#### **IV. The Balance Of Equities And The Public Interest Weigh Heavily In Favor Of An Injunction.**

Defendants have not identified any harm they would suffer from the requested injunction. *See* ECF No. 52-1 at 32–33. They state only that an injunction will “directly interfere with . . . the military's ability to thoroughly study” the issues. *See id.* That is simply not the case. The fundamental problem that Defendants again refuse to confront is that President Trump made sweeping discriminatory changes to military policy *without* first seeking the “seasoned judgment” of experts with “mature experience.” ECF No. 52-1 at 32 (quoting ECF No. 40-23). It is surely equitable and in the public interest to enjoin an unconstitutional, animus-driven

decision to override the military's considered judgment and discriminate against transgender service members, on the basis of no evidence whatsoever. Enjoining President Trump's unconstitutional directives will not prevent the military from studying anything.

Plaintiffs certainly agree that "the public has a strong interest in national defense." ECF No. 52-1 at 33. So do the 56 retired generals and admirals who concluded that it is President Trump's directives that would cause "significant disruptions" and "deprive the military of mission-critical talent." ECF No. 40-17. And after repeatedly extolling the virtues of the Interim Guidance, Defendants cannot credibly claim any harm to the national defense from an injunction that largely preserves the status quo embodied in that guidance beyond March 22.

**V. The Court Should Enjoin Defendants From Implementing Or Enforcing The Facially Unconstitutional Directives.**

"When a district court grants an injunction, the scope of such relief rests within its sound discretion." *Dixon v. Edwards*, 290 F.3d 699, 710 (4th Cir. 2002). The straightforward remedy here is to enjoin Defendants from implementing or enforcing President Trump's facially invalid directives. Defendants' arguments against this common sense relief are not persuasive.

Defendants first ask that any injunction be narrowly drawn so that they may discriminate against any transgender service member other than Plaintiffs. *See* ECF No. 52-1 at 33–35. That would be inappropriate. Plaintiffs have brought a facial challenge and have shown that President Trump's directives are unconstitutional and inconsistent with statutory authority. *See* ECF No. 39 at 32–39. When courts strike down a law, regulation, or order on such a facial challenge, they frequently enjoin the provision in its entirety, rather than allow enforcement against anyone but the plaintiff. *See, e.g., IRAP I*, 857 F.3d at 605 ("[B]ecause Section 2(c) likely violates the Establishment Clause, enjoining it only as to Plaintiffs would not cure the constitutional deficiency, which would endure in all Section 2(c)'s applications."), *vacated as moot*, 2017 WL

4518553; *Cty. of Santa Clara*, 250 F. Supp. 3d at 539 (injunction against “sanctuary city” executive order); *see also IRAP II*, 2017 WL 4674314, at \*40. Such a remedy is particularly appropriate where, as here, the challenged law or policy appears motivated by discriminatory intent. *See N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204, 238 (4th Cir. 2016) (“When discriminatory intent impermissibly motivates the passage of a law, a court may remedy the injury—the impact of the legislation—by invalidating the law.”).<sup>11</sup>

Not only is an injunction against President Trump’s directives appropriate, it is the only remedy that would “provide complete relief to the plaintiffs.” *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted). One of the many harms at issue is the stigma of being singled out as a member of a class that is labeled unfit to serve. *Supra* Part I.A.1. An injunction that simply created six personalized exceptions to a discriminatory policy, otherwise remaining in effect, would not redress this harm. Enforcement of President Trump’s directives against other individuals “would only serve to reinforce the ‘message’ that Plaintiffs ‘are outsiders, not full members’” of the U.S. military. *IRAP I*, 857 F.3d at 605, *vacated as moot*, 2017 WL 4518553 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309 (2000)).<sup>12</sup>

Defendants cite a single case, *Meinhold v. Department of Defense*, 34 F.3d 1469 (9th Cir. 1994), to argue that all of these principles should be disregarded because this case involves the

---

<sup>11</sup> Defendants call this proposed injunction “worldwide” as an apparent pejorative. ECF No. 52-1 at 34. Of course, the geographic scope would be the same even if the injunction were limited to Plaintiffs, unless Defendants mean to suggest that they could evade the injunction by discharging Plaintiffs overseas. The military operates in many places; that is not an argument for permitting it to enforce a discriminatory, unconstitutional policy in some of them.

<sup>12</sup> Moreover, any injunction would have to benefit any present or future member of Plaintiff ACLU of Maryland. The military might have difficulty identifying ACLU members entitled to relief under a narrow injunction. *Cf. Ariz. Dream Act Coal. v. Brewer*, 81 F. Supp. 3d 795, 810–11 (D. Ariz. 2015) (granting broadly applicable injunction because the plaintiff is an organization that “seeks relief on behalf of its members,” and it would be “impractical” for those administering the policy to “distinguish” between members and non-members).

military. ECF No. 52-1 at 34. *Meinhold* creates no such special rule. Rather, the relief requested by the plaintiff in *Meinhold* was simply to have “his discharge voided and to be reinstated.” 34 F.3d at 1480. In limiting the injunction to that plaintiff, the court provided the full relief he had sought. It had no reason to confront — and it therefore did not address — any suggestion that broader harms would result from otherwise maintaining an invalid policy.

After first arguing that the relief Plaintiffs request is too broad, Defendants next argue that it is too trivial. According to Defendants, Plaintiffs seek an “Obey the Law” order requiring “Defendants to comply with the Interim Guidance.” ECF No. 52-1 at 33. This perplexing argument again ignores the fact that the Interim Guidance is *interim* and will imminently be superseded by President Trump’s binding, discriminatory directives. An injunction codifying what is in some respects current policy is necessary for the simple reason that without the injunction, that policy will soon be replaced with a different one that is harmful and unlawful.

Finally, Defendants raise the non-sequitur that military personnel decisions are “ordinarily reviewed by a district court in the APA context.” ECF No. 52-1 at 35. But Defendants do not appear to argue that this lawsuit is somehow procedurally improper. And as explained above, exhaustion is not required here. *Supra* note 8. Plaintiffs have standing, their claims are ripe, President Trump’s directives are likely unconstitutional, and if the directives are not enjoined Plaintiffs will suffer irreparable harm. Defendants cite no authority suggesting that the straightforward injunction Plaintiffs seek is unavailable in these circumstances.

### CONCLUSION

For these reasons, and those set forth in Plaintiffs’ opening memorandum, the Court should deny Defendants’ Motion to Dismiss and grant Plaintiffs’ Motion for a Preliminary Injunction.

Dated: October 27, 2017

David M. Zions\*  
Carolyn F. Corwin\*  
Mark H. Lynch (Bar No. 12560)  
Jaclyn E. Martinez Resly\*  
Jeff Bozman\*  
Marianne F. Kies (Bar No. 18606)  
Christopher J. Hanson\*  
Joshua Rovenger†  
Tom Plotkin\*‡  
Peter J. Komorowski (Bar No. 20034)  
COVINGTON & BURLING LLP  
One CityCenter  
850 Tenth St. NW  
Washington, DC 20001  
Telephone: (202) 662-6000  
Fax: (202) 778-5987  
dzions@cov.com  
ccorwin@cov.com  
mlynch@cov.com  
jmartinezresly@cov.com  
jbozman@cov.com  
mkies@cov.com  
chanson@cov.com  
jrovenger@cov.com  
tplotkin@cov.com  
pkomorowski@cov.com

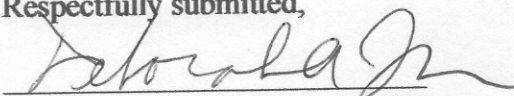
Mitchell A. Kamin\*  
Nicholas A. Lampros\*  
COVINGTON & BURLING LLP  
1999 Avenue of the Stars, Suite 3500  
Los Angeles, California 90067  
Telephone: (424) 332-4800  
Facsimile: (424) 332-4749  
mkamin@cov.com  
nlampros@cov.com

\* Admitted *pro hac vice*

† *Pro hac vice* application forthcoming

‡ Admitted to the Bars of Pennsylvania and New Jersey, admission to the Bar of the District of Columbia pending; and supervised by the principals of the firm.

Respectfully submitted,

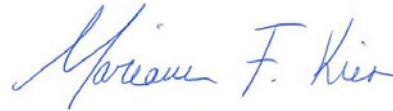
  
Deborah A. Jeon (Bar No. 06905)  
David Rocah (Bar No. 27315)  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION  
OF MARYLAND  
3600 Clipper Mill Road, #350  
Baltimore, MD 21211  
Telephone: (410) 889-8555  
Fax: (410) 366-7838  
jeon@aclu-md.org  
rocah@aclu-md.org

Joshua A. Block\*  
Chase B. Strangio\*  
James Esseks\*  
Leslie Cooper\*  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
125 Broad Street, 18th Floor  
New York, NY 10004  
Telephone: 212-549-2627  
Fax: 212-549-2650  
jblock@aclu.org  
cstrangio@aclu.org  
jesseks@aclu.org  
lcooper@aclu.org

*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 27th day of October, 2017, copies of the foregoing and any exhibits were served via CM/ECF on all counsel of record.

A handwritten signature in blue ink that reads "Marianne F. Kies". The signature is written in a cursive style with a horizontal line underneath it.

Marianne F. Kies



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

BROCK STONE, et al.,  
Plaintiffs,

vs.

DONALD J. TRUMP, et al.,  
Defendants.

Case No. 1:17-cv-02459

**DECLARATION OF MARIANNE F. KIES IN SUPPORT OF  
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Marianne F. Kies, depose and say as follows:

1. I make this declaration in support of the remedies and relief sought by Plaintiffs in this case. The following facts are based on my own personal knowledge, except those stated upon information and belief, and as to all such facts stated upon information and belief, I am informed and believe that the same are true.

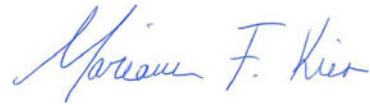
2. I am an attorney with Covington & Burling LLP, and I represent Plaintiffs Brock Stone, Kate Cole, John Doe, Seven Ero George, Teagan Gilbert, Tommie Parker, and the American Civil Liberties Union of Maryland, Inc. in this action.

3. Attached hereto as "Exhibit 29" is a true and correct copy of *Senate Armed Services Committee Holds Hearing on the Nomination of Gen. Joseph Dunford to be Re-Appointed as Chairman of the Joint Chiefs of Staff*, CQ Congressional Transcripts (September 26, 2017).

4. Attached hereto as "Exhibit 30" is a true and correct copy of the Department of Defense Directive 1332.18, "Separation or Retirement for Physical Disability" issued by former Under Secretary of Defense for Personnel and Readiness Edwin Dorn (November 4, 1996).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of October, 2017.



---

Marianne F. Kies

# **Exhibit 29**

CQ CONGRESSIONAL TRANSCRIPTS

Congressional Hearings

Sept. 26, 2017 - Final

©2017, Provided under license from Bloomberg Government.

Bloomberg Government

Support: 1-877-498-3587

www.bgov.com

All materials herein are protected by United States copyright law and/or license from Bloomberg Government, and may not be reproduced, distributed, transmitted, displayed, published or broadcast without the prior written permission of Bloomberg Government. You may not alter or remove any trademark, copyright or other notice from copies of the content.

## **Senate Armed Services Committee Holds Hearing on the Nomination of Gen. Joseph Dunford to be Re- Appointed as Chairman of the Joint Chiefs of Staff**

### **LIST OF PANEL MEMBERS AND WITNESSES**

MCCAIN:

Since a quorum is now present (ph), I ask the committee to consider a list of 3,196 pending military nominations. All of these nominations have been before the committee the required length of time. Is there a motion to favorably report these 3,196 military nominations to the Senate?

REED:

So moved.

MCCAIN:

Is there a second?

(UNKNOWN)

I second.

MCCAIN:

All in favor, say aye.

The motion carries.

The committee meets this morning to consider the nomination of General Joseph Dunford for reappointment as chairman of the Joint Chiefs of Staff. General Dunford, this committee thanks you for your decades of distinguished service to our nation.

We are grateful to your wife, Ellen, for the support that she has always provided to you, and to all who serve our nation in uniform. I'd also like to welcome your son, Patrick. Patrick.

(LAUGHTER)

Fortunately (ph), you look like your mother, Patrick, thank you. (AUDIO GAP) who is joining us this morning. I know that your other children, Joe and Kathleen, send their support from afar, even as I bet they are a little relieved that they do not have to sit through your interrogation.

In order to exercise its legislative and oversight responsibilities, it's important in this committee and other appropriate committees of the Congress are able to receive testimony, briefings and other communications of information. Have you adhered to applicable laws and regulations governing conflicts of interest?

DUNFORD:

I have, Chairman.

MCCAIN:

Do you agree, when asked, to give your personal views, even if those views differ from the administration in power?

DUNFORD:

I do, Chairman.

MCCAIN:

Have you assumed any duties or undertaken any actions which would

appear to presume the outcome of the confirmation process?

DUNFORD:

I have not, Chairman.

MCCAIN:

Will you ensure your staff complies with deadlines established for requested communications, including questions for the record in hearings?

DUNFORD:

I will, Chairman.

MCCAIN:

Will you cooperate in providing witnesses and briefers in response to congressional requests?

DUNFORD:

Yes, Chairman.

MCCAIN:

Will those witnesses be protected from reprisal for their testimony or briefings?

DUNFORD:

They will be, Chairman.

MCCAIN:

Do you agree, if confirmed, to appear and testify upon request before this committee?

DUNFORD:

I do, Chairman.

MCCAIN:

Do you agree to provide documents, including the copies of electronic forms of communication, in a timely manner, when requested by a duly constituted committee, or to consult with a committee regarding the basis for any good-faith delay or denial in providing such documents?

DUNFORD:

I do, Chairman.

MCCAIN:

And I -- my colleagues and I are aware that that is a routine, but given the political environment today, especially, and certainly not any reflection on you, General Dunford, but those questions need to be asked. And I thank you for your responses.

General Dunford, my colleagues and I will have a lot of questions for you about the many pressing national security challenges we face, but this hearing also offers an opportunity to (ph) reflect on some broader topics that have historically and more recently been a major focus of this committee's efforts: the unique role of the chairman in our national security structure and the state of civil-military relations.

As, quote, principal military adviser to the president of the National Security Council, the secretary of defense and the Congress, the chairman of the Joint Chiefs of Staff is the most important military duty in our nation.

The chairman is the one military officer with the authority to present comprehensive analysis and advice to civilian policymakers, informed by all the military services and combatant commands and spanning every global and functional issue of national security.

This responsibility is now more important than ever. Our country faces a multitude of national security challenges, all of which cut across the regional and functional organizations that divide up the Department of Defense. The chairman is the only military officer with a truly comprehensive perspective on the joint force, out of all the threats we face worldwide and the interplay between them.

That is why this committee acted last year to clarify the chairman's statutory responsibility to advise civilian leaders on the global strategic integration of our military efforts. The chairman's unique role lends extra

gravity to the responsibility that you and every military officer possesses, the responsibility to provide best military advice to civilian leaders.

This is not a luxury. It is a duty. It is a duty that military officers owe to the American people and to the men and women under their command. Civilian policy makers in both the executive and legislative branches rely on our military professionals to better understand the military dimensions of the national security challenges we face and the options at our disposal for wielding military power effectively.

But best military advice does not stop there. Military officers, and especially the chairman of the Joint Chiefs of Staff, must tell their civilian superiors what action they believe are best and right to take, and they must do so honestly, candidly, respectfully but forcefully, whether civilians want to hear it or not. Best military advice may be disregarded, but it must always be given.

What's more, in my opinion, best military advice should not be narrowly limited to technical military matters. When the chairman offers his best military advice, he's not simply offering the best advice about the military, but rather, the best advice from the military.

And that extends to issues of national security policy, strategy and operations. For example, the decision to take our nation to war properly rests with civilians. It's a policy question. But military officers should not be prohibited from voicing their advice on such a matter. Indeed, it is their duty to do so.

If you haven't seen Mr. Burns' series on Vietnam, I suggest that you pay attention to it, and I suggest that you examine the tensions that existed between the civilian superiors and the military. And I believe that you will come to the conclusion that the military advice was not given the weight and effect that it -- that it should have, which was one of the factors in leading to 58,000 names on the wall in granite, not too far from here.

Just as we're clear about what constitutions best -- constitutes, excuse me, best military advice, we must be equally clear about its limitation. Advice is just that: advice. The chairman, as principal military adviser, is



not in the chain of command. Ours is not a general staff system. In our system, operational command rests with combatant commanders who report by law to the secretary of defense.

The chairman must also advise civilian leaders on the military dimensions of strategy, operations and plans, both within and among our combatant commanders' area of responsibility, and it -- his right, indeed, his responsibility, to provide competing advice to policymakers when he disagrees with combatant commanders. But the chairman is not an operational commander.

Similarly, best military advice does not mean independent advice. It occurs in the context of civil-military relations, and I want to say a few words on this in closing.

Professor Eliot Cohen has described civil-military relations as an unequal dialogue. Civilian and military rules are not to be dichotomized and held apart. Rather, they must be brought together through an iterative process of discussing, scrutinizing and refining military strategy, operations and plans, a process in which civilian leaders must play an active role and make the major decisions.

Best military advice is central to this dialogue, but it can never replace it. Unfortunately, I sense that this civil-military dialogue has become strained. At times, civilian officials have disrespected military leaders, disregarded their advice on critical military matters and shirked accountability for their decisions.

More recently, civilian oversight and control of the military has morphed into meddling and micromanagement of tactical details for political purposes, which is arm -- which has harmed military effectiveness. The last administration distinguished itself in this regard.

What we must guard against, General Dunford, especially now, when so many civilian leaders at the Department of Defense are either missing, or are themselves recently retired military officers, is an overcorrection. We cannot afford to swing from civilian micromanagement to civilian marginalization.

We need to restore balance in civil-military relations, where best military advice is always rendered and received, but is done so as part of a dialogue with civilians who participate actively and have the last word on policy, strategy, operations and plans. This committee takes its obligations seriously in this regard.

The civil-military dialogue does not only occur within the Department of Defense. It occurs between the branches of government, as well. That's why the chairman also serves as a principal military adviser to the Congress.

And that's why, as part of the confirmation process, we ask current and future chairmen, like all military officers, to provide their best personal advice to this committee, if asked. It is to ensure that the members of this committee and the full Congress are able to meet our independent constitutional responsibilities to the Americans we serve.

At present, this committee, and the Congress more broadly, is not receiving the information and respect it deserves as a coequal branch of government. We do not work for the president or the executive branch.

We have distinct and equal responsibilities under the Constitution, and the administration needs to understand its obligation to the Congress in this regard. Too often, members of this committee are learning in the media for the first time about major national security and military activities that we, as the Committee of Oversight, should be told about and consulted on in advance.

Even now, nearly 10 months into this year, we are told we have a new strategy for Afghanistan, but members of this committee have far more questions than answers.

MCCAIN:

The administration must do better. And until it does, the Congress and this committee will be forced to use what levers we have to show the administration that we are no, and will not be, a rubber stamp.

We will have many questions for you, General. We look forward to your candid, forthright and best military advice.

Senator Reed.

REED:

Thank you very much, Mr. Chairman. I also want to welcome General Dunford this morning, and thank him for his outstanding service to this nation over many years.

General Dunford is joined by his wife, Ellyn, and son, Patrick. Thank you. And also like to acknowledge the general's other children, Joe and Kathleen, who are not able to join us today.

And on behalf of our committee, we thank the entire Dunford family for their continued sacrifice and support. It means a great deal to -- to us, but more particularly to the men and women of the armed forces. Thank you.

Under the leadership of Chairman McCain, this committee has maintained a robust hearing schedule focused on the most pressing threats and challenges facing our armed forces.

Our committee has heard (ph) from the most senior political leaders in the department, the highest echelons of the military and distinguished outside experts. Time and again, these hearings have underscored that the United States is faced with a myriad of challenges that offer no quick or easy solutions and require adroit military leadership.

During General Dunford's tenure as chairman, he has provided sound military counsel and demonstrated a deep understanding of the national security threats our nation must address. As chairman, General Dunford has made it a priority to keep this committee well- informed on the department's policy decisions impacting our armed forces and changes to our military strategy to counter the risk posed by our adversaries.

While this committee may not always agree with General Dunford's views, he has been honest and conducted himself with integrity. Therefore, I believe he should be reappointed to serve as the chairman of the Joint Chiefs of Staff.

As we pause to consider the state of the world today, General Dunford's professionalism and commitment to duty have served him well. This is not the first time in our nation's history that we have had to confront multiple threats from abroad. But it is an incredibly dangerous and uncertain time.

North Korea's nuclear missile program poses an immediate and grave national security threat, and heightened tensions on the peninsula are a deep cause for concern.

The global order established by United States following World War II is under siege by a revanchist Russia determined to reassert its influence around the world.

China continues its saber-rattling in the Asia-Pacific region by undermining the freedom of navigation and using economic coercion of its smaller, more vulnerable neighbors.

Iran continues their aggressive weapons development activities, including ballistic missile development efforts, as well as other destabilizing activities in the region.

Finally, our military has been consumed by two prolonged wars against violent extremist groups like ISIS that have sapped readiness and precluded our military personnel from training for full-spectrum operation.

As we grapple with these threats, we must also be mindful that our president continues to show a lack of in-depth knowledge or nuance in foreign policy and defense matters. It had been my sincere hope that the magnitude of the office, coupled with the enormous challenges we face, would've encouraged the president to be more judicious with his comments and thoughtful with his actions.

Unfortunately, that has not been the case. Today, our foreign policy has been predicated on alienating long-time allies, discounting the value of international organizations and our global commitments and retreating from our leadership role in the world, while at the same time, decisions on our defense posture and complicated military personnel issues are promulgated by presidential tweet.

Such trends lend more uncertainty to already dangerous times, and I believe the risk of miscalculation and unintended consequences have never been higher.

Resolute leadership at the highest echelons of our military is a necessity, now more than ever. I commend General Dunford for the steady hand he has demonstrated in guiding the joint chiefs during his tenure as chairman, and for the sterling example he has set for all those that wear the uniform.

Thank you again, General Dunford, for your willingness to serve our nation.

Thank you, Mr. Chairman.

MCCAIN:

General Dunford, welcome.

DUNFORD:

Thank you, Chairman.

Chairman McCain, Ranking Member Reed, distinguished members of the committee, I thank you for the opportunity to appear before you today. I'm honored to be renominated as the chairman of the Joint Chiefs of Staff.

I'd like to begin by thanking the committee for your support of our soldiers, sailors, airmen and Marines. This year's National Defense Authorization Act is a reflection of your commitment to ensure that they remain the most well-trained, well-equipped and capable military force in the world.

Today, we have a competitive advantage over any adversary, and I can say with confidence that our armed forces are ready to protect the homeland and meet our alliance commitments. However, that advantage has eroded in recent years.

If reconfirmed, I look forward to working together with the committee to ensure that the chairman testifying in 2025 has the same degree of confidence in our ability to provide for the common defense.

This committee is keenly aware of today's complex and volatile security environment -- both the chairman and the ranking member have mentioned it -- and I don't expect the strategic landscape to improve in the near future.

Russia continues to invest in a full range of capabilities designed to limit our power projection, erode U.S. influence and undermine the credibility of the NATO alliance.

Similarly, China is focused on limiting our ability to project power and weakening our alliances in the Pacific.

Iran is projecting malign influence across the Middle East, threatening freedom of navigation while supporting terrorist organizations in Syria, Iraq and Yemen.

And, while we're all focused on the destabilizing threat posed by North Korea and Kim Jong-un's relentless pursuit of a nuclear intercontinental ballistic missile that can threaten the United States, we are also confronted by Al Qaida, ISIS and other transregional terrorist organizations. And while we've made significant progress against core ISIS in Iraq and Syria, we are not complacent, and much work remains to be done.

In Afghanistan, we are beginning to deploy additional U.S. and coalition forces in support of the president's broader South Asia strategy.

In the context of these and other challenges, we need a renewed focus to restore joint readiness and develop the warfighting capabilities we'll need to defend the nation in the future.

As this committee has highlighted in hearings, we face very real and significant readiness challenges today, and we have failed to adequately invest in the future.

I can't state it any clearer. If we don't address this dynamic with sustained, sufficient and predictable funding over the course of several years, we will lose our qualitative and quantitative competitive advantage. In the end, this will have a profound effect on our ability to deter conflict and to respond effectively if deterrence fails.

If reconfirmed, I'll commit to working with the administration and the Congress in addressing these challenges to ensure our men and women in uniform never find themselves in a fair fight.

Chairman, I listened very carefully to your opening statement. I fully understand my responsibilities to provide candid best military advice to the president, the secretary of defense and the National Security Council, and I'll be forthright when I'm asked to appear before this committee and other congressional venues.

And with that, I'm prepared to answer your questions.

MCCAIN:

Well, thank you very much, General.

In June, you testified, "Without sustained, sufficient and predictable funding, I assess that within five years, we will lose our ability to project power."

We still don't have sustained, sufficient and predictable funding. And, as you mention, I'm not sure we will for the foreseeable future, unless Congress finally steps up to do its job. As you know, we'll start fiscal year 2018 on a continuing resolution, with no insight into what the final funding levels will be for the year.

What -- what's the effect of the average First Lieutenant who's out there, or captain -- has (ph) a company command, and they -- and they don't have sufficient funds to carry out their training regimen, and their pilots are flying less hours per month than their Chinese and Russian counterparts?

What -- first of all, what effect does that have on our ability to defend the nation? And second of all, what does it do to the men and women of the all-volunteer force?

DUNFORD:

Chairman, I'll answer the first part, when you say what does it do to our ability to defend the -- our ability to defend the nation. And when I -- when I -- in my opening remarks, I mentioned competitive advantage. And we've done some very careful analysis about where are the current threats. And we use, largely, Russia and China to benchmark our capabilities.

DUNFORD:

And if you go back to 1999 or 2000, we had what we should have as the United States of America, a nation that thinks and acts globally. We had a significant competitive advantage in our ability to project power when and where needed to advance our national interest.

I can't say that today. We are challenged in our ability to project power, both to Europe and in the Pacific, as a result of those threats, and other nations, to include non-state actors as well, have capabilities on a high end that challenge our ability to project power. So over time, that has eroded.

With regard to the question about lieutenants and captains, I think I have some insight into that, in the sense that I was a platoon commander in the late 1970s, and I lived through a period of time when we weren't properly resourced, we didn't have sufficient money for training, we didn't have sufficient personnel and, many times, the tasks that we were asked exceeded our capability.

I think it has to do with the confidence. And I would give you an example of a pilot. If you look a pilot specifically, you know, in the past, pilots might have had 30 hours a month to fly. Now they may be down as low as 15 hours a month.

On a day-to-day basis, you may not be able to see the different between Pilot A and Pilot B. But, if there is an in-flight emergency, I can guarantee you that the pilot that has 30 hours will immediately feel much more comfortable and confident in their ability to deal an anomalous situation, be able to control their physiological response. And you and I may never find out about that incident.

On the contrary, if a pilot has 15 hours a month, we may very well find out about it, because it's a class A mishap.

MCCAIN:

And our non-combat casualties and fatalities are now higher than -- in operations than in combat.

DUNFORD:



Chairman, they are. And I -- and I would attribute that to two things. I mean, one, it's the material condition that does affect the numbers of hours that a pilot flies, a driver drives, so forth. It's also the size of the force relative to the requirements that we have.

Going back to my lieutenant days, if you think about training, whether it's on a ship, in a plane or in the infantry, as a series of 101, 201, 301, 401 tasks, when I was a lieutenant, we didn't go to 201 until we were confident that we were well-founded in 101. And we didn't go to 301 until we were well-founded in 201.

And I would argue that, while we may have trained to standard in the past, when we had sufficient time and resources, now, we're training to time, because that ship is going to go to sea, that pilot is going to go to war, that infantryman is going to go to war, whether or not they've had an opportunity to retrain, sometimes, in the (ph) basic tasks or not.

MCCAIN:

Do you believe it's possible for the United States to achieve its national security objectives in Afghanistan, as long as Pakistan provides support and sanctuary to groups such as the Taliban and the Haqqani Network?

DUNFORD:

I do not believe that we can attain our objectives in Afghanistan, Chairman, unless we materially change the behavior of Pakistan.

MCCAIN:

And have you got thoughts on how you do that?

DUNFORD:

Chairman, while it will require a broad approach to do it, I think it's unacceptable that -- you hit -- you hit the key issue. It's unacceptable that Pakistan provides sanctuary, and we ought to bring the full weight of the U.S. government and our coalition partners on Pakistan to ensure that they do not provide the sanctuary that they have provided historically to groups like Haqqani and the Taliban.

MCCAIN:

Are you satisfied, now, with the rules of engagement, which have been changed with the new administration?

DUNFORD:

Chairman, I am, and I -- and I -- and I had a long conversation with General Nicholson in NATO over the weekend to ensure that he also had the same degree of confidence.

And Secretary Mattis has spoken to General Nicholson in the past week, to make sure he's confident that he has the rules of engagement that allow him to engage any enemy that is a threat to the Afghan government, our mission, coalition forces or U.S. personnel.

MCCAIN:

Some of it reminiscent of our rules of engagement during the Vietnam conflict?

DUNFORD:

Chairman, they may have been. I can assure you today that we have the rules of engagement necessary to adventure our objectives in Afghanistan, and to protect the force, as well.

MCCAIN:

Thank you.

Senator Reed.

REED:

Thank you very much, Mr. Chairman. Thank you, General Dunford.

In response to the committee's pre-hearing policy (ph) questions, you indicated that Iran is adhering to its obligations under the Joint Comprehensive Plan of Action or the JCPOA. But you do rightfully point out that they are engaged in extremely destabilizing activities in the region, missile development, activities that can't be tolerated.

But, going back to JCPOA, is it your view that it was designed to limit their nuclear capacity, and that it is currently achieving that objective?

DUNFORD:

Senator, it was designed specifically to address what I would describe as one of the five major threats of Iran, the nuclear threat, as you point out. What the -- what the agreement didn't address was the missile threat, the maritime threat, Iran's support of proxies in the cyber activity that they have conducted.

REED:

And they're still pursuing those other venues very aggressively, in your view?

DUNFORD:

They are, Senator, and we see a physical manifestation of that in Yemen. We see it in Iraq. We see it in Lebanon. We see it in Syria.

REED:

In this complicated world where there's so much going on, we're -- I have a (ph) focus on North Korea -- if we were to step away from the JCPOA, would that have an effect, in your professional view, on the ability to negotiate or to come to some type of non-kinetic solution in Korea?

DUNFORD:

Senator, it makes sense to me that our holding up agreements that we have signed, unless there's a material breach, would have an impact on others' willingness to sign agreements.

REED:

And in terms of a force that, we've all commented on, is stretched, if -- in reaction to rejecting the JCPOA, would you assume that the Iranians would step up their activity even more, causing us to, at least in a contingency, have forces that would be in that area, and not able -- available for Korea?

DUNFORD:

Senator, I would. We watch every day -- and this is even in addition to the JCPOA issue, just our relationship with Iran -- we watch every day for indicators that either Iranian-backed militia forces or Iranian maritime forces would pose a threat to the force.

We have postured the force to deal with those threats, and we watch the intelligence carefully to make sure our posture every day is in the context of the current threat.

REED:

You've said it and the secretary of defense has said it and the White House has said it, too -- is that that our major effort against North Korea is diplomatic at this moment. Is that accurate?

DUNFORD:

Senator, it absolutely is. The military dimension today is in full support of the economic and diplomatic pressure campaign the secretary of state is leading in North Korea.

REED:

One of the things that's just difficult to comprehend is we do not have an ambassador in South Korea, do we?

DUNFORD:

We do not. We have a charge at this time, Senator.

REED:

And is that (ph) -- General Brooks is sort of doing double duty, informally?

DUNFORD:

No, Senator, we're very proud of what General Brooks is doing right now, as both a -- he sits there at the nexus of the political military.

REED:

Now, I'm very -- as you have confidence in General Brooks. But it's -- if we're in a diplomatic mode, we don't have an ambassador. I'm told we don't also have an assistant secretary for the area in the State Department. We just don't seem to have the team in place to have an all-court press for a diplomatic solution. Is that unfair comment, or?

DUNFORD:

Senator, I certainly probably would comment on it (ph) only because I have clearly heard Secretary Tillerson also comment on the difficulty he has, right now, doing all the things the State Department's been called upon to do with some of the -- some of the gaps that continue to exist.

REED:

In terms of the situation on the peninsula now, can you give us your -- your judgment of where we are today? Given the statements back and forth between leaders of both countries, given our aerial operations off the coast, given the response yesterday that could trigger a reaction by the North Koreans, can you give us an assessment?

DUNFORD:

Senator, I can.

You know, while the political space is clearly very charged right now, we haven't seen a change in the posture of North Korean forces. We watch that very carefully. We clearly have postured our forces to respond in the event of a provocation or conflict.

We also have taken all proper measures to protect our allies, the South Koreans, the Japanese, the force, as well as Americans in the area. But what we haven't seen is military activity that would be reflective of the charged political environment that you're describing.

REED:

Thank you very much, General.

MCCAIN:

Senator Inhofe.

INHOFE:

Thank you, Mr. Chairman.

General Dunford, I'd like to pursue two things: one, intelligence, and the other, modernization. In doing this, I want to get three statements in the record to begin with.

On Sunday, Kim Jong-un released a propaganda video depicting the U.S. aircraft carrier and bomber being blown up by North Korean missiles. He further threatened that a U.S. attack would see our forces, as he said, head to the grave.

INHOFE:

I've been very proud of the uniforms coming out and talking about how real the threat is; General Hyten, the Strategic Command commander, said last week that he views North Korea's ability to deliver a nuclear weapon on an ICBM as a matter of when, not if. And the Defense Intelligence Agency assesses that North Korea would be able to reliably range U.S. mainland with nuclear ICBMs by the end of 2018.

I remember when that 2018 was 2020, and it was 2019. I'd have to ask you how confident you are in the -- in our intelligence community's ability to monitor and detect just where they are, and how accurate you believe the end of 2018 is.

DUNFORD:

Senator, from my review of the intelligence, I think that what General Hyten said and what you just described reflects the collective judgment of the senior leadership in the department.

And I think something that General Hyten said is something I've also said in public -- is that, whether it's 3 months or 6 months or 18 months, it is soon, and we ought to conduct ourselves as though it is just a matter of time, and a matter of very short time, before North Korea has that capability.

INHOFE:

Yeah. And I think it's important to get in the record -- name a couple of the unique challenges in getting intelligence on North Korea that don't exist in other places.

DUNFORD:

The -- well, they may exist to some degree in other places. The North Koreans, over time, have buried much of their capability underground, which creates unique challenges. There's also some specific weather challenges in North Korea that limits our collection at various periods of time.

And, to be honest with you, Senator, part of it also has been, you know, the competing demand for a limited amount of intelligence, surveillance and reconnaissance. Certainly, over the last 18 months, we have increased our collection against North Korea.

But for a long period of time, we had decreased our collection against North Korea because of competing demands elsewhere in the world. So I think those are probably three of the most significant challenges we face.

INHOFE:

That's good. The -- and I assume you're equally concerned about their activity in trading technology, missile technology, with other countries, such as Iran?

DUNFORD:

Senator, we are. We've looked at that nexus quite a bit. I'm not sure we've seen any transfer of nuclear technology, but we certainly have seen missile technology and a wide range of other weapon systems that they have exported, or expertise that they have exported outside of North Korea.

INHOFE:

On modernization, both of the Army Generals Anderson and Murray said recently, in our subcommittee, given the complex range of threats, the Army has a very short window to improve capability and capacity. Meanwhile, our adversaries are closing the capacity gap.

I think you said, you know, if I wrote it down correctly -- you said, "If we don't have sustained funding, we'll lose our qualitative and quantitative advantage over our adversaries." I think that that is accurate. And you've expressed your concern that we're getting very close on that. Is that correct?

DUNFORD:

I have, Senator, and I think this reflects -- both the Chinese, the Russians and others have studied our strengths over the course, now, of 20 years. And they've (ph) been on a path of developing capabilities that exploit our vulnerabilities, and we know what those are, and we have a plan to correct those.

But if we don't correct those, our ability to project power -- for example, when the Army talks about it, our ability to project power into Europe, but then operate freely within Europe, to include to support our forces with logistics bases, sustainment efforts, is going to be challenged.

INHOFE:

And I think your statement, along with some of the other military -- some of the uniforms', are helpful to us, because the American people really don't understand the level of threat that's out there, the complexity of how it's not something that's happened before, and that we need to start prioritizing our military and our defense issues.

One last thing: General Milley recently testified during the '18 Army posture hearing that we are now outranged and outgunned. Do you agree with that statement?

DUNFORD:

Relative to certain threats under certain conditions, I do, Senator.

INHOFE:

Yeah. OK, thank you.

Thank you, Mr. Chairman.

MCCAIN:



Senator Gillibrand.

GILLIBRAND:

Thank you, Mr. Chairman. Thank you, General Dunford, for your service.

The uncertainty that's facing our transgender men and women in uniform since late July has been deeply unsettling to many members of the committee. Chairman McCain, Ranking Member Reed, Susan -- Senator Susan Collins and I have introduced a bipartisan bill that would prevent the Department of Defense from separating currently-serving transgender individuals solely based on their gender identity.

These men and women, across all services and occupations, were told by the Department of Defense that they would be allowed to serve openly and continue in their military careers. Many have worked diligently within their chains of command to meet every requirement put forth by the former administration.

Now, they have been plunged into a career of uncertainty, and their service and sacrifices have been unfairly tarnished. Many of us on the committee are deeply disturbed by the developments of the last few months.

Do you agree that our thousands of openly serving transgender men and women have served their country with honor and valor?

DUNFORD:

I do, Senator. I would just probably say that I believe any individual who meets the physical and mental standards, and is worldwide deployable and is currently serving should be afforded the opportunity to continue to serve.

GILLIBRAND:

Thank you.

If reappointed, can you promise currently-serving transgender individuals who have followed department policy and meet every requirement, as you just said -- as to them, that they will not be separated from the armed services based solely on their gender identity?

DUNFORD:

Senator, I can promise that that will be my advice. What I've -- what I've just articulated is the advice I've provided in private, and I've just provided in public.

GILLIBRAND:

Thank you.

And have you had the opportunity to meet with any of the thousands of transgender individual currently serving in uniform on active duty, to hear how the recent developments have impacted their lives? And if not, will you commit to doing so?

DUNFORD:

I have not, since the -- since, I guess, August, when the announcement was made. But I would certainly do that, Senator.

GILLIBRAND:

Thank you.

On the subject of military sexual violence, we've been at this for a while now. Every secretary of defense since Dick Cheney was secretary of defense have said zero tolerance for sexual assault in the military. But we still have serious issues of climate.

Our assault rate is still 15,000 estimated assaults, sexual acts and unwanted sexual contact. But we really aren't moving the needle in the way we should. During a hearing, over the last few years, we had General Dempsey, who said in 2014 -- he said that we are currently on the clock, if you will. If we don't make serious progress in a year, we might have to look at legislation.

Now, more than -- more than half of the Senate has voted twice to take the decision-making of whether a crime has been committed out of the chain of command, and giving it to trained military prosecutors as a way to professionalize our military justice system.

This is a reform that our allies have already done long ago, mostly for defendants' rights, whether it's the U.K., whether it's Israel, whether it's Australia, Canada, Netherlands. And they've done it purposefully, because they believe that, if someone could be sent to jail for life, that the decision maker who makes those decisions should be well-trained as a criminal prosecutor, have no biases, not know the perpetrator or the victim -- the accused or the accuser and have that criminal justice background, so that they can leave biases at the door.

We've done every type of reform that has been recommended by every panel that's been impaneled to look at this. We have special victims counsels in place to give survivors more legal advice during the process. We have changed the rules of evidence to make them more similar to the civilian system, so there's more protections.

We have done literally anything anyone can think of that the Department of Defense will not oppose. We've made retaliation a crime three years in a row. Not one case has gone to court-martial of retaliation, of the hundreds of cases I've looked at. The largest bases for each of the services, I look at all the sexual assault cases every year and do a broad-based review.

So we're not fixing the problem. I would like a commitment from you that you will work with me on ways to fix this problem and to honestly look at this command structure, because more often than not, the decisions that being -- are made aren't necessarily the right decisions.

Using non-judicial punishment when going to court-martial is recommended by those who have done the investigation, kicking somebody out who has many witnesses against them instead of taking them to court-martial. These are kinds of decisions that are not making our military stronger.

So I would like your commitment that you will work with me on this issue this year, to try to make a difference, to solve this problem.

DUNFORD:

Senator, I don't think any of us are satisfied with where we are, and I would commit to work with you to look at this issue.

GILLIBRAND:

Thank you.

MCCAIN:

General, let me just say that this committee has had hundreds of hours of hearings, input from leaders such as yourself. This issue has been thoroughly vetted by this committee.

The secretary of defense is looking at this issue and others, and I am convinced that the one aspect of this issue that this chairman will not tolerate -- and that is to undermine or cause the commanding officer not to have both authority and responsibility in this process.

MCCAIN:

I just wanted make that very clear to you, the position of the majority of this committee. We've got a lot of work to do on the issue, but to take away the commanding officer's authority and responsibility would be a violation of everything I've ever known about the United States Navy for 70 years.

DUNFORD:

Chairman, can I -- can I respond...

MCCAIN:

Please.

DUNFORD:

... to both you and Senator Gillibrand? I'm on record as having said, and I believe this, that we will not solve the problem unless commanding officers are singularly, personally accountable and responsible for command climate and for fixing the problem.

What I -- what I answered to Senator Gillibrand, just to be clear and to be honest, today, is to continue to look at the issue and find ways to address sexual assault. I was not referring to the chain of command not being responsible or accountable.

My experience is similar to yours, over the last 40 years, that any problem we have ever had inside of the organization has been solved when commanders were engaged, responsible and accountable for solving a problem.

MCCAIN:

Well, I thank you for that statement, General. And we will continue to debate it. And there's a lot of work that needs to be done, as I think you'd be the first to acknowledge. But to say that commanding officers no longer have responsibility for the conduct of those under their command undermines about 200 and some years of military chain of command and responsibility.

If commanding officers are not carrying out those responsibilities, then they should be -- then their lack of assumption of responsibility -- they should be held accountable to. But to take them out of the chain of responsibility, my view, is a serious, serious mistake.

Senator Fischer.

FISCHER:

Thank you, Mr. Chairman.

Thank you, General Dunford, for being here today and for your continued service.

On July 4th and July 28th, North Korea tested a new missile, now known as the KN-20. And based on the capabilities demonstrated in these tests, numerous press reports estimate that the missile has a potential range of over 10,000 miles, which would put much of the United States within its reach.

And while I understand technical hurdles still remain before North Korea possess a reliable, accurate and nuclear-capable ICBM system, what's your assessment of the ballistic missile threat to the homeland from North Korean? Where do you see that trend line moving?

DUNFORD:

Senator, I think for all planning purposes, capability development, we should assume now that North Korea has the capability. As you suggest, there are some technical elements of their program that haven't been fully tested, from a reentry vehicle, to some of the ability to stabilize a missile in flight.

But I view all those as engineering solutions that will be developed over time. And frankly, I think we should assume today that North Korea has that capability and has the will to use that capability.

FISCHER:

The last major modification of our homeland missile defenses came in 2013 when, in response to an accelerating threat from North Korea, then-Secretary Hagel announced plans to increase the number of interceptors from 30 to 44.

And, given what we've witnessed over the past year, do you believe that the current threat environment requires additional homeland missile defense capabilities?

DUNFORD:

I do, Senator. And, over the last seven or eight weeks, we did a very detailed look at increasing ballistic missile defense capability for the North Korean threat, certainly, but for other threats as well.

And we do think an increase is warranted. And I believe, in the NDAA, and we certainly support that, there's an additional 21 interceptors that's -- that are in the NDAA that was just passed.

FISCHER:

Right. And should the department program additional resources towards ballistic missile defense across the fight (ph)?

DUNFORD:

Senator, we -- we should. And both the Congress and the president have directed us to do that, and we have.

FISCHER:

Thank you.

I'd like to follow up on some previous questions that I think we were trying to get to. What happens when operational demands aren't necessarily met? As you know, we conducted a hearing recently on the naval accidents that are happening in the Pacific, and we looked at the concern that the Navy is trying to do too much with too little.

Demand's outpacing the supply. That's what we're seeing, and I don't think it's just focused on the Navy. I think there's concerns with other services, as well.

We know the Navy's doing its reviews, and I think those really focus on the supply side of the -- of the equation on that. Can you tell me if the joint staff is reviewing the operational demands that have been placed on the Navy?

And have these incidents -- have an impact on the way that we are looking at how to assess a high optempo, how that poses a risk to our -- to our forces now?

DUNFORD:

Senator, we -- we have -- we have reviewed that. And what we're making sure, now, is that readiness of the force, as well as our ability to respond to the unexpected, is a key element, even as we meet the requirements.

You know, in the past, without going into a lot of detail, we had a bottom-up process for global force management, meaning each one of the commanders provided us with all their requirements, and then we kind of leveled across and met all those requirements.

We have now implemented -- in this year, we'll implement it for the first time -- a top-down process, where we fence (ph) certain members of forces, as a result of the services needing those forces to be back in the United States to generate readiness, or somewhere else, located where they are generating readiness, and not allocated so we can continue to sustain a force.

We realize that what we've been doing in the past is unsustainable moving forward. This -- the demand does exceed the supply, and we need to make an adjustment to the demand, as well as the supply, as you -- as you alluded to, Senator.

FISCHER:

Do you anticipate reducing the demand?

DUNFORD:

I anticipate managing risk in a different way until we can grow the capacity to meet the demand. I do.

FISCHER:

Does that put more of a threat on the -- on the readiness of our -- of our troops, then? I mean, they're not just -- they're not just -- take the Navy. They're not just out there on ships doing operations with -- with no strategy in place.

DUNFORD:

They are not, Senator. But what we have to do is get to the point where we have a balance between the time that units are at home station training, developing their capabilities, and the time they're deployed.

If you -- if you talk about the Navy example, I was aboard the USS Barry some months ago. The USS Barry had been at sea 70 percent of the time in the previous 12 months.

So, when we go back now and we look at were they able to do all the training necessary and what was their life like during those 12 months, 70 percent of the time underway is an unsustainable rate. And so we're going to have to make adjustments in the demand. That will incur managing operational and strategic risk, there's no doubt.

FISCHER:

Thank you.

MCCAIN:

And then also incur -- include 100-hour work weeks?



DUNFORD:

Chairman, absolutely, and when sailors are at sea, 70 percent of the time, they're at work most of every day.

MCCAIN:

Thank you.

(OFF-MIKE)

DONNELLY:

Thank you, Mr. Chairman.

And, General Dunford, I want thank you for your leadership, your continued service to our nation. And to your family, thank you very much. I think you've done an extraordinary job, and we're privileged to have you in this position.

In your written responses to the committee's questions in advance of this hearing, you addressed a few of my questions about improving mental health and suicide prevention services.

You highlighted the growth in embedded mental health providers, the F.Y. '15 NDAA included a bipartisan provision called the Sexton Act that I authored with Senator Wicker. It requires every service member to get a confidential mental health assessment each year.

In the past, unit (ph) service chiefs have said that you believed it would be fully implemented no later than October 1 of this year, which is next week. General, are the services fully implementing the requirements for robust annual mental health assessments?

DUNFORD:

Senator, thank you.

And, as you know, I've worked that issue personally now for some years, and I appreciate your support in that area. The Army, the National Guard, several of our components are completely compliant, and they'll make the deadline.

There are some outliers that haven't met the standard, and I was aware of that as I prepared for my testimony. So I can assure you that both the secretary and I will be engaged in cleaning it up.

I think the vast majority of the department has become compliant with the Sexton Act, but there are some outliers, and we'll get the full details to you. I became aware of that this week, as we -- as we prepared for testimony.

DONNELLY:

Thank you.

Can you describe your understanding of our strategy to counter North Korea, and how you're working with your partners across interagency to execute that?

DUNFORD:

I can, Senator. And very briefly, when Secretary Tillerson came in last year, people told him that there were two things that he couldn't do anything about. One was that nuclear weapons were inextricably linked to survival of the regime in North Korea; they wouldn't trade away nuclear weapons. And the second is that China wouldn't cooperate.

Secretary Tillerson is testing those two assumptions, because the alternatives at the time to not testing those two assumptions were so dire. So we have, now, a pressure -- pressurization campaign, applying economic and diplomatic means, primarily to force the North Koreans to denuclearize the peninsula.

We're also working very closely with the Chinese. Secretary Tillerson has been almost relentless in dealing with the Chinese over the past few months to get them -- cooperate with the -- with the U.N. sanctions regime.

On the positive side, there's been four U.N. -- four U.N. resolutions passed this year, and I think the Chinese cooperation, to include the Russian cooperation, in passing those sanctions is unprecedented.

We're at the phase now where implementation of the sanctions is going to determine whether or not we have a peaceful solution to denuclearization on the peninsula.

So we are continuing with the military dimension to support primarily Secretary Tillerson's economic and diplomatic pressure campaign, but also making it clear that there is -- there are military options available to the president, if the economic and diplomatic pressure campaign fails.

We think that's important, that North Korea understand that. We also think it's important that China understand that. And I personally went to China in the middle of August, during the recess, to deliver that message to Chinese senior leadership.

DONNELLY:

When you look at North Korea, and there's significant speculation about Kim Jong-un's motives, but do you think it's about just survival of the regime? Or do you think he is also looking to take over South Korea, as well?

DUNFORD:

Senator, I look back at, you know, our experience with North Korea, and I realize that Kim Jong-un has only been there for a short period of their history. Since 1953, we have effectively deterred North Korea from attacking south into -- or attacking into South Korea.

My assessment, based on the intelligence that I've read, is that Kim Jong-un's development of nuclear capability and his development of missile technology is primarily associated with regime survival.

That's not to say that they don't pose a threat to South Korea and to others in the region. But my judgment is that that is what has driven his path of development over the past 18 months.

DONNELLY:

Switching over a little bit to Syria, you've had significant success in Iraq, moving ISIS out. There's ongoing battles in the Raqqa area. Six months from now, where do you hope to be?

DUNFORD:

Six months from now, Senator, with the -- with -- I guess, from experience, always cautious about laying out timelines, and so I won't for the campaign.

But I -- but I do believe that we will have completed operations more properly. Our partners will have completed operations in Raqqa, and we'll be well on our way to going after the external operations capability and the media capability of ISIS that remains in the middle Euphrates river valley, and we'll also be supporting our Iraqi Security Forces partners on the east side of the border, to better secure the border between Iraq and Syria.

So I think we'll have continued to degrade, most importantly, their external operations capability, the ability they have to plan and conduct external operations. I think we'll have undermined the credibility of their narrative. They will increasingly not be able to say that there's a physical caliphate in existence.

I think that'll have an impact on their recruiting. We've already seen the numbers drop, the numbers of individuals who are inspired to join the ISIS movement.

So I think we'll continue to see reduction in territory, reduction in freedom of movement, reduced resources and less credibility in the narrative. And those are the four areas where I think we'll continue to see progress.

DONNELLY:

Thank you.

Thank you, Mr. Chairman.

MCCAIN:

(OFF-MIKE) ask what your take is on the vote in Kurdistan.

DUNFORD:

Chairman, in the wake of that vote, my primary concern now is making sure that the vote doesn't disrupt the cooperation that we have seen between the Peshmerga and the Iraqi Security Forces.

The real challenge in the campaign right now is that operations in the north -- the reason why we were successful in Mosul, the reason we're successful in the north is because of the cooperation between the Peshmerga and the Iraqi Security Forces.

If you look at the next area that the Iraqis are focused on, in the Hawija area, which is southwest of Kirkuk, it's going to require cooperation between the Kurds and Iraqi Security Forces. So I'm concerned that the referendum will disrupt that cooperation.

But my focus, from a military perspective, will be to try to mitigate the effects. And I know that's what Secretary Mattis and General Votel are also trying to do, is mitigate the effects.

MCCAIN:

And President Erdogan has made some pretty aggressive statements.

DUNFORD:

President Erdogan has made some very aggressive statements, and so have the Iranians, Chairman.

MCCAIN:

Senator Cotton.

COTTON:

General, welcome back. Congratulations on your renomination and thank you for your many decades of service.

In your written testimony you stay (ph) on page 10 that Iran has not changed its malign activity since the JCPOA went into effect. Have they increased the pace or scope of their malign activities?

DUNFORD:

Senator, I think you could argue that they have, certainly in Syria. I think it's been relatively constant in Yemen, with regard to their support for the Houthis. Clearly, their support for Lebanese Hezbollah has been at a high level for some period of time.

So in those -- in those three areas, I would say that Syria is the one place where it's probably increased. And you could argue, over the last few months, whether or not it's related to JCPOA or not that Iranian activity inside Iraq has certainly increased, as they look to the endgame in Iraq.

COTTON:

Thank you.

Without going in to the content of rules of engagement, which are obviously classified, have our rules of engagement changed in the last eight months, since President Trump took office, in the Persian Gulf, as it relates to Iranian harassment using small craft or drones or aircraft?

DUNFORD:

Our rules of engagement have not changed, Senator. What we have done, in the wake of a number of incidents, is we've gone back at every level, from the Fifth Fleet, to United States Central Command, and made it very clear what our forces were capable of doing, were they to be threatened.

And so I'm confident that it's -- in application of rules of engagement, if our forces are threatened, they are both postured and capable of effectively responding.

COTTON:

Thank you.

On page 29 and 30 of your written testimony, you restate your support for our nuclear triad, as well as modernizing the National Airborne Operations Command Center.

Strangely to me, the Air Force has just announced that the next version of Air Force One will not have in-flight refueling capability. What do you make of that?

DUNFORD:

Senator, I think that was a decision that was not made by the -- by the Air Force, but made by the White House, and I think it had to do with the fiscal constraints on the program. That will certainly be a limiting factor, and we'll have to plan accordingly.

COTTON:

I think we might need to revisit that decision here on Capitol Hill.

I want to turn to the Open Skies Treaty. Not many Americans know about that, but it allows the United States and Russia and many other countries, but primarily those two countries, to fly aircraft over each other's territory and to take lots of pictures.

Russia has been violating that treaty, as Secretary Mattis testified earlier this year. I assume that you agree with his testimony from earlier this year.

DUNFORD:

I do, Senator. And we as a nation declared them in violation back in June.

COTTON:

And there's a Wall Street Journal article today saying that, in Vienna, today, we will take steps to curb their flights in response to their actions by limiting our flights over Kaliningrad, their enclave in Europe at which they held most of Europe at risk; their limitations in Abkhazia and South Ossetia and Chechnya; and also their altitude floor over Moscow. Are those steps that we're about to take?

DUNFORD:

Those are -- those are all part of an overall effort, Senator. Let me probably just -- make sure that we make it clear. We believe that, on balance (ph), it would be best if the treaty continue to be in place.

But we don't believe the treaty should be in place if the Russians aren't compliant. And so there is a decidedly aggressive diplomatic effort right now to bring the Russians back into compliance, which we think would be the best outcome.

COTTON:

Do you expect some of these reported steps, for instance, restricting flights over Alaska and Hawaii, will bring Russia back into compliance?

DUNFORD:

Senator, I don't know. But this is the best plan we have right now to bring them in compliance before we may consider other alternatives.

COTTON:

Given the size and capabilities of our satellite constellation, versus Russia's, is it fair to say that Russia gets more benefit from these flights than does the United States?

DUNFORD:

I believe that argument's been made, and it's compelling to me.

COTTON:

I want to turn to missile defense in North Korea. We focus a lot on systems like Aegis Ashore and THAAD. Of our West Coast interceptors, what's the prospects currently for boost-phase intercepts, specifically from unmanned aerial vehicles, either with hit-to-kill interceptors or with directed energy?

DUNFORD:

Senator, there's been a lot of work done on boost phase. As you know from asking the question, we don't have that capability right now. I would offer to you a classified briefing, at a time of your convenience, to walk you through where we think we may be right now, but we do not have that capability today.

COTTON:



I think we have that scheduled for later today. It'd be a hell of a thing if we could put a UAV up over the North Korean peninsula and shoot down any missile as it was taking off. I'd suggest that we need to look as aggressively as we can at that.

COTTON:

Finally, General, the deaths of the sailors in the Western Pacific has commanded a lot of tension; rightfully so. You had, I believe, 15 Marines that were badly wounded a couple weeks ago out on the West Coast, though, in a fire involving an amphibious assault vehicle. How are those Marines doing today?

DUNFORD:

Senator, I don't -- I don't know how each one of them individually is doing, but we've been getting routine reports about their progress, and they are making progress. Some of them -- you know, some significant injuries.

COTTON:

I know that you're -- the Marine Corps is conducting a review of the matter, and will have a report. What's the likelihood that the impact of the many years of sequestration budget cuts could've played a role in either the level of training, or operations and maintenance for that vehicle in this incident?

DUNFORD:

Senator, I can't talk to that specific incident, but I am confident that a combination of fiscal challenges and high operational tempo have created conditions that actually have led to some of these incidents; of that, I'm confident.

COTTON:

Thank you, General.

MCCAIN:

Senator Hirono.

HIRONO:

Thank you, Mr. Chairman.

General Dunford, welcome back. And it was a pleasure to meet with you not too long ago.

And with the natural disasters that have been occurring, I also want to take this opportunity to thank the many members of our Armed Forces, including the active National Guard and Reserve personnel who were very instrumental in helping save lives and transporting supplies during the recent natural disasters.

General Dunford, in your 2015 confirmation hearing to serve as chairman, you stated that Russia presented the greatest threat to our national security. And you included their nuclear capability, ability to interfere with our sovereignty of our allies, and you said their behavior was nothing short of alarming. And of course, we can now add involvement in our elections to the list.

You then rank ordered China, North Korea and ISIS -- ISIL or ISIS as two to four on your list of threats to national security. In the intervening time, we have North Korea. So, my question: As we sit here today, would you change your threat assessment order? Is North Korea still third on your list?

DUNFORD:

Senator, one thing I've said to my staff is that we don't actually have the luxury of identifying a single threat today, unfortunately, nor, necessarily, to look at it in a linear fashion. So what I would say is that, in terms of a sense of urgency, today, North Korea certainly poses the greatest threat today.

In terms of overall military capability, I believe China -- Russia poses the greatest threat because of the nuclear, cyber, electronic warfare and the activity that we've seen from the Crimea to the Ukraine.

If I look out to 2025, and I look at the demographics and the economic situation, I think China probably poses the greatest threat to our nation by about 2025, and that's consistent with much -- with much of our analysis.

So that's -- you know, in other words, I can't look at it just in terms of overall capability. But I've got to factor in time and conditions. And when I do that, I look at all three of those threats in that way.

HIRONO:

I would -- I would agree with you in terms of your assessment, and particularly with regard to North Korea being an immediate threat.

I'm always asked -- of course, Hawaii being in the middle of the Pacific, we feel quite vulnerable. So it is on the forefront of -- certainly of my -- minds of constituents, and particularly, of course, not just Hawaii, but Guam and Alaska.

And I understand that the results of the Ballistic Missile Defense Review are expected later this year. Is that correct?

DUNFORD:

Senator, they are, but we didn't wait for the review to request increased ballistic missile defense capability. We've done that in the last couple of weeks, and also noted that, in the NDAA, the committee also addressed that.

HIRONO:

Well, I know that a large new radar system is being planned for Hawaii, and I just had a meeting with Admiral Harris, and this will take a few years. And he indicated that it would be good to move up the radar for Hawaii a year or two, and I'd really like to put that in -- into your way of thinking, so that we can get on with that radar system.

I certainly want to ensure that Hawaii, Alaska and the rest of the United States are protected. Do you -- as we sit here today, are we adequately protected -- Alaska, Hawaii, rest of the United States?

DUNFORD:

Senator, we are adequately protected against the current threat. And I think one of the issues that we all ought to appreciate is that, as the capacity of the threat increases -- that is the size, not just the lethality, not just the fact that North Korea can reach us, but the numbers of

missiles that they may possess that can reach us -- and what we need to be concerned about is ensuring that our ballistic missile defense capability keeps pace with that threat.

HIRONO:

I think it's very important to have that ongoing assessment, and in particular, if you project, maybe, three years down the -- down the road as far as North Korea's capabilities, I believe that there is an assessment occurring as to whether or not Hawaii needs a system in place besides the radar. So that is my understanding.

DUNFORD:

Absolutely, Senator. And we are -- we are constantly assessing -- and again, as recently as last the several weeks, where we made some recommendations based on that assessment -- our ability to protect all Americans: Guam, Hawaii, continental United States, Alaska.

HIRONO:

I know you were asked about the JCPOA, and you state that briefings you have received indicate that Iran is meeting -- adhering to its obligations under the JCPOA. My question is, as long as Iran is in compliance, is it in America's national security interest to maintain the JCPOA?

DUNFORD:

Senator, the intel community assessment is in fact that, with Iran in (ph) compliance right now -- and therefore I think we should focus on addressing the other challenges: the missile threat they pose, the maritime threat they pose, the support of proxies, terrorists, and the cyber threat they pose.

HIRONO:

Yes, and those are not areas that were covered under the JCPOA?

DUNFORD:

They were not, Senator.

HIRONO:

Yes. So is it your intent to advise the president to recertify Iran's compliance ahead of the October 15th deadline...

(CROSSTALK)

DUNFORD:

Senator, mindful of the of the chairman's opening comments, I -- what I would ask is if I could provide the advice that I'm providing to the president now, prior to his decision, to be in private. Certainly share that, but -- not to do that publicly until after the president has made a decision.

HIRONO:

Thank you.

Thank you, Mr. Chairman.

MCCAIN:

Senator Rounds.

ROUNDS:

Thank you, Mr. Chairman.

General, first of all, thank you for your service to our country.

General, the Budget Control Act is a symptom of a much larger problem Congress has been avoiding for far too long, a looming national security issue that I hope you could comment on.

The Congressional Budget Office reports that, by 2025, mandatory spending will be 51 percent higher than it is today, and interest we pay on the national debt will nearly double as a percentage of GDP. CBO projects that the impact on discretionary spending will result in about a 13 percent reduction to defense spending as a percentage of GDP.

My question is, as the Future Years Defense Program begins to overlap the mid-2020s, has the Department of Defense started to look at how this fiscal picture might change what we can afford and where we invest? And has the potential fiscal future been accounted for in any of our future operating concepts or global power projection strategies?

DUNFORD:

Senator, our planning (ph) to date, first and foremost, has highlighted the fact that our capabilities are going to require somewhere between 3 percent and 7 percent.

And we can debate that, and I'm perfectly willing to come over here with the analytic foundation for my assessment that -- between 3 percent and 7 percent, and that's dependent on how much risk you want to assume as you build the force. But between 3 percent and 7 percent is going to be required for us to build the capabilities we need.

Where did we come up with that percentage? We looked at the capabilities of Russia and China today. We looked at the trajectory that they are on for capability development. We looked at where we are today and what investments we need to have to maintain a competitive advantage over those peer competitors.

We use them as a benchmark, if you will, in the mid-2020s. What I would say, I suppose, in response to your question, is that we will have to fundamentally reorder the strategy if we are unable to build the capabilities and capacities to deal with those peer competitors.

Right now, what we have done is we've taken the national security strategy -- we've taken the initial guidance from Secretary Mattis. He'll come out later with a defense strategy after the first of the year. And we've looked at the military capabilities and capacities necessary to support those strategies.

There will be a fundamental disconnect if we don't move on a path that I've just described.

ROUNDS:

And, you know, at the same time, as Senator Hirono has just asked, the concern right now, with regard to the topic of the day -- which is North Korea, and the threats that they may pose and the additional responsibilities imposed upon our military to respond to this particular country's current activities and the threats that they suggest with regard to, you know, the use of ICBMs against any part of our country or our allies -- and so, in this particular case, as you've indicated, you believe, or at least you think, that right now, we have the capabilities.

But does that include the ability, right now, to protect Hawaii against an ICBM attack by North Korea? And was that planned in? And what happens when that occurs? Do you -- do we do that, and do we place our resources on that? And does that change the overall planning for the next 7 to 10 years?

DUNFORD:

Senator, based on the current capacity of the North Koreans, the current threat -- so both the type of the threat and the amount -- and the amount of missiles that they possess, we can protect Hawaii today against an ICBM. We can protect the continental United States against an ICBM.

ROUNDS:

But it seems as though the American public simply assumed that that is just automatic, and then we've got the resources to not only respond to that, and to still be able to build for the future threats, or at least to maintain our ability to defend against those future threats from our other peer competitors.

And I guess that's my point -- is, when we look at all of the different threats that are out there, the assumption that we simply have the resources right now, and that we're not just keeping pace, but we are improving -- is that a fair assumption on the part of the American public?

DUNFORD:

Sir, there's a few things that I wouldn't assume in the future, were we not to make investments. I wouldn't assume access to space, and all that that means for our economy and for our military capability. I wouldn't assume our ability to protect our networks, both for commercial activity and military activity.

I wouldn't assume our ability to deal with the growing electronic warfare threat of our adversaries. And I wouldn't assume the capability to deal with the growing ballistic missile and cruise missile threat of our adversaries. Unless we maintain pace with capability development, those would be bad assumptions.

ROUNDS:

And that requires more than what we would otherwise find under the 2011 Budget Control Act?

DUNFORD:

There's no question. In fact, just to maybe put in perspective, Senator, the bipartisan NDAA that you just passed is \$89 billion more than what the BCA level would be, and probably some number less than what some members of the committee thought it ought to be.

ROUNDS:

Thank you, General.

Thank you, Mr. Chairman.

MCCAIN:

Senator Kaine.

KAINE:

Thank you, Mr. Chair.

And, General, welcome and congratulations on the re-nomination. And you have done a superb job. And, you know, my vote is going to be that you continue to do a superb job. Thank you for the service.



You have testified often to us about the readiness challenges, and we had a pretty sobering hearing last week, digging into the potential sources of these Navy collisions, and readiness issues and the extent of training is something that was on the table.

We've had a recent report from the GAO about -- increased operations and extended maintenance challenges have posed real problems on the Navy side. I was with the commander of the Langley Air Force Base this weekend, and he described to me reduction in training hours as being a real challenge.

So everything you have testified to us about diminished readiness resulting from the budget sequesters is coming true. It wasn't, you know, Chicken Little saying the sky is falling. What we've heard from military leaders since the sequester went into effect, and in the budget caps in March of 2013 -- we're seeing it. And I just think that puts in an additional burden on our shoulders to try to deal with it.

I want to ask you about something that I'm really worried about now, which is the humanitarian crisis in Puerto Rico. So often, when there's a humanitarian crisis anywhere in the world -- a tsunami in Southeast Asia, an Ebola crisis in Africa -- the U.S. military is there, a projection of America's humanitarian spirit. And I'm just stunned at this humanitarian challenge in Puerto Rico.

Puerto Rico -- American citizens with an amazing track record of serving in the military over generations -- centuries, really. Could you talk a little bit about current DOD operations to try to prevent this humanitarian crisis from really spiraling downward in a way that would be devastating to these American citizens?

DUNFORD:

Senator, thank you. In fact, one of the last things I did this morning, before coming over here, was go through the Northern Command update. We get those every few hours, and so I the most recent update as of about 8:30, before I came over here to the Hill.

For us, it's both professional and personal. These are Americans that need support; I've got people who have their families in Puerto Rico on my staff. One of the heads of my personal security detail, until last night,

hadn't heard from his family yet. So that this is something that's been on our minds, and -- and our thoughts and prayers are with the people in Puerto Rico.

The key thing that I think we are delivering right now -- one of the challenges, Senator, in getting aid has been the ports and airfields weren't accessible. And so step one is we're doing all we can do right now to increase the throughput of humanitarian supplies. That's something U.S. military can uniquely provide.

We also are providing some generators and so forth for power. We don't expect them to have power for some time, so that's something that is important, that we can provide.

KAINE:

And this -- and this impacts hospitals and...

DUNFORD:

That's right.

KAINE:

... long-term care facilities that...

DUNFORD:

And so we have generators and so forth...

KAINE:

... that cannot afford to be without continuous power.

DUNFORD:

... absolutely, Senator. And that's why power generation and generators are one of the key areas we're focused on right now. Fresh water and food, clearly, right away, and then medical capabilities. So those of the key areas that Northern Command, under General Robinson's leadership, are focused on right now.

There's literally hourly meetings between FEMA and the government officials in Puerto Rico, to make sure that we are doing all we can. The guidance from Secretary Mattis has been clear. What they need, they get. Just make it happen.

And so what we're doing right now is just making sure that, every place that we can uniquely contribute to the disaster in Puerto Rico, we're poised to do that. And we're anticipating what they might need next week, even if they haven't thought about it yet.

KAINE:

And just for purposes of committee members and the public -- I think I know the answer to this, but I'm not sure I do -- how was the Puerto -- the response to Puerto Rico sort of organized? The DOD has a piece of it, but you are not necessarily the lead.

DUNFORD:

Right.

KAINE:

Is that sort of organized through DHS and FEMA and then, you know, with the DOD taking on an assigned role? Is that sort of how it's being led?

DUNFORD:

That's exactly right, Senator. This is -- this is anyplace in the United States. And so we are in support of FEMA, and General Robinson is a supporting agency to FEMA.

And so we're doing every -- all of the support for Puerto Rico is being coordinated, as you suggest, through Department of Homeland Security, and FEMA, specifically.

But, again, we're doing two things. We're responding to the immediate requests, but then we have a little experience in these kind of operations. And so I know what General Robinson and her team are doing, also, is offering things that maybe people haven't asked for today, and also looking around the corner to see what they might need next week.

KAINE:

Very important for us to be on this, because the scale of it is just devastating. And I appreciate your testimony.

Thank you, Mr. Chair.

MCCAIN:

Senator Ernst.

ERNST:

Thank you, Mr. Chair.

And thank you, General Dunford, Ellyn, to you both and your family. Thank you so much for your support of our men and women in uniform. I know it's a joint effort, so thank you very much.

We do agree, General, that properly resourcing a joint force really is a collaborative effort between Congress and our military and those military leaders. That is why many on this committee have pushed to repeal BCA.

Senator Rounds brought up the financial implications moving forward, and what sequestration might do in regards to many other issues that we're facing with our mandatory spending.

But, looking at that, we also need to use what we have efficiently and effectively. I'm pushing for an audit within the DOD. I think many of us support that. We need to know that our taxpayer dollars are being spent well.

For your part, can you describe the steps that you have taken during your tenure as the chairman to work with that joint force and make it more efficient? Are there specific examples you can give the committee today?

DUNFORD:

There are -- there are, Senator. The first one is that we're implementing the direction that we have from the Congress to reduce our overall headquarters by 30 percent. That in itself is not an insignificant step that we have taken. Also, with regard -- we alluded to it -- with global force

management, what we have done is done a number of things to integrate at the strategic level the prioritization and allocation of resources, to ensure that we are deploying them most effectively and in the context of our strategic objectives.

And then there's a number of things that, of course, wouldn't be something that I would do in the joint force, but certainly am familiar with in dealing with the chiefs.

Business practices across the department are also an area where efficiencies are sought. The leader for that is the deputy secretary of defense, and on the joint staff, the vice chairman sits with him on what's called the Defense Management Advisory Group. And that involves all the vice chiefs. And there's a wide range of -- of business practices that we're looking to be more efficient.

Fortunately, we do have some expertise now from outside the department that has come in and looked at us through a different lens. And so those are areas where I think there are most promise.

But the other thing I'd say, Senator, is that, since 2010, we have gone through a litany of efficiency drills. And, while we have gained some efficiencies, they never quite realize the savings that you expect them to. So you got to stay after it. But this isn't something we started just in the past year. We really have, I think, in a concerted way, been after it since 2010.

ERNST:

Very good, General, and I am certain that you will continue that push going on, as we hope to see you continuing in this position. So I thank you for that.

ERNST:

And then, in your answers to advance policy questions, you also stressed your concern regarding our near-peer overmatch. And I share that concern, as well. Unfortunately, the department will send mixed messages to Congress.

On one hand, our services ask for rapid acquisition of commercial off-the-shelf systems in -- as a solution. And on the other, then, they prefer appropriating dollars forward for the next, best and greatest thing. But, unfortunately a lot of times, the next, best, greatest thing never really materializes.

So how are we going to prioritize acquisitions, moving in the future?

DUNFORD:

Senator, that, as you know, is a -- is a complicated issue. And I think getting the balance right between moving out right now and buying what's available then, and looking long-term for the most effective capability, has been something that we struggle with.

On the one hand, you might quickly say, "Hey, we ought to just be able to go out and buy what's available and field it." Well, I can remember some years ago, when we ended up with 16 links (ph) that could communicate from air to ground, and -- but they couldn't necessarily communicate with each other. I can also remember when we all went out and bought our own software, only to find out that we couldn't effectively communicate with each other. So there is a balance in all of this.

And I think the key thing is, and the -- and the committee inserted some of the language in the NDAA -- and that is to make sure that the Joint Requirements Oversight Council, which is led by the vice chairman and reports to me and the chiefs, is effectively, one, overseeing the requirements that are existing for capabilities; and also, then, the process for making sure that we meet those requirements in a timely manner and those requirements are actually validated.

And I think that's probably a key piece of it, too -- is the requirements. I think, if you get the requirements right and senior leadership is engaged in the requirements -- and I say this both from the perspective of my current job, as well as a former service chief -- service leader engagement with the requirements, validating those requirements before we look at material and non-material solutions to those requirements, in my judgment, is -- is the key to success.

And that is something that I think has happened to a greater degree over the last couple of years, with the pressure, in part, that has been put on by this committee.

ERNST:

Absolutely. Thank you very much, General.

Thank you, Mr. Chair.

MCCAIN:

Senator King.

KING:

Thank you, Mr. Chairman.

Beginning with -- I know, General Dunford, you're a -- you're a reader, and, going back to the -- to the chairman's statements at the beginning of this hearing about the relationship between the military and civilian officials, I commend to you, although I suspect you have already read it, "Dereliction of Duty" by your colleague, General McMaster, a stunning analysis of what not to do in terms of the relationship between civilian and military officials.

You nodded. I assume that means you know the -- you know the book.

DUNFORD:

Senator, I have read it.

KING:

And I think an additional one I would add to your list -- it's a little bit longer -- Barbara Tuchman's "March of Folly," which takes us from Troy to Vietnam, again talking about relationships and how these mistakes are made, which brings me to Korea.

I have a queasy feeling that we're in 1914, stumbling towards Sarajevo. And what worries me is not an instantaneous nuclear confrontation, but an accidental escalation based upon the rhetoric that's going back and forth.

The foreign minister of North Korea yesterday characterized our president's comments as a declaration of war, and he said, therefore, as a -- since the United States has declared war on our country, we will have every right to make countermeasures, including the right to shoot down United States strategic bombers, even when they are not in the airspace border of our country.

That's what worries me, is a misinterpretation, misunderstanding, and an event -- a shooting down of a bomber, a strike on a ship -- that leads to a countermeasure, that leads to a countermeasure, and the end result is, if Kim Jong-un feels his regime is under attack, then the unthinkable happens.

Make me either feel better or worse about where we are.

DUNFORD:

Senator, I will make you feel better. I can tell you that I personally, the Secretary of Defense and Admiral Harris are looking at all of our posture in managing risk on a day-to-day basis, informed by the need to avoid the risk of miscalculation.

The recent operations that we conducted, I can assure you that even -- I was on the road. We probably -- Secretary Mattis and I probably personally invested several hours each in reviewing those, to manage those.

And, without going into classified information here, to look at all of our capabilities, look at all their capabilities, look at timing, look at the probability...

(CROSSTALK)

KING:

What worries me about it is misunderstanding and misinterpretation. What we view as an exercise, they may view as an imminent threat.

DUNFORD:



Senator, what -- I guess what I'm suggesting to you is that, where we conduct these exercises, we're informed by the North Korean posture at a given point in time, or informed by the need to avoid miscalculation and an inadvertent engagement.

KING:

Do we have communication with North Korea with regard to these kinds of situations? This is just an exercise, for example.

DUNFORD:

Right. We do not have military-to-military communications with North Korea right now.

KING:

Turning the North Korea question slightly, you testified earlier -- and all the intelligence community agrees -- that Kim Jong-un's primary motivation is regime survival. Therefore, it seems to me that statements that suggest regime change or regime destruction only solidify his determination to develop and maintain nuclear weapons. Would you agree?

DUNFORD:

Senator, I have been very careful, at the -- at the military level, to make no statements that would exacerbate the current crisis, and I certainly won't comment on things that our senior political leadership have said.

But I certainly can tell you, inside the military, we've made no statements, and we've had a conscious decision not to make any such statements, to ensure that the lead right now is Secretary Tillerson and the message that's being delivered is primarily being delivered by the State Department.

KING:

But you do agree that the primary motivation for the development of the nuclear weapons is a kind of insurance policy for regime survival. Is that not the case?

DUNFORD:

That'd be my assessment, Senator.

KING:

Fine. Thank you.

What would be the practicality of a preemptive nuclear strike or a preemptive military strike on North Korea, in terms of the military effect? Would it -- there's some feeling -- I hear somebody talked about a preemptive strike the other day, not in the administration, but on this -- in this body.

That would not be a short, easy action, would it not?

DUNFORD:

Senator, you bring up a good point. And part of the advice that I've provided to date is, when we do something, we shouldn't assume at that point that we can control escalation. So we need to -- we need to think about this in terms of what might happen, as well as what we would want to happen.

KING:

And part of the problem is those artillery that are ranged across the North Korean border within -- Seoul, which is about as far as from here to Fairfax County.

DUNFORD:

That's right. The greater Seoul area, which has 25 million people -- 250,000 Americans, on any given day, would be in Seoul -- would certainly be threatened by the rockets and missiles along the border.

KING:

So a military -- the idea of a so-called surgical strike, to bring back a term from 40 years ago, is really not valid in this situation. It would not be -- this is not something that would be easy -- to take out, for example, the nuclear capability of the North Koreans.

DUNFORD:

No, that's right, Senator. I mean, while we can do things that, from our perspective, could be less than a full execution of an operations plan, the -- we need to be informed by the potential risk to the greater Seoul area. No matter what we do on the peninsula, I think that's fair.

KING:

Thank you, General.

Thank you, Mr. Chairman.

MCCAIN:

Colonel Wicker.

WICKER:

Chairman Dunford, do you support providing lethal defensive aid to Ukraine?

DUNFORD:

I do, Senator, and have made that recommendation.

WICKER:

As I understand it, DOD has officially made an affirmative recommendation, and State Department, also. So where is that decision, and can you enlighten the committee?

DUNFORD:

Senator, my understanding is that decision is at the White House.

WICKER:

And do you have any idea when we might be able to get an answer on that?

DUNFORD:

I don't, Senator. I will ask when we get back today. We've been asking

for the last couple weeks, but I'm not sure.

WICKER:

Well, I think it's very important that the Ukrainian government succeed in resisting further Russian expansion. What -- why did you recommended yes on providing lethal aid?

DUNFORD:

In my judgment, from the military perspective, the Ukraine needed additional capabilities to protect their sovereignty. As you probably know, Senator, in 2016, we trained a number of their battalions, 2017, trained additional battalions.

We provided medical supplies, night vision goggles, counter- mortar radars and other things, but we felt like their ability to stop armored vehicles and so forth would be -- would be essential to them to protect themselves.

And so we just looked at it as a military gap that existed, that, if that gap was filled, it would increase the probability the Ukrainians could defend themselves.

WICKER:

And I agree. I would just encourage members of the administration to move forward on that.

WICKER:

With regard to Russia's asymmetric threats, such as information operations, cyber attacks and jamming, I want to ask you specifically about the 173rd Airborne Brigade, which is said in a report to be underequipped, undermanned and inadequately organized.

According to an Army review, three years after Crimea, why is -- why is this the case? Is it the case? And what can we do about it?

DUNFORD:

Senator, I read the media article and asked a couple of questions after I saw it. I think what the leader was doing was describing, you know, the current character of war and indicating that he believed that we ought to make some organizational changes and some equipment changes to make the 173rd base in Vicenza, Italy more competitive.

I think you could make that statement more broadly. So this is a leader looking at his particular unit. I think you can look at that statement more broadly and say that we need to adapt the U.S. military -- really, the entire U.S. government -- to be able to compete at that level below war, where the Russians have so successfully integrated information operations, cyber, political influence, economic coercion and information operations.

So really, I think what the 173rd was describing is a force that is designed for conventional war, and needing to make some organizational changes and add different capabilities to be competitive in the space that we're describing now.

WICKER:

So, writ large, actually, this fairly accurate statement about the 173rd actually could be said about the entire Department of Defense. Is that what you're telling this committee?

DUNFORD:

Senator, I think I would broaden it. What I -- what I would say is, today, Russians, Chinese and others are, on a day-to-day basis, doing what I describe as -- they are conducting adversarial competition at a level that falls below conflict. And they've integrated the entire government to be able to do that.

And, in my judgment, we need to improve our ability to compete in that space. And the area specifically I'd mention, from a military capability, would be our electronic warfare capability, our cyber capabilities and our information operations capability.

But all -- those all have to be integrated with those things that we don't have inside the Department of Defense, of course; the economic and political tools. But in my judgment, bringing all those together on a day-to-day basis more effectively is something that we do need to do.

WICKER:

And finally, General, with regard to the 355-ship requirement, this is a requirement that's been developed by the generals and admirals, in consultation with our leadership around the world.

This committee, in the form of the NDAA, has put the Ships Act in the Senate-passed version. It makes the 355 ship requirement the policy of the United States Congress. The House of Representatives has -- has also done that, and I expect this will be coming out of conference very soon.

This requirement is in fact a serious requirement, is it not? And can you assure us that, from the level of the administration, we're serious about getting to that number and getting -- and fulfilling that requirement, rather than the 276 ships we have, and doing it as quick as practical?

DUNFORD:

Senator, I don't think there's any question that all of us know that the Navy is smaller right now than it needs to be to meet all those requirements. And that requirement that you've identified is one that's based on analytic rigor, and it should be a target that we shoot for.

It'd be good to get there as soon as we can. And of course many the conversations we're having about the budget will inform our ability to do that. But we certainly appreciate your leadership in that regard.

WICKER:

Thank you.

Thank you, Mr. Chairman.

MCCAIN:

Senator Heinrich.

HEINRICH:

Thank you, Chairman McCain.

Welcome, General Dunford.

I want to follow up on Senator King's line of questioning with regard to North Korea. As you're aware, all six of North Korea's previous nuclear tests have occurred underground. That obviously contains the radioactive fallout. But Kim Jong-un has since threatened to conduct a test in the Earth's atmosphere.

Can you talk a little bit about what the global risks and implications of a nuclear weapon detonated in the atmosphere would be, as Kim Jong-un is reportedly considering? And, if you were speaking to the North Korean people right now, what would you say to them regarding the risks of detonating a nuclear weapon in the Earth's atmosphere?

DUNFORD:

Well, Senator, I think the best experience we have recently, of course, would be the nuclear reactor in Russia some years ago and the incident that took place in Japan. And even with something that isn't anywhere near what the North Koreans are suggesting, we had significant health challenges for many, many years, and obviously the loss of -- loss of life.

It'd be an incredibly provocative thing, for them to conduct a nuclear test in the Pacific, as they -- as they have suggested. And, you know, I think the North Korean people would have to realize how serious that would be, not only for the United States, but for the international community.

HEINRICH:

I want to just take a quick moment to thank both you and Secretary Mattis for the sober and serious manner that you're approaching North Korea. I think that is the sort of temperament we need now more than ever.

I want to shift gears real quickly. Our commander of special operations, General Thomas, has said that the use of weaponized, commercially available drones by our adversaries was SOCOM's, quote, "most daunting problem," end quote, in 2016. How serious is the threat? And can you explain why it's so difficult to deal with this threat with conventional weapons and kinetic means?

DUNFORD:

First, Senator, I agree with General Thomas's assessment, and that's the consistent feedback we had -- we have from our operational commanders.

In fact, about three months ago, four months ago, we sent a team over, led by my J8, Lieutenant General Tony Ierardi, to sit down with the commanders to make sure we had a full appreciation of what they were dealing with so we could come back here and immediately send to them every single capability we possibly could.

And we've made some progress in that regard, in their ability to deal with this particular threat. But it's also going to require continued experimentation and adaptation to make sure that we stay out in front of the technology that the enemy has delivered.

So this -- we have seen them deliver chemical weapons. We've seen them deliver bombs. We've seen them be able to provide increased intelligence, surveillance and reconnaissance against our partners on the ground, largely.

And so it does create a significant challenge, and we have done all we can do today to deal with that challenge, as well as develop the capabilities we'll need tomorrow. But I can assure you, personally, that that has been exactly where General Thomas has suggested it should be, at the top of our list for current emerging threats in the current fight.

HEINRICH:

Well, I have to say I've been pleased to see the Pentagon respond so quickly with investments in -- in laser technologies and other systems to address urgent needs like this one.

Will you continue to support the Pentagon's use of rapid acquisition authorities provided by this committee to field new technologies like laser and high-power microwaves to help counter those drones and -- and swarms?

DUNFORD:

I will, Senator. I think that having that capability has been one of the bright spots in what has been a largely criticized acquisition process.



HEINRICH:

Yeah, I would agree. And I think that directed energy, on both of those fronts, is a potential game-changer for what's a rapidly developing situation, with drones in particular.

(UNKNOWN)

Thanks (ph). I keep tripping on that. (OFF-MIKE)

HEINRICH:

I want to return real quickly to an issue that Senator Kaine brought up earlier, with regard to Puerto Rico. And you mentioned throughput, and one of the things that I understand is a bottleneck with throughput right now in that emergency response is the number of radars that are down and the fact that planes are landing -- C-130s, et cetera -- on VFR if there's not radar at various airfields.

Does DOD have a role in restoring the radar at those airfields? Is that DHS? And what can you tell us about the -- hopefully, the easing of that bottleneck, which really limits how much we can get in there on a -- on a reasonable time period?

DUNFORD:

Senator, we do have the capability, and are right now -- again, that's our priority -- is focused on making sure the airfields can operate. A piece of their ability to operate will be those expeditionary radars that we have, and we can provide as required on the short -- on a short-term basis.

The responsibility is primarily DHS, but at this point, we're not -- we're not trapped in, you know, bureaucratic niceties. What we're trying to do is make sure that we get the people of Puerto Rico the support they need, when they need it.

And the key thing that needs to be done right now, as you're suggesting, is all the other support they need can't come in until we get the ports and airfields open.

HEINRICH:

Exactly.

DUNFORD:

And so that's why Northern Command has placed that at the top the list of support we're providing.

HEINRICH:

Thanks -- thank you very much, General Dunford.

REED:

On the behalf of the -- Chairman McCain, Senator Perdue, please.

PERDUE:

General Dunford, thank you for being here today. Thank you for your -- you and your family, for your service.

I want to remind the committee that the first ship was, I believe, the U.S.S. Mercy in Port-au-Prince, after the earthquake. And I want to thank the military, on record here, for always being the first in crises like this in Puerto Rico.

PERDUE:

I want to highlight again a quote that was already referred to by the chairman this morning, because I think, in February, you called out this crisis. We have a global security crisis, but we have a debt crisis. And the two right now are -- and you're the first one, I believe, to call this out.

Your quote was, "Without sustained, sufficient and predictable funding, I assess that, within five years, we will lose our ability to project power, the basis of how we defend the homeland, advance U.S. interest and meet our alliance commitments."

Wow. Sir, you've -- this is (ph) a few months forward. Do you still stand by that assessment?

DUNFORD:

Senator, I do. And, you know, if I could just make a quick comment, I know, many times, the perception is that military leaders will never be satisfied with good enough, and they'll always want more. And so somehow, maybe people aren't looking at those comments with the seriousness that I intended them to be.

I would not have made those comments without having gone on a long journey of analytic rigor to really, truly be able to quantify exactly what I'm -- what I'm talking about. I think we share with you, Senator -- because of your interest, we've shared with you some of the results of our work.

But those words are backed by a fairly exhaustive analytic effort that shows specific capability areas where we are in the process of losing our competitive advantage. And in the aggregate, when you go out four or five years, the loss of our competitive advantage in those specific areas means we will not be able to project power when and where necessary to advance our interests.

That does two things. It not only effects our response to crisis, but it increases the probability there will be a crisis, because it'll have an adverse effect on the deterrent capability of the U.S. military.

I believe that one of the things that deters others today from a conventional conflict is their knowledge that we do have a competitive conventional advantage over any adversary today, and we can project power when and where necessary to advance our interests.

Were we to lose that, I believe that there would be an increased possibility of conflict, particularly against our peer competitors.

PERDUE:

Well, that's the question I have today for you, sir, is -- you know, if you look at the latest estimate, back in 2011, then- Chairman Gates -- Secretary of -- or Secretary of Defense, then -- made the estimate, based on a bottoms-up estimate from the military on needs. And that estimate was, in today's dollars, for 2016, about \$753 billion.

Last year, we actually appropriated \$623 billion only. That's all of category 050 (ph), I believe. This year, it's going to be a little bit greater than that, \$677 billion or thereabouts. But we're still significantly less

than just what Secretary Gates wanted, back then, for 2016. And that was before ISIS, Crimea, Ukraine, Syria, Iran, North Korea, and on and on and on, with Russia and China's growing capabilities.

Sir, my question -- and, by the way, you mentioned 3 percent to 7 percent. I don't disagree with that. I don't know what the need is, but I know that we are at a low point right now, historically. I can look at the history. We've averaged, over the last 30 years, after Vietnam, 4 percent. We're now at 3 percent. That 100 basis points is \$200 billion.

So, any way you look at it, today, my estimate is somewhere between \$150 billion and \$200 billion that we are short today, even with being \$89 billion above the BCA.

Sir, my question is how do you determine the priorities going forward with that kind of shortfall? Because every dime that we're spending on the military today and on our veterans and on all domestic discretionary spending -- now let me say this again. Every dime that we spend on our military and our veterans today, by definition, is borrowed money.

In the last eight years, and it's projected the next 10 years will be similar, we borrowed 35 percent of what we spent as a federal government; 25 percent of that spending is discretionary, and military is part of that.

Sir, given all of that, you and Secretary Mattis have talked about the first step in the strategy is filling the hole. Are we on board, doing that now, with the -- with the appropriation this year? And what does the next two or three years look like, in terms of trying to catch up with a number of years -- not just the last six or eight, but a number of years, 20 years, even -- of disinvesting in the military?

DUNFORD:

Thanks, Senator.

The way that we have characterized in our recommendations is that we have readiness challenges. That's been described as the is the -- filling the holes. We have lethality challenges, and by that, we mean areas like electronic warfare, cyber capability, our strike capability that needs to be improved. And then there's a capacity issue.

And ideally, we'd be addressing all of those. We'd be addressing the current readiness of the force that we have. We'd be improving the capabilities we need for tomorrow. And we'd be increasing the capacity of the force to meet the overall requirements that we have.

So the way we've chosen to prioritize it is to make sure that we, number one, make sure that the men and women today in those units that we're deploying have the wherewithal to accomplish the mission with minimal loss of life or equipment. That's job one.

The second thing we're doing, and you saw this in the last two years, is starting to make increased investments, number one, in our nuclear enterprise, because deterring nuclear war is job one for the department, and then addressing some of these deficiencies in cyber capabilities, electronic warfare, ballistic missile defense, which we have spoken about.

What we have not done is come in with a recommendation to increase the size or the capacity of the force because, in my judgment, we should not do that unless we can do it in a balanced way. And there's no way, with the current level of resourcing we have and the projected level of resourcing, that we can grow the force in a balanced way.

So I think we're forced to fill the holes, address the readiness and then do we can to invest in the capabilities that we need to maintain competitiveness today and tomorrow.

What I don't see in the near term: our ability to really grow the force to get after the dynamic that has been discussed a bit this morning, where we have fewer ships than are necessary even to do ballistic missile defense on a day-to-day basis in the Pacific. And that's the challenge that we have, and that's kind of the three ways we think about it.

PERDUE:

Yes, sir. Thank you.

Thank you, Mr. Chair.

REED:

On behalf of Chairman McCain, Senator Warren, please.

WARREN:

Thank you, Mr. Chairman.

General Dunford, good to see you here.

So I want to ask you about the nuclear deal between the United States, the five partner nations and Iran that has placed Iran's nuclear program under verifiable limits and unprecedented inspections so that it cannot develop a nuclear weapon.

The Trump administration has already certified twice to Congress that Iran is complying with this agreement. If President Trump does not certify again by October 15th, he risks blowing up this agreement, and Iran may restart again building a nuclear weapon.

Now, when asked about the Iran nuclear deal in January, Secretary Mattis told this committee that it is, quote, "An imperfect arms control agreement." But he also said, quote, "When America gives her word, we have to live up to it and work with our allies." General, do you agree with that?

DUNFORD:

Senator, I do. And my recommendation the previous two times was informed by that and the fact that the intelligence community had determined that there was not a material breach to the JCPOA.

And so what I recommended is that we focus, leveraging our partners that were part of that agreement to deal with those other challenges that we know Iran poses, whether it -- the terrorist threat, the maritime threat and so forth.

WARREN:

Well, you know, this is always -- the issues. Iran supports terrorism, engages in human rights abuses, works to develop ballistic missiles. But I think it's easier to counter Iran's destabilizing behavior if it has no nuclear weapon than it would be to keep Iran in check if it had access to a nuclear bomb.

So the question I have is, aside from the current nuclear deal, at this time, are you aware of any alternative, binding diplomatic agreement that would prevent Iran from developing a nuclear weapon?

DUNFORD:

I am not, Senator. I would highlight, though, the one thing we all have to come to grips with is there is a sunset...

WARREN:

Yes.

DUNFORD:

... to the current JCPOA, and that that needs to be addressed in the near term.

WARREN:

It certainly does. But, for right now, it appears that the Iran deal is working. There is no viable alternative. And it sounds like we need to keep enforcing this deal to keep us all safe.

I want to ask you another question, and that is about North Korea. You know, most of the time, the discussion centers on the role of China. But I want to ask about Russia's relationship, which is also critical to influencing the North Korean regime.

Russia has completed a railroad linking the two countries. A ferry now operates between Russia and North Korea. Vladimir Putin wrote off 90 percent of North Korea's \$11 billion debt to Russia. State Department estimates that North Korea sends about 20,000 workers to Russia annually, which produces foreign currency that Kim Jong-un desperately needs.

And while we're trying to pull the international community together to -- to try to persuade North Korea to stand down on nuclear weapons, reports emerged last week that fuel shipments between Russia and North Korea are increasing.

So, General Dunford, I want to ask; beyond our existing sanctions and authorities, what more should we be doing to counter Russia's support for North Korea?

DUNFORD:

Senator, I do believe that the solution to what's going on with Russia and China is diplomatic at this point, and economic, to the degree that sanctions and second and third-order sanctions can be implemented. I don't think there is, at this point, a military dimension to the challenge of getting better cooperation from Russia and China.

But I do believe that the things that Secretary Tillerson has proposed to do, and what Secretary Mnuchin has implemented over the past couple months, may be affecting the calculus of Russia and China, although I think we're a long way from determining whether or not the path we're on will result in peaceful denuclearization, which, of course, is what we all want to see.

WARREN:

So, let me ask you -- to put this question on a larger frame, you know, Russia seems to intervene in a lot of places, in opposition to the United States; Syria, Afghanistan, North Korea. Can you just say a word about how you see Putin's larger strategy here?

DUNFORD:

I think -- I think that if you -- there's very few places that I could look at in the world, Senator, where U.S. and Russian interests align. And I think, in many cases, what they're trying to do -- if you start in Europe, their primary focus is to undermine the credibility of the NATO alliance. If you look across the Middle East, they're trying to undermine the partnerships that we have and erode the confidence in our partners of the U.S. commitment to the region.

And I think, by the same token, they're trying to play a spoiler role in -- and achieve undue influence in the issue on the Korean peninsula that you spoke about a minute ago. So I can't think of too many places where Russia is playing a helpful role right now from the Maghreb to the Middle East to North Korea.



WARREN:

Yes. I just think it's so critical, as we talk about our alliances around the world, that we recognize exactly this point; that Russia's doing everything it can to break up those alliances, to sow discord in those alliances and the importance of our keeping them together and the importance of holding Russia accountable for what it's doing with North Korea.

DUNFORD:

Senator, if I could just make a quick comment on that...

WARREN:

Please.

DUNFORD:

I mean, we -- when we developed the national military strategy that we have right now, we determined that the strength of the U.S. military was our allies and partners and the network we've built up since World War II. Not only Russia, but others, recognize that that's our source of strength and so there's a concerted effort to undermine those allies and partners. And so, what we should be doing, at this point, is doubling down our efforts to -- to maintain strong alliances and partnerships because that -- that is the key to success.

WARREN:

Good, thank you very much, General.

REED:

On behalf of Chairman McCain, Senator Sullivan please.

SULLIVAN:

Thank you, Mr. Chairman, and General, congratulations to you, sir, and your family for your decades of exceptional service. I look forward to supporting your swift reconfirmation.

I wanted to turn to an issue that you and I have talked a lot about, in the NDAA, I had a provision in there this year that talked about the -- our FONOPs policy and how we should be looking at regular routine, and if possible, with allies. So, in some ways, our FONOPs, particularly in the South China Sea, are no longer newsworthy.

Can you elaborate a bit on the department's FONOPs policy, and if this differs from the previous administration? For example, you know, it was reported that Admiral Harris essentially had to get individual FONOPs approved by the NSC one at a time under the Obama administration. What's -- what's the strategy right now under the Trump administration, and how does that differ?

DUNFORD:

Senator, thanks, that is a good question. Secretary Mattis, when he came in, in early February, we went to him with a couple of individual Freedom of Navigation operations that you spoke about. And he said, hey look, I -- how about give me a full strategy that lays this thing out now for a long period of time and -- and talks about the strategic effect we're trying to achieve. You had spoke about partners, you talk about being routine and regular. And so those are things that Secretary Mattis directed.

After that, Admiral Harris developed a long-term plan for Freedom of Navigation operations. And that's what we're implementing right now, is a strategic approach to Freedom of Navigation operations that does in fact support our overall strategy in the Pacific, as well as the specific mission, which is, to ensure that we fly, sail and operate wherever international law allows. And we continue to validate those claims where we see international airspace for that matter, or the maritime domain.

SULLIVAN:

So those are going well; regular, routine with our allies if possible, not micromanaged from the NSC?

DUNFORD:

That's right. And -- and, Senator, in candor, we still, and always will, take into account what else is happening...

SULLIVAN:

Sure.

DUNFORD:

...in the strategic environment, whether it's a U.N. General Assembly or some other event. But -- but -- but we do have a base plan from which we're operating right now in a healthy dialogue, I believe, between the commander and the secretary of defense.

SULLIVAN:

Let me turn to missile defense. We've had a lot of questions today. I think -- it is it safe to say that the administration views a much more robust missile defense as a key part of our strategy, with regard to North Korea or Iran, with regard to rogue nations like those two countries that are trying to acquire intercontinental ballistic nuclear missiles?

DUNFORD:

No question, Senator.

SULLIVAN:

So you mentioned the NDAA does a lot, we do, but I think there's more that we should be doing. Does the administration have plans to, at least from a supplemental perspective or working with the Congress, beefing up our missile defense? I think it's something -- we all agree it's very bipartisan, by the way -- that we need to be doing. What are more specifics, General, you can share with us on what we need to be doing, and how can Congress support you?

DUNFORD:

Sure. Senator, we did do exactly as you suggest, and we've submitted it. And if you don't have a copy of that, I'll make sure you get one. But we -- we looked at additional radar systems. We looked at THAAD systems, Patriot systems. As you know, on the NDAA, there's additional interceptors -- additional 21, I think, is the number that I recall -- that are in there. All of those issues are part of -- we did an immediate, kind of, supplemental for -- just as your suggestion, for ballistic missile defense.

I think it was maybe the first or second week of August to make sure it was in time for the budget cycle. So I think what you have outlined in the NDAA, combined with the supplemental that the administration has put together, will meet the immediate needs.

But, of course, we need a long term strategic approach to ballistic missile defense and buying the same capabilities that we have today into the future is not going to be the solution as the threat adapts.

And I know you've received some of the classified briefings on the adaptations of the threat, which means our ballistic missile defense capabilities also have to adapt.

SULLIVAN:

We want to work with you on that. I think it's an area -- like I said, a bipartisan cooperation in the Congress. Which is new but important development and we want to work with the administration on that. Let me end, just a final question.

I really want to applaud you and General Mattis, the entire administration, Secretary Tillerson, on the North Korea strategy. I think what you're trying to achieve, your focus on it, importantly, your frequent and constructive engagement, with Congress asking us to play our part have also been very, very -- and important element of that strategy.

I also believe that you talk a lot about credible military options. And that, to me, is an effective element of our diplomacy. Effective diplomacy, which I think we're starting to see a lot of progress in that realm.

If one of the options was a preemptive or preventive ground war on the Korean Peninsula, like the Gulf War in 1990 or 2003 that was launched by the U.S., my view is that would require an AUMF from the Congress and constitutionally and politically, this would help our policy with regard to leverage, with regard to the ability to show the world that the American people were behind it.

Do you agree with that? And is that something that the administration has started to talk about? I've raised it with a number of folks. I think it's an important issue. We want to be supportive. I think you're getting bipartisan support for what the strategy is. But that kind of issue, to me, is something that we need to be prepared to discuss. Do you have a view on that, General?

DUNFORD:

Senator, I think what I'd do is probably narrow my view to -- the scenario you're describing, I would want to have the full-throated support of the American people in the form of the Congress if we did something like you're suggesting.

SULLIVAN:

Right. And I use that language very carefully. I know the president has a lot of authority to react, to take action, particularly if we're attacked. But I'm talking about a ground war, a la 1950, launched by the United States. Although in 1950, as you know, there was no Congressional authorization.

I think that's an important topic. I think it gives us leverage. And I'm glad to see that you believe that for something like that, you would want that. And I don't want to put words in your mouth. It's an important issue.

DUNFORD:

No, no. Senator, I think -- I think, again, we know from history that we are going to be much better -- a much better degree of success if we have the full-throated support of the American people when we go to war. What you're suggesting is going to war. And...

SULLIVAN:

Correct.

DUNFORD:

...if we're going to conduct a major war, then having the full support of the American people in the form of the Congress, I think, is something we need to have.

SULLIVAN:

Thank you. Thank you, General.

REED:

On behalf of Chairman McCain, Senator Nelson.

NELSON:

General Mattis -- General Dunford, you have, certainly, my confidence in you. And the reason I said General Mattis, I also have that confidence in General Mattis and I also have that confidence in General Kelly. Is there something about marines that inspires confidence?

DUNFORD:

Senator, in my current assignment, I don't think you want me to answer that question, do you?

NELSON:

No.

DUNFORD:

Thank you, sir.

NELSON:

Vladimir Putin cannot beat us on land, he can't beat us on the sea, he can't beat us under the sea, he can't beat us in the air and he can't beat us in space, but he can beat us in cyber. You want to comment on that, how our forces are organized to deter and counter?

DUNFORD:

Thanks, Senator.

I mean, I would agree with your assessment that the most significant threat in cyberspace we face today -- the most advanced capabilities are the Russians'. That's our -- that's our assessment. I would -- I would argue, though, that it's not only his cyber capability.

The one thing that the Russians have effectively done is combine that cyber capability with political influence operations, economic coercion, information operations, electronic warfare and even military posture. And if you take those four or five things and you look at the centralized command-and-control system that Russia has, even playing an overall

weak hand, as you've described each of the domains where we have dominance -- even with an overall weak hand, they've been able to effectively advance their interests without going to war.

And I do believe that that's an area that not only should we be focused on in the department -- and our recent global campaign plans now have added what I call competition -- adversarial competition short of armed conflict as being an area that is included in our campaign plans. But I also believe we need to take a look at that from a whole-of-government perspective, as well, in order to be competitive.

NELSON:

Absolutely, because you know what he can do in the next election. He doesn't -- and the newspapers have reported that he's already in several states' registration records. All he has to do is, particular critical precincts, go in and eliminate every 10th voter.

You can imagine the chaos that would occur on Election Day if the voters get there and, "I'm sorry, Mr. Jones, you're not registered." That would be significantly disruptive to our -- to our infrastructure and to the underpinnings of our country, a free and fair election.

The president's budget makes significant funding cuts in the Department of State and USAID. Does that make sense to you?

DUNFORD:

What I -- what I can say is, Senator, that there's no challenge that I'm currently dealing with that the primary factors in our success won't be diplomatic, economic.

And certainly, even in our campaign in Iraq and Syria, USAID plays a critical role in stabilization, to secure the gains that our partners are making on the ground in Syria and Iraq, as one example. But, every place I've been over the past 15 or 16 years, in Iraq and Afghanistan, a key partner has been USAID.

NELSON:

Well, and as -- you all, as military commanders -- you also project American power in the forms of using so many of our other agencies of government so that you become not only a warrior, as a military commander; you become a diplomat, as well, utilizing those other levers of power.

We've seen that used very effectively by your respective commanders in Africa. Likewise, again, in Latin America. And if you don't have those other agencies -- and I just mentioned two, State and USAID -- it clearly clips your wings in being able to function as a military commander. Any further comment on that?

DUNFORD:

Senator, I think I'd probably just reinforce the one point that, today, any of our military commanders, to be successful, have got to achieve unity of effort with the other government agencies that are on the ground. And you mentioned two, but if I think of our Afghanistan experience, the FBI was there, the DEA was there, customs, border police was there.

So I agree with the thesis that the challenges that we face today are complex contingencies, and they require elements of all of our government in order to be successful.

And so trying to draw a distinction between the security of our nation in one department is not possible today. You know, many departments in our government are all involved in the fundamental task of government, which is -- which is security.

NELSON:

And, General, thank you also to your family for the sacrifices that they have made over the years, in allowing him to continue to serve his country, and for you all, continuing to serve the country in the role that you have, which is substantial. Thank you.

REED:

On behalf of Chairman McCain, Senator Graham, please.

GRAHAM:

Thank you, General Dunford, for your service.



Why should I vote for you?

(LAUGHTER)

DUNFORD:

Senator, over the past two years, I think I have provided best military advice...

GRAHAM:

OK, you've got me.

(LAUGHTER)

In the next two years, don't you agree that sequestration needs to be fixed, or we're going to go backwards?

DUNFORD:

It does, Senator.

GRAHAM:

Do you agree with me, if you don't reform entitlements over the arc of time, there's no money left to do anything other than entitlements?

DUNFORD:

Senator, I've seen the math, and we're headed towards a situation where it's going to be very difficult.

GRAHAM:

Yes, so entitlement reform is necessary to keep a strong military.

I want to look at the threats going forward in the next two years. Do you agree that there must be a credible military option on the table when it comes to North Korea?

DUNFORD:

I do, Senator. And I've personally conveyed that to our -- to China and to our allies in the region.

GRAHAM:

Do you agree with me that Iran has taken the money from the Iranian nuclear agreement, and done more damage with it than good?

DUNFORD:

There are indicators that some money that was freed up as a result of JCPOA has been -- has been put back into malign activities, and certainly, I'd be hard-pressed to find anything that Iran does that is good.

GRAHAM:

So the goal of the agreement was to get them back into the family of nations. Would you say thus far that has not been achieved?

DUNFORD:

Iran is not part of the family of nations today, Senator.

GRAHAM:

OK.

Syria -- do you agree with me that, if we leave Assad in power, it's going to be very difficult to end this war?

DUNFORD:

Senator, I've looked at Syria, as you can imagine, pretty hard, and I think addressing the grievances of the civil war are going to be necessary to have a stable political construct.

GRAHAM:

OK.

In terms of Russia, over the last six months, have they gotten better, worse or about the same?

DUNFORD:

In Syria, Senator?

GRAHAM:

Anywhere. Everywhere.

DUNFORD:

They certainly haven't gotten any better anywhere.

GRAHAM:

OK. There may be evidence that Russia was more deeply involved in sending out fake news during our last election. Does that trouble you?

DUNFORD:

It troubles me, Senator, although I don't have any unique insight into it.

GRAHAM:

OK.

Afghanistan -- the recent decision to add more capability with rules of engagement changes -- do you think that is necessary to be continued?

DUNFORD:

I think it is necessary, Senator, and I think it will help to get the Afghan Security Forces to reverse the trends of the last two years -- casualties and the lost ground that they have experienced.

I think what this -- what this additional effort will allow us to do is provide more effective advisory effort, down to the tactical level, with the Afghans, and also better leverage the air support that we have. And we have increased the air support, as well.

GRAHAM:

And there's a new emphasis on Pakistan, where they need to be a better part of the team?

DUNFORD:

That's exactly right, Senator. There's a key assumption in our -- in the president's South Asia strategy, that Pakistan cannot continue to be a sanctuary for Haqqani, Taliban and others in our -- and we have success.

GRAHAM:

Would you agree with me that we have to have very skilled ambassadors representing our country in both Pakistan, Afghanistan and India to get a good outcome militarily?

DUNFORD:

I would agree, Senator. And I was very encouraged, and I think you were on the committee that -- we -- that we confirmed Ambassador Bass to go to Afghanistan. I've got a good experience with him in Turkey. I've watched him deal with difficult situations. So I think we have the right man headed to Afghanistan.

GRAHAM:

So, in Iraq, it's just a matter of time until we clear ISIL out of Iraq. Do you agree with that?

DUNFORD:

I believe the Iraqi Security Forces are on a pretty good trajectory right now to clear out ISIS.

GRAHAM:

As you look forward, in Iraq, if the Iraqis would accept a follow-on force, do you believe it is in our national security interests, this time, to leave some troops behind to continue to work with the Iraqis?

DUNFORD:

I do, Senator. I think there's a large recognition, both in Iraq and certainly for the coalition partners that are there, that continued training of the Iraqi Security Forces is going to be necessary for them to become self-sustaining.

Obviously, the decision is going to have to be a political decision between Iraqi government and U.S. government. But, from a military perspective, I certainly believe that that's necessary.

GRAHAM:

And finally, do you agree, if the world is seen as capitulating to Kim Jong-un -- the United States, but (ph) the world at large -- that the Iranians will watch and have a different view of where they should be going?

DUNFORD:

Well, I think all of the -- all the nations that, you know, I would consider adversaries or potential adversaries will watch closely what's happening on the Korean peninsula.

GRAHAM:

And finally, it's the policy of this administration to deny the North Korean regime the ability to develop an ICBM with a nuclear weapon on top to hit the American homeland -- not contain it, but deny it. Is that correct?

DUNFORD:

That is -- that is the articulated policy of President Trump.

GRAHAM:

Do you agree with that policy?

DUNFORD:

I do, Senator.

GRAHAM:

Thank you, and I look forward to your service for the next two years. Our men and women in military could not be in finer hands. Thank you and your family.

DUNFORD:

Thank you, Senator.

REED:

On behalf of Chairman McCain, let me recognize Senator Blumenthal.

BLUMENTHAL:

Thanks, Mr. Chairman.

General Dunford, first of all, thank you for your service and to your family as well.

I would like to focus just briefly on Puerto Rico, you were asked about it earlier. Is there more that the Department of Defense can do to provide assistance in the midst of this humanitarian crisis, which involves not only human suffering but also the interruption, for some period of time, of communications, of travel, logistics, the lifeblood, in terms of infrastructure, of the island. Is there more that the military can do?

DUNFORD:

Senator, if there is, we'll be doing it. We're in a constant -- first of all, I couldn't agree with you more. And we've watched the tragedy unfold here over the last few days. The last update I had -- not just to come over here, but just because that's how constant we're getting updated -- was an update on our efforts in Puerto Rico.

To date, what they've identified are the things that would allow us to open airfields, open the ports, and get that immediate electricity, fresh water and food to the -- to the people in Puerto Rico. But if there is more that -- that needs to be done, I can assure you that Secretary Mattis has placed Puerto Rico as a priority for all of us and General Robinson is constant contact with FEMA, as well as officials in Puerto Rico, to make sure the department is leaning forward and providing all the support that they need.

BLUMENTHAL:

The National Guard of Connecticut, and I think of other states, have been involved in transportation. The air fields are now open to military aircraft and relief flights. Do you anticipate that military aircraft can and will be used more extensively in this effort?

DUNFORD:

I do, Senator. That's absolutely part of the plan. Particularly, again, for generators, water, food, those kind of immediate needs.

BLUMENTHAL:

Would you anticipate that the corps of engineers can play a role in opening some of the ports? Perhaps, some of the other means of transportation that could be involved?

DUNFORD:

Senator, I don't know whether it'd be specifically the corps of engineers or some of our combat engineers, but I do believe that the military is uniquely capable of helping to clear the debris and get the airfields -- repair the airfields and get them up and operating.

And I can assure you, whatever capabilities are required in that regard, whether they're a resident inside the corps of engineers or resident in some of our other operational units, we'll make sure the right capability is at the right place.

BLUMENTHAL:

And the -- the Department of Defense is indeed leaning forward and prepared, ready, able and willing to provide whatever assistance is necessary?

DUNFORD:

Absolutely, Senator. These are Americans and we're going to do everything we can to help them out.

BLUMENTHAL:

And they are Americans.

DUNFORD:

They are Americans, Senator.

BLUMENTHAL:

Let me ask you about the recent exercises conducted by Russia. I think they were called Zapad. Zapad West with Belarus. Are there any sort of lessons or other intelligence that we've gained that you can discuss in this forum from having observed those exercises?

DUNFORD:

Senator, it'd probably be -- if you don't mind, reluctant to discuss it in public. I was just with a meeting of all 29 NATO Chiefs of Defense last weekend. This, as you can imagine, was one of the topics. And then I came back out through Norway with my Norwegian counterpart to talk more specifically about challenges in the northern flank of NATO and some of the things we've seen in the exercise.

But I can assure you, we watched very carefully what the Russians have done during the Operation Zapad to make sure that we understand where they are in terms of capability development and what the implications are for NATO security and for U.S. security.

BLUMENTHAL:

And despite the Russian efforts to drive wedges in our NATO alliance among our allies, would you say that the NATO alliance is in good health right now?

DUNFORD:

Senator, I would. And I -- and I certainly now have probably a five year perspective, from two out of my last three assignments directly involved with NATO. And I would even say, in the last -- a year ago, there was a strong debate inside of NATO about 360 degree security and almost a different view from those nations that viewed the south and the terrorist threat as being the priority in those nations that viewed Russia as being a priority.

And I think over the past year, with some very strong leadership -- and I think the Secretary General has been a part of that, I feel much better today about the cohesiveness of NATO and about the recognition that it's not either or of those threats. It's both. And that nations need to make the significant contributions to prepare us for both of those challenges.

So I think the overall health of NATO is actually -- I would assess to be



very strong.

BLUMENTHAL:

Thank you. My time is expired, but I just want to say I will be strongly and enthusiastically supporting you for another term. And again, my thanks for your service and as well to your family. Thank you.

DUNFORD:

Thank you, Senator.

REED:

On behalf of Chairman McCain, Senator Shaheen, please.

SHAHEEN:

Well, thank you. I think I'm the last one, so hopefully we will be quick. General Dunford, thank you to you and your family for your willingness to continue to serve in this role.

I think it's fair to say that there's a lot of support on this committee for your nomination. On Friday it was reported that the KC- 46 aerial refueling tanker program was hit with three categories one deficiencies, including one that was reported as possibly jeopardizing the willingness of the Air Force to accept the aircraft from Boeing.

How concerned are you about those deficiencies and are you worried that we won't be able to take delivery of those aircraft by the scheduled time of spring of 2018?

DUNFORD:

Senator, what I am concerned about is the delivery of the tankers and the capability that that would imply a capability gap. I think if you had the transportation commander here, General McDew, today, he would talk to you about tankers as being one of his more significant challenges in meeting all of our requirements.

So, I'm not familiar with the details of these deficiencies and it hasn't been translated into time, for me, at this point. But, I think with regard to the capability itself, that is one of the more critical capabilities in the joint force and all of our plans are based on our ability to meet this requirement.

SHAHEEN:

Well, absolutely. And, I'm sure -- I assume you would give us your commitment that you will follow up and find out how serious those deficiencies are and whether they jeopardize the scheduled timeframe for delivery.

DUNFORD:

I will, Senator.

SHAHEEN:

Thank you. You talked about the importance of electronic warfare and of coordinating those efforts and also there have been several back and forths about Russia and its hybrid capabilities and how important that is to its current capacity to engage. Can you talk about how the military is looking at our electronic and cyber tools and how we're working with other departments within the federal government, Treasury, State, to coordinate those efforts?

DUNFORD:

Right. Senator, obviously primarily focused on defending the information technology of the department, as well as select industrial pieces that support the department. So, that's our primary focus. And then defending the nation, which includes a suite of offensive capability.

So, being able to exploit in cyberspace, being able to conduct offensive operations and defensive operations are all a piece of it. But with regard to collaboration and cooperation, the one area that Admiral Rogers and his team are very focused on is, when the vulnerability is identified the sharing the action take into address those vulnerabilities is an important piece.

And that's going to require not only, as you suggest, great cooperation within the government, and I think we're in a pretty good place in that regard. But it's also going to require a great public private cooperation, as well, so that when that assistance is offered it's accepted and there's a degree of trust that what we're trying to do is actually help them mitigate the risk of vulnerability.

That's probably one of the key areas of cooperation. And as you know, Senator, you've paid close attention to the this issue, there's always a debate about what agency within our government is best capable of performing what mission.

I think that dialogue will go on for many years to come and we're always refining it and we should be. We shouldn't be comfortable or complacent that we have it exactly right and that dialogue is ongoing. Not only about the organizational construct of cyber command itself, but also the departments role within the broader government effort.

SHAHEEN:

I certainly agree with that. However, I do think it's important for us to have someone within the administration who is the point person on cyber activities. Is there somebody that you're aware of who's actually the person in charge of those activities?

DUNFORD:

Senator, I can't say that there is. It doesn't mean that there isn't, I'm -- I'm not aware of somebody right now in the administration who's designated -- probably and incorrectly, I have a decidedly DOD perspective right now, but I'll certainly find out.

SHAHEEN:

Well, thank you. I think it's -- says something that, as the chairman of the joint chiefs, you're not aware of who the person is who's in charge.

You also talked about the importance of our alliances and partnerships, and how that contributes to how Russia and our other adversaries view the strength of the United States. Do you have any sense of what the reaction would be among our partners with the JCPOA, if the United States were to abrogate our commitments under that treaty?

DUNFORD:

Senator, I don't have any unique insights into that. But I certainly know what everybody else knows from the open source, and I don't think there'd be unanimity of those who are part of the JCPOA, were we to walk away.

SHAHEEN:

Thank you. Thank you, Mr. Chairman, and again, thank you for your willingness to continue to serve.

REED:

Thank you.

On behalf of Chairman McCain, Senator Peters, please.

PETERS:

Thank you, Senator Reed.

General Dunford, again, thank you for your testimony here today. Thank you for your service to our country. But I also want -- just want to thank you for your thorough answers that you always give to our questions. They're very candid. And not only your willingness to answer those questions here in a formal setting, but you've always been accessible to us on a one-on-one basis to answer specific questions. And I appreciate that immensely.

General Dunford, I know that the department is concerned about the geopolitical implications of megacities, including the growth of cities of over 10 million people. I spoke with Admiral Harris about this when he testified earlier this year.

Admiral Harris testified that there are 10 megacities in the world, with eight of them in the Pacific Command area of responsibilities. And these locations are ripe to become geopolitical hotspots, given the number of people involved and some of the unique political context that they -- are associated with them.

So the ability of the services to operate in these very dense urban environments are going to become increasingly important, both in contingency and conflict, as well as humanitarian assistance.

We have particular concerns about Seoul, given the threats of -- that are now associated with North Koreans' action. And Seoul is obviously one of those megacities that we need to be concerned about, and also raises a host of other issues when it comes to dealing with that.

If you could address plans that we have for dealing in megacities, how you plan to deal with that issue, and are there needs for us to invest additional training -- and not only of the soldiers and Marines, but also developing tactics and procedures that we need to go forward, that we should be assisting you in from a congressional perspective?

DUNFORD:

Senator, I could, and I think the core of what we're doing to prepare for that is found in our exercise and our experimentation program. And it also reflects in the priorities that we'd have for innovation.

And so, if you take a look at our exercise and experimentation program, it is focused on our ability to deal in a very complex, dense urban terrain. I think all of us have looked at the demographics. We've looked at where people will live, we looked at where the sources of conflict will be, and -- in preparing ourselves accordingly to do that.

There's some unique challenges in megacities. Command and control is one of those challenges; intelligence, surveillance and reconnaissance is one of those challenges; minimizing collateral damage while delivering effective fires are one of those challenges. And those are all areas within the department that we are -- that we are working on.

PETERS:

And then, please, let us know if there's anything else we can do to help you provide the resources necessary, because I think it's obvious that's going to be an area that we're going to have to be dealing with in the future, without question.

DUNFORD:

Thanks, Senator.

PETERS:

When you were asked a previous question about things not to assume in a future war, at the top of the list was our ability to dominate in space. And so I'd like you to talk a little bit about that, in particular, what we're seeing with the Chinese that seem to be developing -- at least evidence suggests that they're developing as many as three different ASAT capabilities and have conducted multiple tests in space of direct-ascent ASAT (ph) systems.

They also established a new service, a few years ago, to make that capability even more robust. You could address how concerned we should be, and from a congressional perspective, do we need to be putting more resources into this critical area?

DUNFORD:

Senator, thanks.

When we fielded the current space capabilities, we didn't field them with resilience to the current threat in mind. And so they are vulnerable to the threats that you spoke about, and not only the Chinese, but the Russians and others recognize that. Even North Korea has a nascent anti-space program that's there.

And if you look at our dependencies in space, whether it's the timing of our systems, global pre-positioning, our command and control systems militarily, or the dependence on our economy on space capabilities, the vulnerabilities in space, which we really identify in the budget as a need for increased resilience in space to those threats -- the vulnerabilities have significant implications, not only from a military perspective, but from a commercial perspective, as well.

So, certainly, part of our budget is designed to enhance our resilience in space, and also enhance the redundancies and the access that we have to a wide range of space capabilities so that we minimize the threat that you've -- that you've identified.

As a result of that analysis and recognition, in probably the last three years, you have seen increased requests from the department for space-related capabilities. Again, my priority at this point would be on space resilience, but there's a wide range of other capabilities we need, as well.

And that, again, is informed by the developing threat -- military threat to space capabilities that we have.

PETERS:

And, if I may add, the point that you made -- it's not just our military satellites. We need to be working with some of our commercial suppliers of communication satellites and other space technologies. We should be stepping up our activities working with the commercial sector, I would assume?

DUNFORD:

Absolutely, Senator. In fact, one of the -- one of the areas that we believe there's some potential is to -- is to better leverage commercial activities, for example, to expand our intelligence, surveillance, reconnaissance capability.

PETERS:

Great. Thank you, General. Appreciate it.

REED:

General, Thank you for your service -- selfless service in the Marine Corps and to the nation. And thank your family for their service alongside you.

And, on behalf of Chairman McCain, I would declare the hearing adjourned. Thank you.

DUNFORD:

Thank you, Senator.

### **List of Panel Members and Witnesses**

PANEL MEMBERS:

SEN. JOHN MCCAIN, R-ARIZ. CHAIRMAN

SEN. JAMES M. INHOFE, R-OKLA.

SEN. ROGER WICKER, R-MISS.

SEN. LINDSEY GRAHAM, R-S.C.

SEN. DEB FISCHER, R-NEB.

SEN. TED CRUZ, R-TEXAS

SEN. TOM COTTON, R-ARK.

SEN. MIKE ROUNDS, R-S.D.

SEN. JONI ERNST, R-IOWA

SEN. THOM TILLIS, R-N.C.

SEN. DAN SULLIVAN, R-ALASKA

SEN. BEN SASSE, R-NEB.

SEN. DAVID PERDUE, R-GA.

SEN. LUTHER STRANGE, R-ALA.

SEN. JACK REED, D-R.I. RANKING MEMBER

SEN. BILL NELSON, D-FLA.

SEN. CLAIRE MCCASKILL, D-MO.

SEN. JEANNE SHAHEEN, D-N.H.

SEN. KIRSTEN GILLIBRAND, D-N.Y.

SEN. RICHARD BLUMENTHAL, D-CONN.

SEN. JOE DONNELLY, D-IND.

SEN. MAZIE K. HIRONO, D-HAWAII

SEN. TIM KAINE, D-VA.



SEN. MARTIN HEINRICH, D-N.M.

SEN. ELIZABETH WARREN, D-MASS.

SEN. GARY PETERS, D-MICH.

SEN. ANGUS KING, I-MAINE

WITNESSES:

GENERAL JOSEPH F. DUNFORD (USMC), CHAIRMAN, JOINT  
CHIEFS OF STAFF

---

Source: **CQ Transcripts**

# **Exhibit 30**



# Department of Defense INSTRUCTION

NUMBER 1332.38

November 14, 1996

---

---

ASD(FMP)

SUBJECT: Physical Disability Evaluation

- References: (a) [DoD Directive 1332.18](#), "Separation or Retirement for Physical Disability," November 4, 1996  
(b) Title 10, United States Code  
(c) Sections 3502, 5532, 6303, and 18332 of title 5, United States Code  
(d) Sections 206 and 502 of title 37, United States Code  
(e) through (k), see enclosure 1

## 1. PURPOSE

This Instruction implements policy, assigns responsibilities, and prescribes procedures under references (a) and (b) for:

- 1.1. Retiring or separating Service members because of physical disability.
- 1.2. Making administrative determinations under references (c) and (d) for Service members with Service-incurred or Service aggravated conditions.
- 1.3. Authorizing a fitness determination for members of the Ready Reserve who are ineligible for benefits under reference (b) because the condition is unrelated to military status and duty.

## 2. APPLICABILITY

This Instruction applies to the Office of the Secretary of Defense (OSD), the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff, and the Combatant Commands (hereafter referred to collectively as "the DoD Components"). The term "Military

Services,” as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.

### 3. DEFINITIONS

Terms used in this Instruction are defined at enclosure 2.

### 4. POLICY

It is DoD policy under reference (a) that:

4.1. The DoD Disability Evaluation System (DES) shall be established to conduct physical disability evaluation in a consistent and timely manner.

4.2. Members of the Reserve components who are not on a call to active duty of more than 30 days and who are medically disqualified for impairments unrelated to the member’s military status and performance of duty shall be referred into the DES solely for a fitness determination upon the request of the member or when directed by the Secretary concerned.

4.3. The applicable standards for all determinations related to physical disability evaluation shall be consistently and equitably applied, in accordance with 10 U.S.C. (reference (b)), to Active component and Ready Reserve members.

### 5. RESPONSIBILITIES

5.1. The Under Secretary of Defense for Personnel and Readiness shall:

5.1.1. Exercise cognizance and oversight of the DoD DES.

5.1.2. Make the final decision on requests from the Military Departments for exceptions to the standards of this Instruction.

5.2. The Assistant Secretary of Defense for Force Management Policy, under the Under Secretary of Defense for Personnel and Readiness, shall:

5.2.1. Exercise cognizance of laws, policies, and regulations that effect the DES.

5.2.2. Issue guidance, as required, to further interpret, implement, and govern the policy and procedures for the four elements of the DES.

5.2.3. Establish necessary reporting requirements to monitor and assess the performance of the DES and compliance of the Military Departments with this Instruction and DoD Directive 1332.18 (reference (a)).

5.2.4. Coordinate with the Assistant Secretary of Defense for Reserve Affairs concerning the impact of laws and DoD policy on Reserve members who have conditions that are cause for medical disqualification.

5.2.5. Coordinate with the Assistant Secretary of Defense for Health Affairs in developing procedures for medical issues pertaining to physical disability evaluation.

5.2.6. Review substantive changes proposed by the Military Departments to Departmental policies and procedures for physical disability evaluation that affect the uniformity of standards for separation or retirement for unfitness because of physical disability or separation of Ready Reserve members for medical disqualification.

5.2.7. Develop quality assurance procedures to ensure that policies are applied in a fair and consistent manner.

5.3. The Assistant Secretary of Defense for Health Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

5.3.1. Make recommendations for a final decision by the Secretary of Defense on the unfit findings on all officers in pay grade 0-7 or higher and medical officers in any grade who are pending nondisability retirement for age or length of service at the time of their referral into the DES.

5.3.2. Review substantive changes proposed by the Military Departments in their supplemental medical standards to enclosure 4 of this Instruction concerning medical conditions that are cause for referral of a member into the DES.

5.4. The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall coordinate as necessary to ensure that procedures for the DES apply consistently and uniformly to members of the Reserve components.

5.5. The Secretaries of the Military Departments shall:

5.5.1. Ensure that members with conditions that may be cause for referral into the DES are counseled at appropriate stages on the DES process and the member's rights, entitlements, and benefits.

5.5.2. Establish a quality assurance process to ensure that policies and procedures established by DoD Directive 1332.18 (reference (a)) and this Instruction are interpreted uniformly.

5.5.3. Make determinations on unfitness because of medical disqualification or physical disability; entitlement to assignment of percentage of disability at the time of retirement or separation because of physical disability; and, except as limited by 10 U.S.C. 1216(d) (reference (b)), entitlement to and payment of disability retired and severance pay.

5.5.4. Ensure that the record of proceedings for physical disability cases supports the findings and recommendations made.

5.5.5. Ensure the Temporary Disability Retired List (TDRL) is managed to meet the requirements of 10 U.S.C. 1210 (reference (b)) for timely periodic physical examinations, suspension of retired pay, and removal from the TDRL.

5.5.6. Designate a Military Department representative to serve as the Department representative for the Disability Evaluation System.

5.5.7. Ensure all matters raising issues of fraud on the DES by members are investigated and resolved as appropriate.

6. PROCEDURES

See enclosure 3.

7. EFFECTIVE DATE

This Instruction is effective for all MEBs 120 days after the date of this Instruction.

A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke extending to the right.

Edwin Dorn  
Under Secretary of Defense for  
Personnel and Readiness

Enclosures - 5

1. References
2. Definitions
3. Procedures
4. Guidelines Regarding Medical Conditions and Physical Defects That Are Cause for Referral into the Disability Evaluation System
5. Conditions Not Constituting a Physical Disability

E1. ENCLOSURE 1

REFERENCES, continued

- (e) DoD Directive 6130.3, “Physical Standards for Appointment, Enlistment, Induction”, May 2, 1994
- (f) Section 104 of title 26, United States Code
- (g) DoD Directive 1332.27, “Survivor Benefit Plan”, January 4, 1974
- (h) DoD Directive 1332.35, “Transition Assistance for Military Personnel,” December 9, 1993
- (i) [DoD Instruction 1332.39](#), “Application of the Veterans Administration Schedule for Rating Disabilities,” November 14, 1996
- (j) Sections 801-940 of title 10, United States Code, “Uniform Code of Military Justice”
- (k) Sections 101 and 302 of title 38, United States Code



## E2. ENCLOSURE 2

### DEFINITIONS, continued

E2.1.1. Accepted Medical Principles. Fundamental deductions, consistent with medical facts that are so reasonable and logical as to create a virtual certainty that they are correct.

E2.1.2. Accession Standards. Physical standards or guidelines that establish the minimum medical conditions and physical defects acceptable for an individual to be considered eligible for appointment, enlistment or induction into the Military Services under DoD Directive 6130.3 (reference (e)).

E2.1.3. Active Duty. Full-time duty in the active Military Service of the United States. It includes:

E2.1.3.1. Full-time National Guard Duty.

E2.1.3.2. Annual training.

E2.1.3.3. Attendance while in active Military Service at a school designated as a Service school by law or by the Secretary of the Military Department concerned.

E2.1.3.4. Service by a member of a Reserve component ordered to active duty (with or without his or her consent), or active duty for training (with his or her consent), with or without pay under competent orders.

E2.1.4. Active Duty for a Period of More than 30 Days. Active duty or full-time National Guard Duty under a call or order that does not specify a period of 30 days or less.

E2.1.5. Active Reserve Status. Status of all Reserves who are not on an active-duty list maintained under Section 574 or 620 of 10 U.S.C. (reference (b)), except those in the inactive National Guard, on an inactive status list or in the Retired Reserve. Reservists in an active status may train with or without pay, earn retirement points, and may earn credit for and be considered for promotion. In accordance with the Reserve Officer Personnel Management Act (ROPMA), a member in an Active Reserve status must be on the Reserve Active-Status List (RASL) (10 U.S.C. 14002 (reference b)).

E2.1.6. Active Service. Service on active duty or full-time National Guard duty.

E2.1.7. Compensable Disability. A medical condition determined to be unfitting by reason of physical disability and which meets the statutory criteria under Chapter 61 of reference (b) for entitlement to disability retired or severance pay.

E2.1.8. Competency Board. A board consisting of at least three medical officers or physicians (including one psychiatrist) convened to determine whether a member is competent (capable of making a rational decision regarding his or her personal and financial affairs).

E2.1.9. Death. A determination of death must be made in accordance with accepted medical standards and the laws of the State where the member is located or the military medical standards in effect at an overseas location.

E2.1.10. Deployability. A determination that the member is free of a medical condition(s) that prevents positioning the member individually or as part of a unit, with or without prior notification to a location outside the Continental United States for an unspecified period of time.

E2.1.11. Duty Related Impairments. Impairments which, in the case of a member on active duty for 30 days or less, are the proximate result of, or were incurred in line of duty after September 23, 1996, as a result of:

E2.1.11.1. Performing active duty or inactive duty training;

E2.1.11.2. Traveling directly to or from the place at which such duty is performed; or

E2.1.11.3. After September 23, 1996, an injury, illness, or disease incurred or aggravated while remaining overnight, between successive periods for purposes of IDT, at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance of the member's residence.

E2.1.12. Extended Active Duty. Active duty under orders specifying a period of more than 30 days.

E2.1.13. Final Reviewing Authority. The final approving authority for the findings and recommendations of the PEB.

E2.1.14. Full and Fair Hearing. A hearing held by a board, before which the Service member has the right to make a personal appearance with the assistance of counsel and to present evidence in his or her behalf.

E2.1.15. Impairment of Function. Any disease or residual of an injury that results in a lessening or weakening of the capacity of the body or its parts to perform normally, according to accepted medical principles.

E2.1.16. Inactive Duty Training (IDT). Duty prescribed for Reservists, other than active duty or full-time National Guard Duty, under 37 U.S.C. 206 (reference (d)) or other provision of law. It does not include work or study in connection with a correspondence course of a Uniformed Service.

E2.1.17. Instrumentality of War. A vehicle, vessel, or device designed primarily for Military Service and intended for use in such Service at the time of the occurrence of the injury. It may also be a vehicle, vessel, or device not designed primarily for Military Service if use of or occurrence involving such a vehicle, vessel, or device subjects the individual to a hazard peculiar to Military Service. This use or occurrence differs from the use or occurrence under similar circumstances in civilian pursuits. There must be a direct causal relationship between the use of the instrumentality of war and the disability, and the disability must be incurred incident to a hazard or risk of the service.

E2.1.18. Line of Duty Investigation. An inquiry used to determine whether an injury or disease of a member performing military duty was incurred in a duty status; if not in a duty status, whether it was aggravated by military duty; and whether incurrence or aggravation was due to the member's intentional misconduct or willful negligence.

E2.1.19. Natural Progression. The worsening of a pre-Service impairment that would have occurred within the same timeframe regardless of Military Service.

E2.1.20. Nonduty Related Impairments. Impairments of members of the Reserve components that were neither incurred nor aggravated while the member was performing duty, to include no incident of manifestation while performing duty which raises the question of aggravation. Members with nonduty related impairments are eligible to be referred to the PEB for solely a fitness determination but not a determination of eligibility for disability benefits.

E2.1.21. Office, Grade, Rank, or Rating.

E2.1.21.1. Office. A position of duty, trust, authority to which an individual is appointed.

E2.1.21.2. Grade. A step or degree in a graduated scale of office or military rank that is established and designated as a grade by law or regulation.

E2.1.21.3. Rank. The order of precedence among members of the Armed Forces.

E2.1.21.4. Rating. The name (such as "Boatswain's Mate") prescribed for members of an Armed Force in an occupational field.

E2.1.22. Optimum Hospital and Medical Treatment Benefits. The point of hospitalization or treatment when a member's progress appears to be stabilized; or when, following administration of essential initial medical treatment, the patient's medical prognosis for being capable of performing further duty can be determined.

E2.1.23. Performing Military Duty of 30 days or less. A term used to inclusively cover the categories of duty pertaining to 10 U.S.C. 1204 - 1206 (reference (b)) (active duty, IDT, and travel directly to and from active duty or IDT).

E2.1.24. Permanent Limited Duty. The continuation on active duty or in the Ready Reserve in a limited duty capacity of a Service member determined unfit as a result of physical disability evaluation or medical disqualification.

E2.1.25. Physical Disability. Any impairment due to disease or injury, regardless of degree, that reduces or prevents an individual's actual or presumed ability to engage in gainful employment or normal activity. The term "physical disability" includes mental disease, but not such inherent defects as behavioral disorders, adjustment disorders, personality disorders, and primary mental deficiencies. A medical impairment or physical defect standing alone does not constitute a physical disability. To constitute a physical disability, the medical impairment or physical defect must be of such a nature and degree of severity as to interfere with the member's ability to adequately perform his or her duties.

E2.1.26. Preponderance of Evidence. That evidence that tends to prove one side of a disputed fact by outweighing the evidence on the other side (that is, more than 50 percent). Preponderance does not necessarily mean a greater number of witnesses or a greater mass of evidence; rather, preponderance means a superiority of evidence on one side or the other of a disputed fact. It is a term that refers to the

quality, rather than the quantity of the evidence.

E2.1.27. Presumption. An inference of the truth of a proposition or fact, reached through a process of reasoning and based on the existence of other facts. Matters that are presumed need no proof to support them, but may be rebutted by evidence to the contrary.

E2.1.28. Presumption Period. The designated time frame that requires application of the Presumption of Fitness Rule to a member's physical disability evaluation.

E2.1.29. Proximate Result. A permanent disability the result of, arising from, or connected with active duty, annual training, active duty for training, or inactive duty training (IDT), (etc.) to include travel to and from such duty or remaining overnight between successive periods of inactive duty training. Proximate result is a statutory criteria for entitlement to disability compensation under Chapter 61 of reference (b) applicable to Reserve component members who incur or aggravate a disability while performing an ordered period of military duty of 30 days or less.

E2.1.30. Ready Reserve. Units and individual reservists liable for active duty as outlined in Sections 12301 (Full Mobilization) and 12302 (Partial Mobilization) of 10 U.S.C. (reference (b)). This includes members of units, members of the Active Guard Reserve Program, Individual Mobilization Augmentees, Individual Ready Reserve, and the Inactive National Guard.

E2.1.31. Retention Standards. Physical standards or guidelines which establish those medical conditions or physical defects that may render a Service member unfit for further Military Service and are therefore cause for referral of the member into the DES.30.

E2.1.32. Service Aggravation. The permanent worsening of a pre-Service medical condition over and above the natural progression of the condition caused by trauma or the nature of Military Service.

E3. ENCLOSURE 3PROCEDURES

## TABLE OF CONTENTS

<u>PART 1. OPERATIONAL STANDARDS FOR THE DES</u>	<u>Page</u>
E3.P1.1. <u>Overview of the DES</u>	16
E3.P1.2. <u>Medical Evaluation</u>	16
E3.P1.2.1. Purpose	16
E3.P1.2.2. Type of Evaluation	16
E3.P1.2.3. Content	17
E3.P1.2.4. Competency	17
E3.P1.2.5. TDRL Periodic Examinations	17
E3.P1.2.6. Physician's Guide	18
E3.P1.2.7. Nonmedical Documentation	18
E3.P1.2.8. Ready Reserve Nonduty-Related Impairments	18
E3.P1.3. <u>Physical Disability Evaluation</u>	18
E3.P1.3.1. Purpose	18
E3.P1.3.2. Informal PEB	19
E3.P1.3.3. Formal PEB	19
E3.P1.3.3.1. Eligibility	19
E3.P1.3.3.2. Directed Formal	19
E3.P1.3.3.3. Issues	19
E3.P1.3.3.4. Submission of Informal PEB Rebuttal	19
E3.P1.3.3.5. Hearing Rights	20
E3.P1.3.4. Record of Proceedings	21
E3.P1.3.4.1. Duty-Related Impairments	21
E3.P1.3.4.2. Nonduty-Related Conditions	22
E3.P1.3.4.3. Rationales	22
E3.P1.3.5. Quality Assurance	22
E3.P1.4. <u>Counseling</u>	22
E3.P1.4.1. Purpose	22
E3.P1.4.2. Topics	22
E3.P1.4.3. Ready Reserve Members	23
E3.P1.4.4. Incompetent Members	23
E3.P1.4.5. Pre-separation Counseling	23
E3.P1.5. <u>Personnel</u>	23
E3.P1.5.1. Purpose	23
E3.P1.5.2. Functions	23
E3.P1.6. <u>Time Standards for Case Processing</u>	24
E3.P1.6.1. Referral Time Frame	24
E3.P1.6.2. Medical	24
E3.P1.6.2.1. Duty Related	24
E3.P1.6.2.2. Nonduty-Related	24
E3.P1.6.3. PEB	24
E3.P1.6.4. Imminent Death Processing	24

## TABLE OF CONTENTS, continued

E3.P1.7.	<u>Training and Education</u>	25
<b>PART 2.</b>	<b><u>ELEGIBILITY FOR REFERRAL</u></b>	26
E3.P2.1.	<u>Criteria for Referral</u>	26
E3.P2.2.	<u>Duty-Related Impairments</u>	26
E3.P2.3.	<u>Nonduty-Related Impairments</u>	27
E3.P2.4.	<u>Ineligibility for Referral</u>	27
E3.P2.5.	<u>Members with a Nonwaivered Pre-Existing Condition</u>	28
E3.P2.6.	<u>Members with Medical Waivers</u>	28
E3.P2.7.	<u>Waiver of MEB/PEB Evaluation</u>	29
<b>PART 3.</b>	<b><u>STANDARDS FOR DETERMINING UNFITNESS DUE TO PHYSICAL DISABILITY OR MEDICAL DISQUALIFICATION</u></b>	30
E3.P3.1.	<u>Uniformity of Standards</u>	30
E3.P3.2.	<u>General Criteria for Making Unfitness Determinations</u>	31
E3.P3.3.	<u>Relevant Evidence</u>	30
E3.P3.3.1.	Referral Following Illness or Injury	30
E3.P3.3.2.	Referral for Chronic Impairment	31
E3.P3.3.3.	Adequate Performance Until Referral	31
E3.P3.3.4.	Cause and Effect Relationship	31
E3.P3.4.	<u>Reasonable Performance of Duties</u>	31
E3.P3.4.1.	Considerations	31
E3.P3.4.1.1.	Common Military Tasks	31
E3.P3.4.1.2.	Physical Fitness Test	31
E3.P3.4.1.3.	Deployability	32
E3.P3.4.1.4.	Special Qualifications	32
E3.P3.4.2.	General, Flag, and Medical Officers	32
E3.P3.4.3.	Members on Permanent Limited Duty	32
E3.P3.4.4.	Overall Effect	32
E3.P3.5.	<u>Presumption of Fitness</u>	32
E3.P3.5.1.	Application	32
E3.P3.5.2.	Presumptive Period	33
E3.P3.5.3.	Overcoming the Presumption	33
E3.P3.6.	<u>Evidentiary Standards for Determining Unfitness Because of Physical Disability</u>	34
E3.P3.6.1.	Factual Finding	34
E3.P3.6.2.	Preponderance of Evidence	34
<b>PART 4.</b>	<b><u>STANDARDS FOR DETERMINING COMPENSABLE DISABILITIES</u></b>	35
E3.P4.1.	<u>Overview of Compensable Criteria</u>	35
E3.P4.2.	<u>Proximate Result</u>	36
E3.P4.3.	<u>Applicable Statute for Reserve Component Members</u>	36

## TABLE OF CONTENTS, continued

E3.P4.4. <u>Line of Duty Requirements</u>	36
E3.P4.4.1. Uses	37
E3.P4.4.2. Relationship of Line of Duty Findings to DES Determinations	37
E3.P4.4.3. Referral Requirement	38
E3.P4.4.4. Presumptive Determinations	38
E3.P4.4.5. Required Determinations	38
E3.P4.5. <u>Evidentiary Standards for Determining Compensability of Unfitting Conditions</u>	39
E3.P4.5.1. Misconduct and Negligence	39
E3.P4.5.2. Presumptions for Members on Ordered Active Duty of More Than 30 Days	39
E3.P4.5.2.1. At Time of Entry	39
E3.P4.5.2.2. After Entry	39
E3.P4.5.2.2.1. Presumption	39
E3.P4.5.2.2.2. Hereditary and/or Genetic Diseases	39
E3.P4.5.2.3. Presumption of Aggravation	39
E3.P4.5.3. Prior-Service Impairments	40
E3.P4.5.4. Conditions Presumed To Be Pre-existing	40
E3.P4.5.5. Medical Waivers	40
E3.P4.5.6. Treatment of Pre-Existing Conditions	41
E3.P4.6. <u>Rating Disabilities</u>	41
<u>PART 5. ADMINISTRATIVE DETERMINATIONS</u>	42
E3.P5.1. <u>Administrative Determinations for Purposes of Employment under Federal Civil Service</u>	42
E3.P5.1.1. Incurred in Combat with an Enemy of the United States (5 U.S.C. 8332) (Reference (c))	42
E3.P5.1.2. Armed Conflict (5 U.S.C. 3502, 5532, 6303) (Reference (c))	42
E3.P5.1.3. Instrumentality of War during a Period of War (5 U.S.C. 3502, 5532, 6303) (Reference (c))	42
E3.P5.1.3.1. World War II	43
E3.P5.1.3.2. Korea	43
E3.P5.1.3.3. Vietnam	43
E3.P5.1.3.4. Persian Gulf War	43
E3.P5.2. <u>Determinations for Federal Tax Benefits</u>	43
E3.P5.2.1. Status	43
E3.P5.2.2. Combat Related	44



## TABLE OF CONTENTS, continued

<u>PART 6. TDRL Management</u>	45
E3.P6.1. <u>Placement on the TDRL</u>	45
E3.P6.2. <u>TDRL Reevaluation</u>	45
E3.P6.2.1. Administrative Finality	45
E3.P6.2.2. New Diagnoses	45
E3.P6.2.3. Member Medical Records	45
E3.P6.2.4. Compensability of New Diagnoses	46
E3.P6.2.5. Current Physical Examination	46
E3.P6.2.6. Refusal or Failure to Report	46
E3.P6.2.7. Priority	46
E3.P6.2.8. Reports from non MTFs	46
E3.P6.2.9. Incarcerated Members	47
<u>PART 7. FINAL DISPOSITION</u>	48
E3.P7.1. <u>Final Decision Authority</u>	48
E3.P7.1.1. Secretary of Defense (or Secretary of Transportation)	48
E3.P7.1.2. Secretary of the Military Department	48
E3.P7.2. <u>General Rules Regarding Disposition</u>	48
E3.P7.2.1. Retirement	48
E3.P7.2.2. Fit Off the TDRL	49
E3.P7.2.2.1. Appointment and/or Enlistment	49
E3.P7.2.2.2. Recall to Active Duty	49
E3.P7.2.2.2.1. Regular Component Members	49
E3.P7.2.2.2.2. Reserve Component	49
E3.P7.2.2.3. Separation	49
E3.P7.2.2.4. Termination of TDRL	49
E3.P7.3. <u>Continuance of Unfit Members on Active Duty or in the Ready Reserve</u>	50
E3.P7.4. <u>Transition Benefits</u>	50
E3.P7.5. <u>Dispositions for Unfit Members</u>	50
E3.P7.5.1. Permanent Disability Retirement	50
E3.P7.5.2. Placement on the TDRL	50
E3.P7.5.3. Separation with Disability Severance Pay	50
E3.P7.5.3.1. Criteria	50
E3.P7.5.3.2. Active Service	51
E3.P7.5.3.3. Transfer to Retired Reserve	51
E3.P7.5.3.4. Ready Reserve Early Qualification for Retired Pay	51
E3.P7.5.4. Separation under Chapter 61 of 10 U.S.C. (Reference (b)) without Entitlement to Benefits	51
E3.P7.5.5. Discharge under other than Chapter 61 of 10 U.S.C. (Reference (b))	51
E3.P7.5.6. Revert with Disability Benefits	52

### E3.P1. ENCLOSURE 3 PART 1

#### OPERATIONAL STANDARDS FOR THE DES

##### E3.P1.1. Overview of the DES.

Under the supervision of the Secretary concerned, each DES shall consist of four elements:

E3.P1.1.1. Medical evaluation by Medical Evaluation Boards (MEBs), Ready Reserve physical examinations, and TDRL periodic physical examinations.

E3.P1.1.2. Physical disability evaluation by Physical Evaluation Board (PEBs), to include appellate review.

E3.P1.1.3. Service member counseling.

E3.P1.1.4. Final disposition by appropriate personnel authorities.

##### E3.P1.2. Medical Evaluation

E3.P1.2.1. Purpose. The medical evaluation element of the DES shall document under departmental regulations the medical status and duty limitations of Service members referred into the DES.

E3.P1.2.2. Type of Evaluation. Medical evaluation is required for personnel undergoing a Medical Evaluation Board when:

E3.P1.2.2.1. The Service member is on active duty under orders specifying a period of more than 30 days.

E3.P1.2.2.2. The Service member is a Reserve component member referred for a duty related impairment.

E3.P1.2.2.3. The member is on the TDRL and due for a periodic physical examination.

Either a physical examination or a MEB is required when a Reserve component member is referred for impairments unrelated to the member's military status and performance of duty (see definition for nonduty-related impairments). Before submission to the PEB, physical examinations accomplished by other than a medical

treatment facility (MTF) shall be forwarded through command channels to the medical approving authority designated by the respective Service for review and approval.

E3.P1.2.3. Content. MEBs, TDRL physical examinations, and Reserve component physical examinations shall document the full clinical information of all medical conditions the Service member has and state whether each condition is cause for referral into the DES. (See enclosure 4 of this Instruction.) Clinical information shall include a medical history, appropriate physical examination, medical tests and their results, medical and surgical consultations as necessary or indicated, diagnoses, treatment, and prognosis. MEBs shall not state a conclusion of unfitness because of physical disability, assignment of disability percentage rating, or the appropriate disposition under Chapter 61 of 10 U.S.C. (reference (b)).

E3.P1.2.4. Competency. MEBs and TDRL periodic examinations shall include the results of a competency board when the member has a functional or organic disorder that makes questionable the member's ability to handle his or her personal affairs and to understand and cooperate in MEB and PEB proceedings.

E3.P1.2.5. TDRL Periodic Examinations. In addition to the requirements specified above, TDRL periodic examinations shall address:

E3.P1.2.5.1. An estimate of change since the previous examination.

E3.P1.2.5.2. Etiology of all medical impairments diagnosed since the member was placed on the TDRL, to include:

E3.P1.2.5.2.1. Whether the new diagnosis was caused either by the condition for which the member was placed on the TDRL or the treatment received for such a condition.

E3.P1.2.5.2.2. If not caused by the condition for which the member was placed on the TDRL, whether the member's medical records document incurrence or aggravation of the condition while the member was in a military duty status; and if so, whether the condition was cause for referral into the DES at the time the member was placed on the TDRL.

E3.P1.2.5.3. The stability of the condition. If the condition remains unstable, the report of examination shall address the progress of the disability and a suggested time frame (not to exceed 18 months) for the next examination.

E3.P1.2.5.4. A detailed occupational history and an indication of pertinent social and recreational activities, and activities of daily living.

E3.P1.2.6. Physician's Guide. Physicians who prepare MEBs and TDRL periodic physical examinations for referral for physical disability evaluation are encouraged to use the DVA's Physician's Guide for Disability Evaluation Examinations to describe the nature and degree of severity of the member's condition.

E3.P1.2.7. Nonmedical Documentation. For cases of members with duty-related impairments, the MTF shall forward to the PEB with the MEB documentation, the documents listed in paragraphs E3.P1.2.7.1. through E2.P1.2.7.4., below.

E3.P1.2.7.1. A copy of the line of duty determination under subsection E3.P4.4.3. of Part 4.

E3.P1.2.7.2. Except in situations of critical illness or injury in which return to duty is not expected, a statement from the member's immediate commanding officer describing the impact of the member's medical condition on the member's ability to perform his or her normal military duties and to deploy or mobilize, as applicable. When the member has been reassigned for medical purposes (for example, to a medical holding unit) the MTF will obtain this statement from the member's former unit commander.

E3.P1.2.7.3. Pertinent personnel records, as required by the member's Service, to establish the member's military history.

E3.P1.2.7.4. Official document identifying the next-of-kin, court appointed guardian, or trustee when a Service member is determined incompetent. (See subsection E3.P1.2.4. of Part 1.)

E3.P1.2.8. Ready Reserve Nonduty-Related Impairments. Cases of Ready Reserve members with nonduty-related impairments (see definition) will be referred to the PEB in accordance with Service regulations.

### E3.P1.3. Physical Disability Evaluation

E3.P1.3.1. Purpose. The physical disability evaluation element of the DES shall determine the fitness of Service members with medical impairments to perform

their military duties; and for members determined unfit for duty-related impairments, their entitlement to benefits under Chapter 61 of 10 U.S.C. (reference (b)). Physical disability evaluation shall be conducted by PEBs and include the elements in subsections E3.P1.3.2. through E3.P1.3.5., below.

E3.P1.3.2. Informal PEB. The informal PEB will conduct a documentary review without the presence of the Service member for providing initial findings and recommendations.

E3.P1.3.3. Formal PEB. Eligible Service members shall be provided a minimum of one opportunity for a formal PEB to fulfill the statutory requirement of Section 1214 of reference (b) for a full and fair hearing when requested by a Service member being separated or retired for physical disability under Chapter 61 of reference (b). The Service member's declination of a formal PEB will be documented by the Physical Evaluation Board Liaison Officer (PEBLO) counselor. Appearance before a formal PEB may be in person, through a designated representative, or via video teleconferencing media.

E3.P1.3.3.1. Eligibility

E3.P1.3.3.1.1. Service members determined unfit by the informal PEB shall be granted a formal PEB upon request.

E3.P1.3.3.1.2. Active duty and Ready Reserve members determined fit do not have an entitlement to a formal PEB since a finding of fit does not cause involuntary separation for physical disability.

E3.P1.3.3.1.3. TDRL members determined fit shall be entitled to a formal PEB since removal from the TDRL represents a change in military status.

E3.P1.3.3.2. Directed Formal. A formal PEB may be directed by the final reviewing authority or appropriate designated Military Department authority without regard to the member's election concerning the informal PEB's findings.

E3.P1.3.3.3. Issues. At the formal hearing, the member shall be entitled to address any issue that affects the member's benefits under Chapter 61 of 10 U.S.C. (reference (b)); 5 U.S.C. 3502, 5532, 6303, and 8332 (reference (c)); and 26 U.S.C. 104 (reference (f)). Final determination of these issues shall be in accordance with Military Department regulations.

E3.P1.3.3.4. Submission of Informal PEB Rebuttal. Service members

requesting a formal PEB should be encouraged to submit a rebuttal identifying the issues of disagreement with the informal PEB's findings and recommendations.

E3.P1.3.3.5. Hearing Rights. Service members shall have, at a minimum, the following rights before the formal PEB:

E3.P1.3.3.5.1. The right to personally appear at the formal hearing, which may include video teleconferencing, unless such appearance proves impracticable because the member cannot travel (e.g., the member is incarcerated or incapacitated).

E3.P1.3.3.5.1.1. If the member's conduct or statements create a potential security risk to board members and/or other personnel, local security police shall be alerted and appropriate security precautions shall be taken.

E3.P1.3.3.5.1.2. Unless the formal hearing is directed by the Military Department concerned, members of the Ready Reserve with nonduty-related impairments are responsible for their personal travel and other expenses.

E3.P1.3.3.5.2. The right to the assistance of a detailed military counsel provided at no expense to the member or a personal representative provided at no expense to the Service. This right extends to Reserve component members who request a formal hearing pending separation for medical disqualification.

E3.P1.3.3.5.3. The right to make a sworn statement or an unsworn statement.

E3.P1.3.3.5.4. The right to remain silent. When the member exercises this right, the member may not selectively respond, but must remain silent throughout the hearing.

E3.P1.3.3.5.5. The right to introduce witnesses, depositions, documents, sworn or unsworn statements (affidavits) or other evidence in their behalf and to question all witnesses who testify at the hearing. Witnesses who are not members or employees of the Department of Defense and members of the Department of Defense who are not deemed essential witnesses as determined by the PEB attend formal hearings at no expense to the Government.

E3.P1.3.3.5.6. The right of access to all records and information received by the PEB before, during, and after the formal hearing which may affect the findings of the PEB or appellate review authority.

E3.P1.3.3.5.7. The right to a written rationale explaining the findings and recommendations of the formal PEB.

E3.P1.3.3.5.8. The right, upon written request, to a record of the hearing. The respective Service shall determine the format of the record (audio, video, or written transcript).

E3.P1.3.3.5.9. The right to appeal the findings and recommendations of the formal PEB.

E3.P1.3.4. Record of Proceedings. A record of proceedings will be prepared to document the findings and recommendations of the PEB.

E3.P1.3.4.1. Duty-Related Impairments. The record of proceedings for active duty members and Ready Reserve members referred for duty-related impairments shall document at a minimum:

E3.P1.3.4.1.1. The determination of fit or unfit. If determined fit, a determination of whether the Service member is deployable may be included if Service regulations require such a determination and deployability is defined and uniformly applied to the office, grade, rank, or rating in both the Active and Reserve components of that Service.

E3.P1.3.4.1.2. The code and percentage rating assigned an unfitting physical disability in accordance with the VASRD.

E3.P1.3.4.1.3. The reason an unfitting condition is not compensable.

E3.P1.3.4.1.3.1. For all cases with a finding of pre-existing condition without aggravation, the specific accepted medical principle for overcoming the presumption of Service aggravation shall be cited and explained.

E3.P1.3.4.1.3.2. For all cases of Reserve component members performing duty of 30 days or less with a finding of not the proximate result of performing duty, the justification shall be documented.

E3.P1.3.4.1.4. For members being placed on the TDRL or permanently retired, a statement concerning the stability and permanent nature of the physical disability.

E3.P1.3.4.1.5. Administrative determinations under sections A. and B. of Part 5 of this Instruction.

E3.P1.3.4.2. Nonduty-Related Conditions. For members of the Ready Reserve referred for nonduty-related conditions, the record of proceedings shall document only:

E3.P1.3.4.2.1. The fitness determination.

E3.P1.3.4.2.2. For members determined fit, a determination of whether the member is deployable if Service regulations require such a determination and deployability is defined and applied to the office, grade, rank, or rating in both the Active and Reserve components of that Service.

E3.P1.3.4.3. Rationales. The record of all proceedings for PEB evaluation and changes made as a result of review by subsequent reviewing authority shall include a written rationale (explanation) in support of the findings and recommendations made.

E3.P1.3.5. Quality Assurance. Quality assurance review shall be conducted as necessary to ensure compliance with the laws, directives, and regulations governing physical disability evaluation.

#### E3.P1.4. Counseling

E3.P1.4.1. Purpose. The counseling element of DES shall afford Service members undergoing evaluation by the DES the opportunity to be advised of the significance and consequences of the determinations made and the associated rights, benefits, and entitlements.

E3.P1.4.2. Topics. Counselors shall counsel on such matters as:

E3.P1.4.2.1. The sequence and nature of the steps in processing.

E3.P1.4.2.2. Statutory and regulatory rights.

E3.P1.4.2.3. Effect of findings and recommendations.

E3.P1.4.2.4. Recourse to rebuttals.



E3.P1.4.2.5. Estimated retired or severance pay based upon the PEB's findings and recommendations.

E3.P1.4.2.6. Probable retired grade.

E3.P1.4.2.7. Potential veterans benefits.

E3.P1.4.2.8. Post-retirement insurance programs and the Survivor Benefit Plan in accordance with DoD Directive 1332.27 (reference (g)) if appropriate.

E3.P1.4.2.9. Applicable transition benefits under DoD Directive 1332.35 (reference (h)).

E3.P1.4.2.10. Prior to acting on a Service member's request for a formal PEB, review with the member the applicable standard detailed in the VASRD or DoD Instruction 1332.39 (reference (i)), which would have to be recognized in order to increase the percentage of disability.

E3.P1.4.3. Ready Reserve Members. Ready Reserve members pending separation for physical disability should be counseled by the MTF Physical Evaluation Board Liaison Officer concerning their rights under the DES as established by section E3.P1.3. of Part 1 and section E3.P2.1. of Part 2.

E3.P1.4.4. Incompetent Members. When a Service member has been determined incompetent, his or her primary next of kin, or court appointed guardian shall be counseled and afforded the opportunity to assert the rights granted to the Service member, unless prohibited by law.

E3.P1.4.5. Pre-Separation Counseling. Service members on a call to active duty of more than 30 days shall not be separated or retired because of physical disability prior to completion of pre-separation counseling under reference (h). Though counseling is normally accomplished 90 days before separation, the date of separation or retirement of members determined unfit need not be extended to provide a minimum of 90 days between counseling and separation or retirement.

#### E3.P1.5. Personnel

E3.P1.5.1. Purpose. The personnel element of DES shall accomplish disposition of the Service member's case. Specifically, appropriate personnel

authorities shall accomplish the functions listed in subsection E3.P1.5.2., below.

E3.P1.5.2. Functions. The personnel element shall:

E3.P1.5.2.1. Issue orders and instructions to implement the determination of the respective Service's final reviewing authority.

E3.P1.5.2.2. Serve as approving authority for requests by Service members determined unfit to continue on active duty or in the Ready Reserve in a permanent limited duty status.

E3.P1.5.2.3. Manage the TDRL under section E3.P6.2. of Part 6.

#### E3.P1.6. Time Standards for Case Processing

E3.P1.6.1. Referral Time Frame. It is not within the mission of the Military Departments to retain members on active duty or in the Ready Reserve to provide prolonged, definitive medical care when it is unlikely the member will return to full military duty. Service members shall be referred into the DES as soon as the probability that they will be unable to return to full duty is ascertained and optimal medical treatment benefits have been attained (see Enclosure 2, Page 9, Paragraph E2.1.20). All members shall be referred for evaluation within one year of the diagnosis of their medical condition if they are unable to return to military duty.

#### E3.P1.6.2. Medical

E3.P1.6.2.1. Duty-Related. When a physician initiates a MEB, the processing time should normally not exceed 30 days from the date the MEB report is dictated to the date it is received by the PEB.

E3.P1.6.2.2. Nonduty-Related. For cases of Reserve component members referred for solely a fitness determination on a nonduty-related condition, processing time for conduct of MEB or physical examination shall not exceed 90 calendar days.

E3.P1.6.3. PEB. Upon receipt of the MEB or physical examination report by the PEB, the processing time to the date of the determination of the final reviewing authority as prescribed by the Secretary of the Military Department should normally be no more than 40 days.

E3.P1.6.4. Imminent Death Processing. When competent medical authority

determines that a Service member's death is expected within 72 hours, the member may be referred expeditiously into the DES. To protect the interests of the Government and the Service member, disposition shall be placement on the TDRL provided all requirements under statute, law, and regulation are met. In no case shall a Service member be retired after his or her death or before completion of a required line of duty determination. Determination of death shall be made under the laws of the state where the member is assigned, or under military medical standards when the member is outside the United States.

E3.P1.7. Training and Education.

Those Service members designated by the Secretary concerned as primary participants in the DES shall be trained and educated in a timely and continuing manner concerning the policies and procedures of this Instruction. Primary participants in the DES include, but are not limited to, medical officers who prepare MEBs, patient administration officers, disability counselors, PEB and appellate review members, and judge advocates.

E3.P2. ENCLOSURE 3 PART 2

ELIGIBILITY FOR REFERRAL

E3.P2.1. Criteria for Referral.

Service members on active duty or in the Ready Reserve shall be eligible for referral into the DES when the member:

E3.P2.1.1. Has a medical condition that is cause for referral into the DES as established by enclosure 4 of this Instruction or by the respective Service's supplemental medical standards, and the member has received optimal medical treatment benefits; or

E3.P2.1.2. Will be unable to return to full military duty within one year of diagnosis of the medical condition; or

E3.P2.1.3. Was previously determined unfit, continued in a permanent limited duty status, and the period of continuation has expired; and

E3.P2.1.4. Is not disqualified under section E3.P2.4. of Part 2.

E3.P2.1.5. Is a member of the regular component of the Armed Forces entitled to basic pay; or any other member of the Armed Forces entitled to basic pay who has been called or ordered to active duty for more than 30 days; or any other member of the Armed Forces, after September 23, 1996, who is on active duty but is not entitled to basic pay under 37 U.S.C. 502(b) (reference (d)) due to authorized absence to participate in an educational program, or for an emergency purpose, as determined by the Secretary concerned.

E3.P2.2. Duty-Related Impairments

E3.P2.2.1. Service members described in section E3.P2.1., above, who have impairments which, in the case of a member on active duty for 30 days or less, are the proximate result of, or were incurred in line of duty after September 23, 1996, as a result of:

E3.P2.2.1.1. Performing active duty or inactive duty training;

E3.P2.2.1.2. Traveling directly to or from the place at which such duty is performed; or

E3.P2.2.1.3. After September 23, 1996, an injury, illness, or disease incurred or aggravated while remaining overnight, between successive periods for purposes of IDT, at or in the vicinity of the site of the IDT, if the site is outside reasonable commuting distance of the member's residence.

shall be referred into the DES except as provided in sections E3.P2.4. and E3.P2.7., below.

E3.P2.2.2. Members with duty related impairments as described in paragraphs E3.P2.2.1.1. through E3.P2.2.1.3., above, shall be referred into the DES for a determination of fitness, and if found unfit, a determination of entitlement to separation or retirement for disability with benefits under Chapter 61 of 10 U.S.C.(reference (b)). The fact that a Service member is unfit for disabilities incurred during the periods designated in paragraphs E3.P2.2.1.1. through E3.P2.2.1.4., above, does not constitute entitlement to disability benefits. (See Part 4 for compensation entitlement criteria.)

#### E3.P2.3. Nonduty-Related Impairments.

Members of the Ready Reserve with nonduty-related impairments, and who are otherwise eligible, will be referred into the DES upon the request of the member or when directed under Service regulations. Referral will be solely for a determination of fitness for duty.

#### E3.P2.4. Ineligibility for Referral.

Service members are ineligible for physical disability evaluation, when:

E3.P2.4.1. The member's defect is a developmental or constitutional disorder not constituting a physical disability. (See enclosure 5 for a comprehensive listing.)

E3.P2.4.2. Except as provided under Service regulations, the member is pending an approved, unsuspended, punitive discharge or dismissal.

E3.P2.4.3. Except as provided under Service regulations, the member is pending separation under provisions that authorize a characterization of service of Under Other Than Honorable (UOTH). This restriction is based on the provisions under which the member is being separated and not on the actual characterization the

member receives. For example, because separation for misconduct authorizes a UOTH, a member who is being separated for misconduct with a general characterization is ineligible for referral into the DES except as provided under the regulations of the respective Service.

E3.P2.4.4. Service regulations should normally provide for referral to the DES of those members designated in subsections E3.P2.4.2. and E3.P2.4.3., above, when the medical impairment or extenuating circumstances may be the cause of the conduct.

E3.P2.5. Members with a Nonwaivered Pre-Existing Condition.

Service members who are identified with nonwaivered medical conditions or physical defects that existed prior to service may be administratively separated without referral into the DES when the medical condition meets all the criteria listed in subsections E3.P2.5.1. through E3.P2.5.4., below:

E3.P2.5.1. The medical impairment is identified prior to or within 180 days of the member's initial entry on active duty or active duty for training or full-time National Guard duty.

E3.P2.5.2. The medical impairment does not meet accession standards under DoD Directive 6130.3 (reference (e)).

E3.P2.5.3. The impairment is not a condition that is cause for referral to the PEB under enclosure 4 or Service supplemental medical standards.

E3.P2.5.4. Service aggravation of the impairment has not occurred. If the Service member contests the "not Service aggravated" determination by the physician recommending separation, the member may request the MEB be forwarded to the PEB for review.

E3.P2.6. Members with Medical Waivers.

Provided no aggravation has occurred, Service members who enter the military with a medical waiver may be separated without physical disability evaluation when the responsible medical authority designated by Service regulations determines within 180 days of the member's entry into active service that the waived condition represents a risk to the member or prejudices the best interests of the Government.

Once 180 days have elapsed or the condition is one which causes referral into the DES, the member shall be referred for physical disability evaluation, if otherwise qualified.

**E3.P2.7. Waiver of MEB/PEB Evaluation.**

In certain circumstances, Service members may waive referral to the PEB with the approval of the Secretary of the Military Department. The member must be counseled on the DES process; his or her right to a PEB; and the potential benefits of remaining in an active duty or Active Reserve status for purposes of completing evaluation by the DES. The member must request a waiver in writing, and such request, or an affidavit, must attest that the member has received the counseling described above and declines referral to the PEB. Waiver requests are authorized when either:

E3.P2.7.1. The MEB reflects that the member's medical condition existed prior to service and was not aggravated by service.

E3.P2.7.2. Physical disability evaluation requires extension past the date of the member's Service agreement or an approved retirement date, and the member does not consent to retention.

E3.P2.7.2.1. Members of a Reserve component on active duty under a call to duty of more than 30 days may continue disability evaluation upon release from active duty provided they maintain a Ready Reserve status. However, they must sign a waiver declining retention on active duty.

E3.P2.7.2.2. Members approved for separation under any program which incurs a Reserve obligation and who have conditions which are cause for referral into the DES are prohibited from waiving physical disability evaluation.

E3.P2.7.3. A Service member reaches the end of active obligated Service and has no remaining Service obligations.

### E3.P3. ENCLOSURE 3 PART 3

#### STANDARDS FOR DETERMINING UNFITNESS DUE TO PHYSICAL DISABILITY OR MEDICAL DISQUALIFICATION

##### E3.P3.1. Uniformity of Standards.

The standards listed within this instruction for determining unfitness due to physical disability shall be strictly adhered to, unless exceptions are approved by the Under Secretary of Defense for Personnel and Readiness based upon the unique needs of the respective Military Department.

##### E3.P3.2. General Criteria for Making Unfitness Determinations

E3.P3.2.1. A Service member shall be considered unfit when the evidence establishes that the member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include duties during a remaining period of Reserve obligation.

E3.P3.2.2. In making a determination of a member's ability to so perform his/her duties, the following criteria may be included in the assessment:

E3.P3.2.2.1. The medical condition represents a decided medical risk to the health of the member or to the welfare of other members were the member to continue on active duty or in an Active Reserve status.

E3.P3.2.2.2. The medical condition imposes unreasonable requirements on the military to maintain or protect the member.

E3.P3.2.2.3. The Service member's established duties during any remaining period of reserve obligation.

##### E3.P3.3. Relevant Evidence.

All relevant evidence will be considered in assessing Service member fitness, including the circumstances of referral. To reach a finding of unfit, the PEB must be satisfied that the information it has before it supports a finding of unfitness.

E3.P3.3.1. Referral Following Illness or Injury. When referral for physical disability evaluation immediately follows acute, grave illness or injury, the medical



evaluation may stand alone, particularly if medical evidence establishes that continued service would be deleterious to the Service member's health or is not in the best interests of the respective Service.

E3.P3.3.2. Referral For Chronic Impairment. When a Service member is referred for physical disability evaluation under circumstances other than as described in subsection E3.P3.3.1., above, evaluation of the member's performance of duty by supervisors as indicated, for example, by letters, efficiency reports, credential reports, status of physician medical privileges, or personal testimony may provide better evidence than a clinical estimate by a physician of the Service member's ability to perform his or her duties. Particularly in cases of chronic illness, these documents may be expected to reflect accurately a member's capacity to perform.

E3.P3.3.3. Adequate Performance Until Referral. If the evidence establishes that the Service member adequately performed his or her duties until the time the Service member was referred for physical evaluation, the member may be considered fit for duty even though medical evidence indicates questionable physical ability to continue to perform duty.

E3.P3.3.4. Cause and Effect Relationship. Regardless of the presence of illness or injury, inadequate performance of duty, by itself, shall not be considered as evidence of unfitness due to physical disability unless it is established that there is a cause and effect relationship between the two factors.

#### E3.P3.4. Reasonable Performance of Duties

E3.P3.4.1. Considerations. Determining whether a member can reasonably perform his or her duties includes consideration of:

E3.P3.4.1.1. Common Military Tasks. The member, due to physical disability, is unable to reasonably perform the duties of his or her office, grade, rank, or rating (hereafter called duties) to include during a remaining period of Reserve obligation. For example, whether the member is routinely required to fire his or her weapon, perform field duty, or to wear load bearing equipment or protective gear.

E3.P3.4.1.2. Physical Fitness Test. Whether the member is medically prohibited from taking the respective Service's required physical fitness test. When an individual has been found fit by a PEB for a condition which prevents the member from taking the Service physical fitness test, the inability to take the physical fitness test shall not form the basis for an adverse personnel action against the member.

E3.P3.4.1.3. Deployability. When a Service member's office, grade, rank or rating requires deployability, whether a member's medical condition(s) prevents positioning the member individually or as part of a unit with or without prior notification to a location outside the Continental United States. Inability to perform the duties of his or her office, grade, rank, or rating in every geographic location and under every conceivable circumstance will not be the sole basis for a finding of unfitness. When deployability is used by a Service as a consideration to determine fitness, the standard must be applied uniformly to both the Active and Reserve components of that Service.

E3.P3.4.1.4. Special Qualifications. For members whose medical condition causes loss of qualification for specialized duties, whether the specialized duties comprise the member's current duty assignment; or the member has an alternate branch or specialty; or whether reclassification or reassignment is feasible.

E3.P3.4.2. General, Flag, and Medical Officers. An officer in pay grade 0-7 or higher or a medical officer in any grade shall not be determined unfit because of physical disability if the member can be expected to perform satisfactorily in an assignment appropriate to his or her grade, qualifications, and experience. Thus, the inability to perform specialized duties or the fact the member has a condition which is cause for referral to a PEB is not justification for a finding of unfitness.

E3.P3.4.3. Members on Permanent Limited Duty. A member previously determined unfit and continued in a permanent limited duty status or otherwise continued on active duty, will normally be found unfit at the expiration of his or her period of continuation. However, the member may be determined fit when the member's condition has healed or improved so that the member would be capable of performing his or her duties in other than a limited duty status.

E3.P3.4.4. Overall Effect. A member may be determined unfit as a result of the overall effect of two or more impairments even though each of them, standing alone, would not cause the member to be referred into the DES or be found unfit because of physical disability.

### E3.P3.5. Presumption of Fitness

E3.P3.5.1. Application. Except for Service members previously determined unfit and continued in a permanent limited duty status, Service members who are pending retirement at the time they are referred for physical disability evaluation

enter the DES under a rebuttable presumption that they are physically fit. The DES compensates disabilities when they cause or contribute to career termination. Continued performance of duty until a Service member is approved for length of service retirement creates a rebuttable presumption that a Service member's medical conditions have not caused career termination.

E3.P3.5.2. Presumptive Period. Service members shall be considered to be pending retirement when the dictation of the member's MEB occurs after any of the circumstances designated in paragraphs E3.P3.5.2.1. through E3.P3.5.2.4., below.

E3.P3.5.2.1. When a member's request for voluntary retirement has been approved. Revocation of voluntary retirement orders for purposes of referral into the DES does not negate application of the presumption.

E3.P3.5.2.2. An officer has been approved for Selective Early Retirement.

E3.P3.5.2.3. An officer is within 12 months of mandatory retirement due to age or length of service.

E3.P3.5.2.4. An enlisted member is within 12 months of his or her retention control point (RCP) or expiration of active obligated service (EAOS) but will be eligible for retirement at his or her RCP/EAOS.

E3.P3.5.3. Overcoming the Presumption. The presumption of fitness rule shall be overcome when:

E3.P3.5.3.1. Within the presumptive period an acute, grave illness or injury occurs that would prevent the member from performing further duty if he or she were not retiring; or

E3.P3.5.3.2. Within the presumptive period a serious deterioration of a previously diagnosed condition, to include a chronic condition, occurs and the deterioration would preclude further duty if the member were not retiring; or

E3.P3.5.3.3. The condition for which the member is referred is a chronic condition and a preponderance of evidence establishes that the member was not performing duties befitting either his or her experience in the office, grade, rank, or rating before entering the presumptive period. When there has been no serious deterioration within the presumptive period, the ability to perform duty in the future shall not be a consideration.

E3.P3.6. Evidentiary Standards for Determining Unfitness Because of Physical Disability

E3.P3.6.1. Factual Finding. A factual finding that a Service member is unfit because of physical disability depends on the evidence that is available to support that finding. The quality of evidence is usually more important than quantity. All relevant evidence must be weighted in relation to all known facts and circumstances which prompted referral for disability evaluation. Findings will be made on the basis of objective evidence in the record as distinguished from personal opinion, speculation, or conjecture. When the evidence is not clear concerning a Service member's fitness, an attempt will be made to resolve doubt on the basis of further objective investigation, observation, and evidence. Benefit of unresolved doubt shall be resolved in favor of the fitness of the Service member under the rebuttable presumption that the member desires to be found fit for duty.

E3.P3.6.2. Preponderance of Evidence. Findings about fitness or unfitness for Military Service shall be made on the basis of preponderance of the evidence. Thus, if a preponderance (that is, more than 50 percent) of the evidence indicates unfitness, a finding to that effect will be made. If, on the other hand, a preponderance of the evidence indicates fitness, the Service member may not be separated or retired by reason of physical disability.

E3.P4. ENCLOSURE 3 PART 4

STANDARDS FOR DETERMINING COMPENSABLE DISABILITIES

E3.P4.1. Overview of Compensable Criteria.

Members who are determined unfit under the standards of Part 3 shall be retired or separated with disability benefits when:

E3.P4.1.1. The physical disability is not the result of the member's intentional misconduct or willful neglect and was not incurred during a period of unauthorized absence or excess leave; and, either:

E3.P4.1.1.1. The physical disability was incurred or aggravated while:

E3.P4.1.1.1.1. A member of a regular component of the armed forces entitled to basic pay.

E3.P4.1.1.1.2. Any other member of the armed forces entitled to basic pay who has been called or ordered to active duty (other than for training under 10 U.S.C 10148(a), reference (b)) for a period of more than 30 days.

E3.P4.1.1.1.3. Any other member of the armed forces, after September 23, 1996, who is on active duty but is not entitled to basic pay by reason of 37 U.S.C. 502(b) (reference (d)), due to authorized absence to participate in an educational program, or for an emergency purpose, as determined by the Secretary concerned; or

E3.P4.1.1.2. The physical disability was the proximate result of, or was incurred in line of duty after September 23, 1996, as a result of:

E3.P4.1.1.2.1. Performing active duty, annual training, active duty for training, or other full time duty under a call or order that specifies a period of 30 days or less.

E3.P4.1.1.2.2. Performing IDT, to include IDT for points only, other than work or study in connection with a correspondence course of a Uniformed Service.

E3.P4.1.1.2.3. Traveling directly to or from the place of active duty or IDT.

E3.P4.1.1.2.4. After September 23, 1996, an injury, illness, or disease

incurred or aggravated while remaining overnight, between successive periods of inactive duty training, at or in the vicinity of the site of the inactive duty training if the site is outside reasonable commuting distance from the member's residence.

#### E3.P4.2. Proximate Result

E3.P4.2.1. The DES shall make a determination of proximate result on Reserve component cases when:

E3.P4.2.1.1. The member is not currently on a call to active duty of more than 30 days; and

E3.P4.2.1.2. The unfitting disability was not incurred or aggravated while the member was on an a call to active duty of more than 30 days; and

E3.P4.2.1.3. The unfitting disability may have been incurred or aggravated while the member was performing duty of 30 days or less as specified in subsection E3.P4.1.1.1.3., above.

E3.P4.2.2. A disability shall be deemed the proximate result of performing duty when it is a direct consequence of an occurrence during any of the periods of duty specified in subsection E3.P4.1.1.1.3., above. All facts, circumstances, and laws on a particular case must be considered.

#### E3.P4.3. Applicable Statute for Reserve Component Members.

A Reserve component member shall be adjudicated under the statutory provisions applicable to his or her duty status at the time of onset or aggravation of the condition for which the member is determined unfit. This means a Ready Reserve member not on extended active duty at the time of his or her referral into the DES, but who is determined unfit for a disability incurred or aggravated while the member was on a call to active duty of more than 30 days, comes under the provisions of 10 U.S.C. 1201 - 10 U.S.C. 1203 and not 10 U.S.C. 1204 - 1206 (reference (b)). In such a situation, "in line of duty while entitled to basic pay" rather than "proximate result" is the applicable statutory requirement for entitlement to disability compensation.

#### E3.P4.4. Line of Duty Requirements.

In the DES, line of duty determinations assist the PEB and appellate review authority

in meeting the statutory requirements under Chapter 61 of reference (b) for separation or retirement for physical disability.

E3.P4.4.1. Uses. Line of duty determinations, when required, shall be used during physical disability evaluation to establish the following:

E3.P4.4.1.1. Whether the disability was incurred or aggravated while the member was in a duty status.

E3.P4.4.1.2. Whether the disability of a Reserve component member was incurred or aggravated while the member was on extended active duty or performing active duty of 30 days or less, while traveling directly to or from the place of active duty or IDT or while remaining overnight, between successive periods of IDT, at or in the vicinity of the site of the IDT if the site is outside reasonable commuting distance from the member's residence.

E3.P4.4.1.3. Relationship of the Line of Duty (LOD) determinations shall be made in accordance with the regulations of the respective Military Department. When an LOD determination is required, the PEB shall consider the findings made for those issues mutually applicable to the LOD and PEB determinations. These issues include whether a condition is pre-existing and whether it is aggravated by Service and any issues of misconduct or negligence. If the PEB determines the LOD determination is contradictory to the evidence, physical disability evaluation may be suspended for a review of the LOD in accordance with Service regulations.

E3.P4.4.1.4. Whether the disability is the result of the member's intentional misconduct or willful neglect, or was incurred during a period of unauthorized absence.

E3.P4.4.2. Relationship of Line of Duty Findings to DES Determinations

E3.P4.4.2.1. Line of duty determinations shall be made under the regulations of the respective Military Department. When a line of duty determination is required, the DES shall consider the finding made for those issues mutually applicable to line of duty and DES determinations.

E3.P4.4.2.2. When the DES has reasonable cause to believe a line of duty finding appears to be contrary to the evidence, physical disability evaluation shall be suspended for review of the line of duty determination according to Service regulations. The PEB or appellate review authority shall forward the case to the final line of duty reviewing authority designated by the Secretary of the Military

Department with a memorandum documenting the reasons for questioning the line of duty finding.

E3.P4.4.2.3. The facts recorded in a line of duty investigation shall be considered in making the proximate result determination when applicable to Reserve component cases. However, the DES, not line of duty investigations, determines proximate result.

E3.P4.4.3. Referral Requirement. When a line of duty determination is required, it shall be accomplished before the forwarding of a Service member's case to the PEB. However, when the case is being processed under imminent death procedures and a line of duty is required, the PEB may commence adjudication of the case pending receipt of the completed line of duty. (Refer to Part 1, subsection E3.P1.6.4.)

E3.P4.4.4. Presumptive Determinations. The line of duty determination is presumed to be in the line of duty without an investigation in the case of:

E3.P4.4.4.1. Disease, except as described in paragraphs E3.P4.5.5.1. and E3.P4.5.5.5., below.

E3.P4.4.4.2. Injuries clearly incurred as a result of enemy action or attack by terrorists.

E3.P4.4.4.3. Injuries while a passenger in common commercial or military carriers.

E3.P4.4.5. Required Determinations. At a minimum, line of duty determinations shall be required in the circumstances listed in paragraphs E3.P4.4.5.1. through E3.P4.4.5.5., below.

E3.P4.4.5.1. Injury, disease, or medical condition that occurs under strange or doubtful circumstances or may be due to the member's intentional misconduct or willful negligence; e.g., motor vehicle accidents.

E3.P4.4.5.2. Injury involving the abuse of alcohol or other drugs.

E3.P4.4.5.3. Self-inflicted injury.

E3.P4.4.5.4. Injury or disease possibly incurred during a period of unauthorized absence.



E3.P4.4.5.5. Injury or disease is apparently incurred during a course of conduct for which charges have been preferred under the Uniform Code of Military Justice (UCMJ)(reference (j)).

E3.P4.4.5.6. Injury, illness, or disease of a Ready Reserve member while performing duty of 30 days or less or while traveling directly to or from the place at which such duty is performed or while remaining overnight, between successive periods of IDT, at or in the vicinity of the site of the IDT if the site is outside reasonable commuting distance from the member's residence.

#### E3.P4.5. Evidentiary Standards for Determining Compensability of Unfitting Conditions

E3.P4.5.1. Misconduct and Negligence. Line of duty determinations concerning intentional misconduct and willful negligence shall continue to be judged by the evidentiary standards established by the Secretary of the Military Department.

E3.P4.5.2. Presumptions for Members on Ordered Active Duty of More Than 30 days. The presumptions listed in paragraphs E3.P4.5.2.1. through E3.P4.5.2.3., below, apply to members on orders to active duty of more than 30 days for purposes of determining whether an impairment was incurred or aggravated while a member was entitled to basic pay.

E3.P4.5.2.1. At Time of Entry. A Service member is presumed to have been in sound physical and mental condition upon entering active duty except for medical defects and physical disabilities noted and recorded at the time of entrance.

#### E3.P4.5.2.2. After Entry

E3.P4.5.2.2.1. Presumption. Any injury or disease discovered after a Service member enters active duty -- with the exception of congenital and hereditary conditions -- is presumed to have been incurred in the line of duty;

E3.P4.5.2.2.2. Hereditary and/or Genetic Diseases. Any hereditary and/or genetic disease shall be presumed to have been incurred prior to entry into active duty. However, any aggravation of that disease, incurred in the line of duty, beyond that determined to be due to natural progression shall be deemed service aggravated.

E3.P4.5.2.3. Presumption of Aggravation. The presumption that a disease is incurred or aggravated in the line of duty may only be overcome by competent medical evidence establishing by a preponderance of evidence that the disease was clearly neither incurred nor aggravated while serving on active duty or authorized training. Such medical evidence must be based upon well-established medical principles, as distinguished from personal medical opinion alone. Preponderance of evidence is defined as that degree of proof necessary to fully satisfy the board members that there is greater than a 50% probability that the disease was neither incurred during nor aggravated by military service.

E3.P4.5.3. Prior Service Impairments. Any medical condition incurred or aggravated during one period of service or authorized training in any of the Armed Forces that recurs or is aggravated during later service or authorized training, regardless of the time between, should normally be considered incurred in the line of duty provided the condition or subsequent aggravation was not the result of the member's misconduct or willful negligence. In those cases in which the service member reverts to a civilian status after the condition is incurred, the service member must prove by a preponderance of evidence that the medical condition was incurred or aggravated in the line of duty and was not due to intentional misconduct or willful negligence.

E3.P4.5.4. Conditions Presumed to be Pre-Existing. Occurrence of disease as described in paragraphs E3.P4.5.4.1. and E3.P4.5.4.2., below, shall be presumed to have existed prior to entry into Military Service.

E3.P4.5.4.1. Signs or symptoms of chronic disease identified so soon after the day of entry on Military Service (usually within 180 days) that the disease could not have originated in that short a period will be accepted as proof that the disease manifested prior to entrance into active Military Service.

E3.P4.5.4.2. Signs or symptoms of communicable disease within less than the medically recognized minimum incubation period after entry on active Service will be accepted as evidence that the disease existed prior to Military Service.

E3.P4.5.5. Medical waivers. Members who entered the Service with a medical waiver for a pre-existing condition and who are subsequently determined unfit for the condition shall not be entitled to disability separation or retired pay unless Military Service permanently aggravated the condition or hastened the condition's rate of natural progression. Members granted medical waivers shall be advised of this

*DODI 1332.38, November 14, 96*

provision at the time the waiver is granted.

E3.P4.5.6. Treatment of Pre-Existing Conditions. Generally recognized risks associated with treating preexisting conditions shall not be considered service aggravation.

E3.P4.6. Rating disabilities.

When a disability is established as compensable, the disability shall be rated according to the VASRD, as implemented by DoD Instruction 1332.39 (reference (i)) and federal law.

E3.P5. ENCLOSURE 3 PART 5

ADMINISTRATIVE DETERMINATIONS

E3.P5.1. Administrative Determinations for Purposes of Employment under Federal Civil Service.

Physical disability evaluation shall include a recommendation or final decision and supporting documentation on whether the injury or disease that makes the member unfit or that contributes to unfitness was incurred in combat with an enemy of the United States; or was the result of armed conflict; or was caused by an instrumentality of war during a period of war. (These determinations pertain to whether a military retiree later employed under Federal Civil Service is entitled to the following benefits: credit of military service towards a Federal Civil Service retirement under 5 U.S.C. 8332; retention preference under 5 U.S.C. 3502; exemption from the dual compensation provisions of 5 U.S.C. 5532; and credit of military service for Civil Service annual leave accrual under 5 U.S.C. 6303) (reference (c)).

E3.P5.1.1. Incurred in Combat with an Enemy of the United States (5 U.S.C. 8332)(Reference (c)). The physical disability is a disease or injury incurred in line of duty in combat with an enemy of the United States as defined by the U.S. State Department.

E3.P5.1.2. Armed conflict (5 U.S.C. 3502, 5532, 6303)(Reference (c)). The physical disability is a disease or injury incurred in the line of duty as a direct result of armed conflict. The fact that a member may have incurred a disability during a period of war or in an area of armed conflict, or while participating in combat operations is not sufficient to support this finding. There must be a definite causal relationship between the armed conflict and the resulting unfitting disability.

E3.P5.1.2.1. Armed conflict includes a war, expedition, occupation of an area or territory, battle, skirmish, raid, invasion, rebellion, insurrection, guerrilla action, riot, or any other action in which Service members are engaged with a hostile or belligerent nation, faction, force, or terrorists.

E3.P5.1.2.2. Armed conflict may also include such situations as incidents involving a member while interned as a prisoner of war or while detained against his or her will in custody of a hostile or belligerent force or while escaping or attempting to escape from such confinement, prisoner of war, or detained status.

E3.P5.1.3. Instrumentality of War During a Period of War (5 U.S.C 3502, 5532, 6303, 8332 (Reference (c))). The injury or disease is caused by an instrumentality of war (see definitions in enclosure 2) and incurred in the line of duty during a period of war as defined in 38 U.S.C. 101 and 302 U.S.C. (reference (k)) and makes the member unfit. Applicable periods are:

E3.P5.1.3.1. World War II. The period beginning 7 December 1941 and ending 31 December 1946 and any period of continuous service performed after 31 December 1946 and before 26 July 1947 if such period began before 1 January 1947.

E3.P5.1.3.2. Korea. The period beginning 27 June 1950 and ending 31 January 1955.

E3.P5.1.3.3. Vietnam. The period beginning 5 August 1964 and ending 7 May 1975. The "Dominican Intervention" occurred during this period.

E3.P5.1.3.4. Persian Gulf. The period beginning 2 August 1990 through date to be prescribed by Presidential proclamation or law.

E3.P5.2. Determinations for Federal Tax Benefits.

Physical disability evaluation shall include a determination and supporting documentation on whether the member's physical disability compensation is excluded from Federal gross income under 26 U.S.C. 104 (reference (f)). For compensation to be excluded, the member must meet either of the criteria listed in subsection E3.P5.2.1. or E3.P5.2.2., below.

E3.P5.2.1. Status. On 24 September 1975 the individual was a member of the Armed Forces, to include the Reserve components, the National Oceanic and Atmospheric Administration (NOAA and formerly the Coast and Geodetic Survey), the U.S. Public Health Service, or was under binding written agreement to become such a member.

E3.P5.2.1.1. A Service member who was a member of an Armed Force of another country on that date is entitled to the exclusion.

E3.P5.2.1.2. A Service member who was a contracted cadet of the Reserve Officers Training Corps on that date is entitled to the exclusion.

E3.P5.2.1.3. Entitlement to the exclusion is based solely on the member's status on that date. A member who separates from the Service after that date and incurs a disability during a subsequent enlistment is entitled to the exclusion.

E3.P5.2.2. Combat-related. This standard covers those injuries and diseases attributable to the special dangers associated with armed conflict or the preparation or training for armed conflict. A physical disability shall be considered combat-related if it makes the member unfit or contributes to unfitness and was incurred under any of the circumstances listed in paragraphs E3.P5.2.2.1. through E3.P5.2.2.4., below.

E3.P5.2.2.1. As a direct result of armed conflict. The criteria are the same as in paragraph E3.P5.1.2., above.

E3.P5.2.2.2. While engaged in hazardous service. Such service includes, but is not limited to, aerial flight duty, parachute duty, demolition duty, experimental stress duty, and diving duty.

E3.P5.2.2.3. Under conditions simulating war. In general, this covers disabilities resulting from military training, such as war games, practice alerts, tactical exercises, airborne operations, leadership reaction courses; grenade and live fire weapons practice; bayonet training; hand-to-hand combat training; repelling, and negotiation of combat confidence and obstacle courses. It does not include physical training activities, such as calisthenics and jogging or formation running and supervised sports.

E3.P5.2.2.4. Caused by an instrumentality of war. Incurrence during a period of war is not required. A favorable determination is made if the disability was incurred during any period of service as a result of such diverse causes as wounds caused by a military weapon, accidents involving a military combat vehicle, injury, or sickness caused by fumes, gases, or explosion of military ordnance, vehicles, or material. However, there must be a direct causal relationship between the instrumentality of war and the disability. For example, an injury resulting from a Service member falling on the deck of a ship while participating in a sports activity would not normally be considered an injury caused by an instrumentality of war (the ship) since the sports activity and not the ship caused the fall. The exception occurs if the operation of the ship caused the fall.

## E3.P6. ENCLOSURE 3 PART 6

### TDRL MANAGEMENT

#### E3.P6.1. Placement on the TDRL.

Service members shall be placed on the TDRL when they would be qualified for permanent disability retirement but for the fact that the member's disability is not determined to be of a permanent nature and stable.

E3.P6.1.1. A disability shall be considered unstable when the preponderance of medical evidence establishes that accepted medical principles indicates the severity of the condition will change within the next five years so as to result in an increase or decrease of the disability rating percentage or a finding of fit.

E3.P6.1.2. Except for cases processed under imminent death procedures, members with unstable conditions rated at a minimum of 80 percent and which are not expected to improve to less than an 80% rating, shall be permanently retired.

#### E3.P6.2. TDRL Reevaluation

E3.P6.2.1. Administrative Finality. During TDRL reevaluation, previous determinations concerning application of any presumption established by this Instruction, line of duty, misconduct, proximate result, and whether a medical impairment was service-incurred or preexisting and aggravated shall be considered administratively final for those conditions for which the member was placed on the TDRL unless there is evidence of fraud; a change of diagnosis that warrants the application of accepted medical principles for a preexisting condition; or correction of error in favor of the member.

E3.P6.2.2. New Diagnoses. A fitness and compensable determination shall be made on all diagnoses presenting during the period of TDRL evaluation. When a member is determined fit for the condition for which he or she was placed on the TDRL, but unfit for a noncompensable condition incurred while on the TDRL, the member shall be separated from the TDRL without entitlement to disability benefits.

E3.P6.2.3. Member Medical Records. The Service member shall provide to the examining physician, for submission to the PEB, copies of all his or her medical records (civilian, Department of Veterans Affairs, and all military medical records) documenting treatment since the last TDRL reevaluation.



E3.P6.2.4. Compensability of New Diagnoses. Conditions newly diagnosed during TDRL periodic physical examinations shall be compensable when:

E3.P6.2.4.1. The condition is unfitting; and

E3.P6.2.4.2. The condition was caused by the condition for which the member was placed on the TDRL, or directly related to its treatment; or

E3.P6.2.4.3. The evidence of record establishes that the condition was either incurred while the member was entitled to basic pay or as the proximate result of performing duty, whichever is applicable, and was an unfitting disability at the time the member was placed on the TDRL. Otherwise, such conditions shall be deemed unfitting due to the natural progression of the condition and noncompensable under Chapter 61 of 10 U.S.C. (reference (b)), although the member may be eligible for benefits for these conditions under the DVA.

E3.P6.2.5. Current Physical Examination. Service members on the TDRL shall not be entitled to permanent retirement or separation with disability severance pay without a current TDRL or DVA periodic physical examination acceptable to the Service Secretary.

E3.P6.2.6. Refusal or Failure to Report. As provided under Chapter 61 of reference (b), when a Service member on the TDRL refuses or fails to report for a required periodic physical examination or to provide his or her medical records in accordance with Enclosure 3 Part 6, Paragraph E3.P6.2.3., his or her disability retired pay may be terminated. If the member later reports for the physical examination, retired pay will be resumed retroactively, to the date the examination was actually performed. If the Service member subsequently shows just cause for his or her failure to report, disability retired pay may be paid retroactively for a period not to exceed one year prior to the actual performance of the physical examination. If the member does not undergo a periodic physical examination after disability retired pay has been terminated, he or she will be administratively removed from the TDRL on the fifth anniversary of placement on the list and separated without entitlement to any of the benefits under reference Chapter 61 of 10 U.S.C. (reference (b)).

E3.P6.2.7. Priority. TDRL examinations, including hospitalization in connection with the conduct of the examination, shall be furnished on the same priority as given to active duty members.

E3.P6.2.8. Reports from Non MTFs. MTFs designated to conduct TDRL

periodic physical examinations may use reports of medical examinations from medical facilities of another Service, the DVA, other Government Agencies, and authorized civilian medical facilities and physicians to complete the examination. The designated MTF remains responsible for the adequacy of the examination and the completeness of the report. The report must include the information specified in subsection E3.P1.2.4. of Part I.

E3.P6.2.9. Incarcerated Members. A report of medical examination shall be requested from the appropriate authorities in the case of a Service member imprisoned by civil authorities. In the event no report, or an inadequate report, is received, documented efforts will be made to obtain an acceptable report. If an examination is not received, disposition of the case shall be in accordance with subsection E3.P6.6., above. The member shall be advised of the disposition and that remedy rests with the respective Service's Board for Correction of Military Records.

## E3.P7. ENCLOSURE 3 PART 7

### FINAL DISPOSITION

#### E3.P7.1. Final Decision Authority

E3.P7.1.1. Secretary of Defense (or Secretary of Transportation). Under 10 U.S.C. 1216 (reference (b)), the Secretary of Defense, or in the case of the Coast Guard, the Secretary of Transportation shall approve the unfit findings on an officer in pay grade 0-7 or higher or a medical officer in any grade who, at the time of referral for physical disability evaluation, was scheduled for nondisability retirement under any provision of reference (b) for age or length of service.

E3.P7.1.2. Secretary of the Military Department. Except as provided in subsection E3.P7.1.1., above, the Secretary of the Military Department shall have delegable authority to make all determinations consistent with this Instruction regarding unfitness, disability percentage, entitlement to disability severance and retired pay.

#### E3.P7.2. General Rules Regarding Disposition

E3.P7.2.1. Retirement. Except for members approved for permanent limited duty (see section E3.P7.3., below), any military member on active duty or in the Ready Reserves who is found to be unfit will be retired, if eligible for retirement, or, if not so eligible, separated. Disciplinary separation or other administrative separations from the Armed Forces are not prevented by this general rule.

E3.P7.2.1.1. Members with a disposition of separation for physical disability who have 15 but less than 20 years of service computed under Section 1208 of reference (b) and whose unfitting conditions are not due to the member's intentional misconduct or willful neglect or incurred during a period of unauthorized absence shall be afforded the opportunity to elect separation for physical disability or to apply for, and if approved, nondisability retirement under the Temporary Early Retirement Authority (TERA) under 10 U.S.C. 3911 (reference (b)) during the period of temporary special qualification authority beginning on October 23, 1993, and ending on October 1, 1999. Further, the same opportunity shall be afforded to members recommended for placement on or separation from the TDRL.

E3.P7.2.1.2. Ready Reserve members with 15 but less than 20 years of qualifying service under Section 12732 of reference (b) who are to be separated for

physical disability other than due to the member's intentional misconduct, willful failure to comply with standards and qualifications for retention, willful neglect or incurred during a period of unauthorized absence shall be afforded the opportunity to elect either separation for physical disability or early qualification for retired pay at age 60 under Section 12731a of reference (b) during the period of temporary special retirement qualification authority beginning on October 23, 1992, and ending on October 1, 1999. Further, the same opportunity shall be afforded to Ready Reserve members recommended for placement on or separation from the TDRL.

E3.P7.2.2. Fit off the TDRL. Service members determined fit as a result of TDRL reevaluation shall be processed as described below.

E3.P7.2.2.1. Appointment and/or Enlistment. Upon the Service member's request and provided he or she is otherwise eligible, the member shall be appointed or enlisted in the applicable grade and component as outlined in Section 1211 of reference (b).

E3.P7.2.2.2. Recall to Active Duty. Subject to paragraph E3.P7.2.3.3., below:

E3.P7.2.2.2.1. Regular Component Members. Subject to their consent, Regular officers and enlisted members shall be recalled to duty, provided they are otherwise eligible and were not required to be separated under law or regulation at the time they were placed on the TDRL. They shall be deemed medically qualified for those conditions on which a finding of fit was determined. Any new condition arising between DES evaluation and recall must meet the respective Service's medical standards for retention.

E3.P7.2.2.2.2. Reserve Component. Subject to their consent, Reserve component officers, warrant officers and enlisted members shall be reappointed or reenlisted as a Reserve for service in his or her Reserve component under 10 U.S.C. 1211 (reference (b)).

E3.P7.2.2.3. Separation. In accordance with Section 1210(f) of reference (b), members required to be separated or retired for nondisability reasons at the time they were referred for physical disability evaluation and placed on the TDRL shall, if determined fit, be separated or retired, as applicable.

E3.P7.2.2.4. Termination of TDRL status. Termination of TDRL status and retired pay shall be as outlined in 10 U.S.C. 1211 (reference (b)).

E3.P7.3. Continuance of Unfit Members on Active Duty or in the Ready Reserves.

When, with the recommendation of the Service component, the Secretary of the Military Department concerned determines that an unfit Service member's service obligation, skill, or experience justifies the continuance of that Service member on active duty or in active status in a permanent limited duty status, the Service member may be retained as an exception to the general policy rule in subsection B.1, above.

E3.P7.4. Transition benefits.

Active component members and Reserve component members who are on active duty are entitled to the transition benefits established by DoD Directive 1332.35 (reference (h)) when these members are being separated or retired for physical disability unless waived by DoD or prohibited by federal law.

E3.P7.5. Dispositions for Unfit Members

E3.P7.5.1. Permanent Disability Retirement. Retirement is directed under Section 1201 or 1204 of reference (b) when the member is unfit for a permanent and stable compensable physical disability under the standards of this Instruction; and

E3.P7.5.1.1. The member has at least 20 years of service computed under Section 1208 of reference (b); or

E3.P7.5.1.2. The total disability rating is at least 30 percent under the VASRD.

E3.P7.5.2. Placement on the TDRL. Retirement is directed under Section 1202 or 1205 of reference (b) when the requirements for permanent disability retirement are met except the physical disability is not permanent and stable.

E3.P7.5.3. Separation with disability severance pay

E3.P7.5.3.1. Criteria. Separation is directed under Section 1203 or 1206 of reference (b) when the member is unfit for a compensable physical disability determined under the standards of this Instruction, and the requirements listed in subparagraphs E3.P7.5.3.1.1. and E3.P7.5.3.1.2., below, are met. Stability is not a factor for this disposition.

E3.P7.5.3.1.1. The member has less than 20 years of service computed under Section 1208 of reference (b); and

E3.P7.5.3.1.2. The disability is rated at less than 30 percent, to include 0 percent.

E3.P7.5.3.2. Active Service. Under 10 U.S.C. 1212 (reference (b)), a part of a year of active service that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded. Thus, members with less than six months of service at the effective date of their disability separation receive no disability severance pay.

E3.P7.5.3.3. Transfer to Retired Reserve. Under Section 1209 of reference (b), Ready Reserve members who have completed at least 20 qualifying years of Reserve service and who would otherwise be qualified for retirement may forfeit disability severance pay and request transfer to an Inactive Status List for the purpose of receiving nondisability retired pay at age 60. When disability severance pay is accepted, the member forfeits all rights to receive retired pay under Chapter 1223 of reference (b) at age 60. There are no provisions under reference (b) to repay disability severance pay for the purpose of receiving retired pay.

E3.P7.5.3.4. Ready Reserve Early Qualification for Retired Pay. Under 10 U.S.C. 12731 of reference (b), Reserve component members with at least 15, and less than 20, years of qualifying service and who would otherwise be qualified for retirement may waive disability disposition and request early qualification for retired pay until 1 October, 1999, unless the provisions of this statute are extended or rescinded.

E3.P7.5.4. Separation under Chapter 61 of 10 U.S.C. (Reference (b)) Without Entitlement to Benefits. Discharge is directed under Section 1207 of reference (b) when the member is unfit for a disability incurred as a result of intentional misconduct, willful neglect, or during a period of unauthorized absence.

E3.P7.5.5. Discharge Under Other Than Chapter 61 of 10 U.S.C.(Reference (b)). An unfit member is directed for discharge under other provisions of reference (b) when the member is not entitled to physical disability compensation due to the circumstances listed in paragraphs E3.P7.5.5.1.through E3.P7.5.5.4., below.

E3.P7.5.5.1. The disability existed prior to service and was not permanently aggravated by service; or

E3.P7.5.5.2. The disability was incurred while the member was in an excess leave status; or

E3.P7.5.5.3. The disability was incurred by a Reserve component member performing duty of 30 days or less, but the disability was determined not the proximate result of performing such duty; or

E3.P7.5.5.4. The medical impairment of a Ready Reserve member is nonduty-related; disqualifies the member for retention in the Reserve components; and either the member does not request referral into DES for a fitness determination or such referral results in a finding of unfit. Disposition of such members shall be under appropriate Service regulations.

If a member not entitled to physical disability compensation under Chapter 61 of reference (b) due to the circumstances listed above has six years or more, but less than 20 years of active service, immediately prior to that discharge, the member shall be entitled to separation pay as an involuntary discharge or release from active duty as prescribed by Section 1174 of reference (b), unless the Secretary concerned determines that the conditions under which the member is discharged do not warrant payment of such pay.

E3.P7.5.6. Revert With Disability Benefits. This disposition is used to return to retired status a retiree recalled to active duty who was:

E3.P7.5.6.1. Previously retired for physical disability; or,

E3.P7.5.6.2. Determined unfit during the period of recall. For members previously retired for age or years of service, the compensable percentage of disability must be 30 percent or more to receive disability benefits.

#### E4. ENCLOSURE 4

### GUIDELINES REGARDING MEDICAL CONDITIONS AND PHYSICAL DEFECTS THAT ARE CAUSE FOR REFERRAL INTO THE DISABILITY EVALUATION SYSTEM

#### E4.1. GENERAL

E4.1.1. This enclosure provides a listing, mainly by body system, of medical conditions and physical defects which are cause for referral into the Disability Evaluation System (DES).

E4.1.1.1. This listing is not all inclusive.

E4.1.1.2. A service member who has one or more of the listed conditions or physical defects is not automatically unfit and therefore may not qualify for separation or retirement for disability.

E4.1.2. Individual Secretaries of the Military Departments may, consistent with this Instruction, modify these guidelines to fit their particular needs. These modifications may include conditions or defects, individually or in combination that:

E4.1.2.1. Significantly interfere with the reasonable fulfillment of the purpose of the individual's employment in the Military Service;

E4.1.2.2. May seriously compromise the health or well-being of the individual if he or she were to remain in the Military Service. This may involve dependence on certain medications, appliances, severe dietary restrictions, or frequent special treatments, or a requirement for frequent clinical monitoring.

E4.1.2.3. May prejudice the best interests of the Government if the individual were to remain in the Military Service.

E4.1.3. Any condition that appears to significantly interfere with performance of duties appropriate to a service member's, office, grade, rank or rating will be considered for MEB evaluation. The MEB shall:

E4.1.3.1. Confirm the medical diagnosis(es).

E4.1.3.2. Document the Service member's current medical condition to



include treatment status and potential for medical recovery.

E4.1.3.3. Review each case based on relevant facts.

E4.1.3.4. Bolded and bracketed evaluation procedures and/or data of special importance to the assessment process shall be contained in the MEB.

E4.1.3.5. A suggested annotated format for the MEB report is at Attachment I of this Instruction.

E4.1.3.6. If optimal medical treatment has been received in accordance with service specific guidelines, refer to the PEB.

## E4.2. MUSCULOSKELETAL SYSTEM

### E4.2.1. Upper Extremity

E4.2.1.1. The ability to pinch, grasp, or grip is prevented by disease, residuals of disease, acute injury, or chronic residuals of acute injury to the hand or fingers.

E4.2.1.2. Amputation of a part or whole of the upper extremity.

E4.2.1.3. Recurrent dislocation (not subluxation) when not surgically correctable.

E4.2.1.4. Ranges of Joint Motion (ROM): Motion that is less than the measurements listed below. (Measurements should be validated by three (3) measurements that agree at the 5% level. The measuring instrument should be noted. Both active and passive ROM should be listed. When a normal paired extremity is present a comparison of the ROM of the normal to the impaired extremity should be included (See Plate I)).

E4.2.1.4.1. Shoulder: Flexion or abduction to at least 90 degrees.

E4.2.1.4.2. Elbow and/or Forearm: Flexion to 100 degrees or extension to 60 degrees. Pronation and/or Supination arc to at least 80 degrees.

E4.2.1.4.3. Wrist: A total of at least 15 degrees flexion plus extension.

E4.2.1.4.4. Hand: The motion at each of the three finger joints, when

added together, must reach 135 degrees of active flexion or 75 degrees of active extension, in two or more fingers of the same hand. The thumb must be able to be opposed to at least two fingertips.

E4.2.2. Lower Extremity

E4.2.2.1. Disease, residual of disease, acute injury, or residual of injury that interferes with ambulation or the wearing of military shoes and/or boots for a period in excess of 180 days.

E4.2.2.2. Any documented condition that precludes the ability to run or walk without a perceptible limp.

E4.2.2.3. Shortening of an extremity that exceeds two inches (5 cms).

E4.2.2.4. Feet: Any condition that prevents walking, running, or normal weight bearing.

E4.2.2.5. Knee: Internal derangement of the knee when there is residual instability following remedial measures such as surgery or physical therapy.

E4.2.2.6. Joint Ranges of Motion (ROM): Motion that is less than the measurements listed below. (Measurements should be validated by three (3) measurements that agree at the 5% level. The measuring instrument should be noted. Both active and passive ROM should be listed. When a normal paired extremity is present a comparison of the ROM of the normal to the impaired extremity should be included (See Plate II).)

E4.2.2.6.1. Hip: Flexion to 90 degrees, or extension to 0 degrees.

E4.2.2.6.2. Knee: Flexion to 90 degrees, or extension to 15 degrees.

E4.2.2.6.3. Ankle: Dorsiflexion to 10 degrees, or planter flexion to 10 degrees.

E4.2.3. Inflammatory Condition. Any inflammatory condition involving the bones, joints, or muscles of the extremities, that after accepted therapy, prevents the military member from performing the preponderance of duties assigned.

E4.2.4. Prosthetic Replacement. Total or partial prosthetic replacement of a major joint, i.e., hip, knee, shoulder.

E4.2.5. Muscles. Atrophy of, loss of substance of, direct injury to (or residuals thereof) one or more muscles or muscle groups that prevents satisfactory use of the upper or lower extremity. (Does not include muscular changes secondary to neurological disorders. Refer to section on the Nervous System.)

E4.2.6. Tendon and/or Ligament Transplantation: If restoration of function is not sufficient to adequately perform the preponderance of duties required.

#### E4.2.7. Spine

E4.2.7.1. Congenital Disorders. (e.g., Spina Bifida, Coxa Vara, Spondylolysis/Spondylolisthesis, Kyphosis, Scoliosis) When more than mild symptoms cause a deterioration in performance of required duties.

#### E4.2.7.2. Acquired Disorders

E4.2.7.2.1. Fractures requiring spinal cord decompression with residual neurological deficit or loss of mobility due to fusion.

E4.2.7.2.2. Spondylolysis and/or Spondylolisthesis requiring fusion with loss of mobility.

E4.2.7.2.3. Herniation of nucleus pulposus when more than mildly symptomatic, with demonstrated neurological involvement; or subsequent surgical treatment does not provide symptomatic relief sufficient for performance of duties.

E4.2.8. Skull. Significant loss of substance without prosthetic replacement, or with prosthetic replacement in the presence of significant residuals.

E4.2.9. Fibromyalgia. This condition must meet the definition as put forth by the American College of Rheumatology in 1990.

### E4.3. Organs of Special Senses

#### E4.3.1. Eyes

E4.3.1.1. Eye Disease. Active eye disease or any progressive organic disease or degeneration, regardless of the stage of activity, that is resistant to treatment and affects the distant visual acuity or visual fields such that distant visual acuity is significantly affected or the field of vision of the better eye is less than 40

degrees. (See "Visual Acuity" below.)

E4.3.1.2. Visual Acuity. Visual acuity that cannot be corrected with ORDINARY SPECTACLE LENSES, to at least 20/40 in one eye and 20/100 in the other eye, or 20/20 in one eye and 20/400 in the other eye, or an eye has been enucleated.

E4.3.1.3. Aniseikonia. With subjective eye discomfort, neurologic symptoms, sensations of motion sickness, functional difficulties and difficulties in distinguishing forms, and not corrected by standard optical lenses.

E4.3.1.4. Binocular Diplopia. When not surgically or optically correctable, that is severe, and constant.

E4.3.1.5. Bilateral Hemianopsia. Any type that is permanent, and based on an organic defect.

E4.3.1.6. Night Blindness. Of such a degree that precludes unassisted night travel.

E4.3.1.7. Vision Fields

E4.3.1.7.1. Visual fields with bilateral concentric constriction to less than 40 degrees.

E4.3.1.7.2. Visual field in better eye is less than 40 degrees.

E4.3.2. Ears and/or Hearing

E4.3.2.1. Ears

E4.3.2.1.1. Otitis Externa, chronic, severe, requiring frequent and prolonged treatment.

E4.3.2.1.2. Mastoiditis requiring frequent and prolonged treatment; or, subsequent to mastoidectomy there is constant drainage from the mastoid cavity.

E4.3.2.1.3. Meniere's syndrome or labyrinthine disorders of sufficient severity to interfere with satisfactory performance of duties.

E4.3.2.1.4. Otitis Media, chronic, resistant to conventional therapy interfering with satisfactory performance of duties.

#### E4.3.2.2. Hearing

E4.3.2.2.1. Unaided hearing loss that adversely effects safe and effective performance of duty.

E4.3.2.2.2. In the assessment of hearing, when the unaided average loss in the BETTER ear is 35 Db (ANSI) or more in the normal speech range (pure tone audiometric values at the 1000, 2000, 3000, 4000 hertz) the individual will be evaluated at an audiology and speech center. Referral to an MEB will be based on the test that most accurately reflects the degree of hearing loss.

E4.3.2.2.3. Trained and experienced personnel will not be categorically disqualified if they are capable of effective performance of duty with a hearing aid. Speech discrimination test results should be included.

#### E4.4. SYSTEMIC DISEASES

E4.4.1. Definition. Any acute or chronic condition that affects the body as a whole (systemic) and interferes with the successful performance of duty, or requires medication for control, or needs frequent monitoring by a physician, or that requires geographic assignment limitations or requires a temporary limitation of duty exceeding 180 days, or a permanent limitation of duty that effects the whole body (systemic).

##### E4.4.1.1. Infectious

E4.4.1.1.1. Systemic Mycoses, e.g. Blastomycosis.

E4.4.1.1.2. Tuberculosis. Pulmonary or generalized.

E4.4.1.1.3. Leprosy.

E4.4.1.1.4. AIDS.

E4.4.1.1.5. Sexually Transmitted Diseases

E4.4.1.1.6. HIV Seropositivity

##### E4.4.1.2. Arthritis

E4.4.1.2.1. Rheumatoid Arthritis.

E4.4.1.2.2. Spondyloarthropathy.

E4.4.1.2.2.1. Ankylosing spondylitis.

E4.4.1.2.2.2. Reiter's Syndrome.

E4.4.1.2.2.3. Psoriatic Arthritis.

E4.4.1.2.2.4. Arthritis associated with inflammatory bowel disease.

E4.4.1.2.2.5. Whipple's disease.

E4.4.1.3. Other Systemic Diseases

E4.4.1.3.1. Amyloidosis.

E4.4.1.3.2. Sarcoidosis. Progressive, not responsive to therapy.

E4.4.1.3.3. Panniculitis. Relapsing, febrile, nodular.

E4.4.1.3.4. Myasthenia Gravis.

E4.4.1.3.5. Porphyria cutanea tarda.

E4.4.1.3.6. Systemic Lupus Erythematosus.

E4.4.1.3.7. Sjogren's Syndrome.

E4.4.1.3.8. Chronic Fatigue Syndrome.

E4.4.1.3.9. Myopathy. Inflammatory, metabolic, hereditary.

E4.4.1.3.10. Progressive systemic sclerosis.

E4.4.1.3.11. Systemic vasculitis.

E4.4.1.3.12. Hypersensitivity angiitis. Resistant to treatment and more than mildly symptomatic.

E4.4.1.3.13. Behcet's syndrome.

E4.4.1.3.14. Adult-onset Still's disease.

E4.4.1.3.15. Mixed connective tissue disease (overlapping syndromes).

## E4.5. RESPIRATORY SYSTEM

### E4.5.1. Upper Airway

E4.5.1.1. Sinusitis. Sinusitis or rhinitis (atrophic), with Suppuration. Unresponsive to conventional therapy.

### E4.5.1.2. Larynx

E4.5.1.2.1. Obstructive edema of the glottis requiring tracheostomy.

E4.5.1.2.2. Vocal cord paralysis seriously interfering with speech or airway.

E4.5.1.2.3. Stenosis of such a degree as to cause respiratory embarrassment on moderate exertion.

E4.5.1.3. Trachea. Stenosis or narrowing of such a degree as to cause respiratory embarrassment on moderate exertion.

E4.5.2. Lower Airway. (Rating is usually based upon Pulmonary Function Tests (PFTs) measuring residual function. Tests should be validated (two of studies agreeing at the 5% level). In addition, studies before and after medication should be done).

### E4.5.2.1. Infection

#### E4.5.2.1.1. Pulmonary Tuberculosis.

E4.5.2.1.1.1. If treatable but more than 15 months will be required before service member can be returned to active duty.

E4.5.2.1.1.2. Cases unresponsive to therapy.

E4.5.2.1.2. Histoplasmosis, blastomycosis, toxoplasmosis, or other mycosis not responding to accepted therapy.

E4.5.2.2. Asthma. (A clinical syndrome characterized by cough, wheeze, dyspnea and physiological evidence of reversible air flow obstruction or airway hyperreactivity that generally persists over six (6) months. Reversible air flow obstruction is defined as more than 15% increase in FEV1 following administration of an inhaled Bronchodilator. Airway hyperreactivity is defined as the exaggerated decrease in air flow induced by a standard methacholine challenge test. Chronic asthma requires the regular use of medication to allow the individual to perform the preponderance of military duties.)

E4.5.2.3. Bronchiectasis or bronchiolectasis. Cylindrical or saccular with residuals requiring repeated medical care.

E4.5.2.4. Bronchitis. Chronic, severe, recurrent unresponsive to repeated medical care.

E4.5.2.5. Atelectasis. Unresponsive to conventional therapy requiring repeated medical care.

E4.5.2.6. Pulmonary Sarcoidosis. Progressive, unresponsive to conventional therapy.

E4.5.2.7. Pneumoconiosis. Severe, with dyspnea on moderate exertion.

E4.5.2.8. Cystic disease of the lung

E4.5.2.9. Pulmonary Emphysema

E4.5.2.10. Pulmonary Fibrosis

E4.5.2.11. Residuals. Residuals of pneumothorax, hemothorax, empyema, or residuals of operative procedures on the lungs or chest wall.

E4.5.2.12. Bronchial Stenosis

E4.5.2.13. Diaphragmatic Dysfunction. Diaphragmatic dysfunction resulting in dyspnea on minimal exertion, not responsive to therapy.

E4.5.2.14. Lung Transplant.

## E4.6. CARDIOVASCULAR SYSTEM



E4.6.1. Heart. (In assessing the function of the heart, various functional therapeutic classifications (FTC) may be used as standards (New York Heart Association, Canadian Cardiovascular Society, etc.) Each of the Cardiac conditions should be given an FTC.)

E4.6.1.1. Arteriosclerotic Heart Disease.

E4.6.1.1.1. Coronary Artery Disease.

E4.6.1.1.1.1. Angina Pectoris.

E4.6.1.1.1.2. Myocardial Ischemia

E4.6.1.1.1.3. Myocardial Infarction.

E4.6.1.1.1.4. Congestive Heart Failure.

E4.6.1.2. Inflammatory.

E4.6.1.2.1. Endocarditis.

E4.6.1.2.2. Pericarditis, chronic or repetitive.

E4.6.1.2.3. Rheumatic Heart Disease.

E4.6.1.2.4. Syphilitic Heart Disease.

E4.6.1.3. Cardiac Arrhythmias and/or Pacemakers. (See also pare E4.5.2.2., above)

E4.6.1.3.1. Supraventricular Arrhythmias. When life threatening or symptomatic enough to interfere with duty performance.

E4.6.1.3.2. Heart Block (second or third degree AV block) and chronic symptomatic bradyarrhythmias with poor response to conventional therapy.

E4.6.1.3.3. Ventricular Arrhythmias. When potentially life threatening or symptomatic enough to interfere with the performance of duty.

E4.6.1.3.4. Residuals of Sudden Cardiac Death Syndrome Following Successful Resuscitation.

E4.6.1.3.5. Near or recurrent syncope of cardiac origin.

E4.6.1.3.6. Permanent indwelling pacemakers or defibrillators or other permanent antitachycardia devices.

E4.6.1.4. Hypertrophic Cardiomyopathy.

E4.6.1.5. Dilated Cardiomyopathy.

E4.6.1.6. Myocardial Disease.

E4.6.1.7. Valvular Heart Disease.

E4.6.1.8. Hypertensive Cardiac Disease.

E4.6.1.9. Post Operative or other invasive procedures involving the heart, pericardium, or vascular system.

E4.6.1.9.1. Permanent Prosthetic Valve Implantation.

E4.6.1.9.2. Coronary Artery Revascularization.

E4.6.1.9.3. Coronary or Valvular Angioplasty or Plaque removal.

E4.6.1.9.4. Cardiac Arrhythmia Ablation procedures, unless free of unfitting symptoms and signs.

E4.6.1.9.5. Reconstructive Cardiovascular surgery.

E4.6.1.9.6. Cardiac Transplant.

E4.6.1.10. Any cardiovascular disorder requiring chronic drug therapy in order to prevent the occurrence of potentially fatal or severely symptomatic events that would interfere with duty performance.

#### E4.6.2. Vascular System

E4.6.2.1. Arteriosclerosis Obliterans. Evidence of arterial disease such as intermittent, ischemic rest pain, or gangrenous/ulcerative skin changes of a permanent nature. Involvement of one or more organs or systems, or anatomic region with symptoms of arterial insufficiency.

E4.6.2.2. Major Cardiovascular Anomalies.

E4.6.2.2.1. Coarctation of the Aorta.

E4.6.2.2.2. Aneurysm of any major vessel.

E4.6.2.3. Periarteritis Nodosa.

E4.6.2.4. Chronic Venous Insufficiency.

E4.6.2.5. Raynaud's Syndrome.

E4.6.2.6. Thromboangiitis Obliterans. With claudication (see E4.6.2.1., above).

E4.6.2.7. Recurrent Thrombophlebitis.

E4.6.2.8. Varicose Veins. Severe and symptomatic despite conventional therapy.

E4.6.2.9. Any vascular reconstruction.

E4.6.3. Miscellaneous Conditions.

E4.6.3.1. Cold Injury.

E4.6.3.1.1. Frostbite, if significant or with residuals.

E4.6.3.1.2. Trench foot.

E4.6.3.1.3. Hypothermia.

E4.6.3.2. Erythromyalgia.

E4.6.3.3. Hypertensive Cardiovascular and/or Vascular disease.

E4.6.3.3.1. Diastolic pressure consistently greater than 100mm Hg following adequate therapy; and/or,

E4.6.3.3.2. Associated changes in the brain, heart, kidney, or optic fundi.

E4.6.3.4. Neurocirculatory Syncope

E4.6.4. Anticoagulant Therapy. When chronically required.

#### E4.7. GASTROINTESTINAL SYSTEM

E4.7.1. General. Any organic condition of the Gastrointestinal System that prevents adequate maintenance of the service member's nutritional status, or requires significant dietary restrictions.

E4.7.2. Inflammatory and/or Infectious Conditions.

E4.7.2.1. Esophagitis.

E4.7.2.1.1. Infectious (e.g., Candidiasis).

E4.7.2.1.2. Reflux. When not responsive to therapy.

E4.7.2.1.3. Hiatal hernia. When not responsive to therapy.

E4.7.2.2. Gastritis. When not responsive to therapy.

E4.7.2.3. Hepatitis.

E4.7.2.3.1. Persistent symptoms or persistent evidence of impaired liver function.

E4.7.2.3.2. Inability to serve as a blood donor.

E4.7.2.3.3. Persistence of biochemical markers indicating chronicity.

E4.7.2.4. Pancreatitis, chronic, with residuals (such as malabsorption/glucose abnormality due to enzyme deficiency), or recurrent.

E4.7.2.5. Regional Enteritis.

E4.7.2.6. Ulcerative Colitis.

E4.7.2.7. Proctitis, significantly symptomatic.

E4.7.2.8. Intra-abdominal abscess. When unresponsive to therapy.

E4.7.2.9. Hepatic abscess. When unresponsive to therapy.

E4.7.3. Obstructive Conditions

E4.7.3.1. Congenital.

E4.7.3.1.1. Diverticula.

E4.7.3.1.2. Webs.

E4.7.3.1.3. Strictures.

E4.7.3.2. Acquired.

E4.7.3.2.1. Diverticula.

E4.7.3.2.2. Webs.

E4.7.3.2.3. Strictures.

E4.7.3.2.4. Peritoneal Adhesive Bands.

E4.7.4. Dysfunctional Conditions

E4.7.4.1. Achalasia of the Esophagus.

E4.7.4.2. Biliary Dyskinesia.

E4.7.4.3. Cirrhosis. Moderate with evidence of portal hypertension, abdominal veins and/or impaired liver function and/or significant impairment of health.

E4.7.4.4. Ulcers (Duodenal, Gastric, Intestinal) when there are complications or residuals.

E4.7.4.5. Postgastrectomy and/or Dumping Syndromes.

E4.7.4.6. Permanent Gastrostomy, Enterostomy, Ileostomy, Colostomy, Pancreoenterostomy.

E4.7.4.7. Total Gastrectomy, Pancreatectomy

E4.7.4.8. Fecal Incontinence.

E4.7.5. Abdominal Wall Defects. Hernia, recurrent, when repair is contraindicated and the defect interferes with duty performance. This includes removal, e.g., post mastectomy reconstructive surgery.

#### E4.8. GENITOURINARY SYSTEM

E4.8.1. Urinary System. (There are three general dysfunctions of the urinary system: Renal Dysfunction, Voiding Dysfunction, Urinary Tract Infection. Some conditions involve a combination.)

E4.8.1.1. Renal Dysfunction. (Medical workup will include Creatinine Clearance to quantitate the degree of dysfunction.(See Table 5 of DoD Instruction 1332.39 (reference (i))

E4.8.1.1.1. Retained Renal Calculus. When resulting in recurrent symptoms, abnormal renal function, or recurrent infection and is not correctable by therapy.

E4.8.1.1.2. Cystic Kidney, when renal function is impaired or the focus of recurrent infection.

E4.8.1.1.3. Glomerulonephritis.

E4.8.1.1.4. Hydronephrosis. When not correctable.

E4.8.1.1.5. Hypoplasia of the kidney. When symptomatic (high blood pressure, frequent infections, e.g.).

E4.8.1.1.6. Chronic Nephritis.

E4.8.1.1.7. Nephrosis.

E4.8.1.1.8. Stricture of the Ureter, if clinically significant and not correctable.

E4.8.1.1.9. Residuals of Ureteral Operations, including:

E4.8.1.1.9.1. Ureterocolostomy and/or Ureterosigmoidostomy.

E4.8.1.1.9.2. Ureterocystostomy.

E4.8.1.1.9.3. Ureteroileostomy.

E4.8.1.1.9.4. Ureteroplasty.

E4.8.1.1.10. Pyeloplasty, with significant residuals.

E4.8.1.1.11. Nephrectomy. When there are complications with the remaining kidney.

E4.8.1.1.12. Nephrostomy, Pyelostomy, Ureterostomy. When there is persistent drainage.

E4.8.1.1.13. Renal Transplant.

E4.8.1.1.13.1. Recipient.

E4.8.1.1.13.2. Donor. If there is malfunction of the remaining kidney.

E4.8.1.1.14. Pyelonephritis, if chronic.

E4.8.1.2. Voiding Dysfunction

E4.8.1.2.1. Cystitis, when complications or residuals preclude satisfactory performance of duty.

E4.8.1.2.2. Urinary Incontinence, if unresponsive to treatment.

E4.8.1.2.3. Neurogenic Bladder.

E4.8.1.2.4. Epispadias. When there is an inability to perform required duty due to soilage or recurrent infection.

E4.8.1.2.5. Stricture of the Urethra, not amenable to treatment.

E4.8.1.2.6. Cystectomy

E4.8.1.2.7. Cystoplasty. When residual urines are greater than 50cc and/or there is refractory infection.

E4.8.1.2.8. Urethrostomy.

E4.8.1.3. Urinary Tract Infection

E4.8.1.3.1. Chronic Urethritis.

E4.8.1.3.2. Chronic Pyonephrosis/Pyelonephritis.

E4.8.1.3.3. Perirenal Abscess.

E4.8.1.3.4. Cystoplasty. When there is refractory infection.

E4.8.2. Female Genitourinary Conditions

E4.8.2.1. Dysmenorrhea. When severity is such that duty performance is affected.

E4.8.2.2. Endometriosis. When the severity is such that duty performance is affected.

E4.8.2.3. Menopausal Syndrome. When constitutional symptoms prevent duty performance.

E4.8.2.4. Chronic Pelvic Pain. When the severity is such that duty performance is affected.

E4.8.2.5. Hysterectomy. When residual complications preclude satisfactory performance of duty.

E4.8.2.6. Oophorectomy. When residual symptoms preclude satisfactory duty performance.

E4.9. HEMIC AND LYMPHATIC SYSTEMS

E4.9.1. Anemia. When symptomatic and not responsive to therapy.

E4.9.2. Hemolytic Crises. When complicated, chronic, and symptomatic.

E4.9.3. Leukopenia. When not responsive to therapy or when therapy is prolonged, or when complicated by recurrent infections.



E4.9.4. Polycythemia. When unresponsive to therapy.

E4.9.5. Purpura or Bleeding disorders.

E4.9.6. Chronic Anticoagulation Therapy.

E4.9.7. Hypercoagulable states with thromboembolic disease.

E4.9.8. Indwelling Filter to prevent embolic phenomena.

E4.9.9. Leukemia, or history thereof.

E4.9.10. Lymphomas, or history thereof.

E4.9.10.1. Hodgkin's.

E4.9.10.2. Non-Hodgkin's.

#### E4.10. SKIN AND CELLULAR TISSUES

E4.10.1. When conditions are severe, unresponsive to therapy, and interfere with the satisfactory performance of duty, wearing of the uniform, or using military equipment.

E4.10.2. Systemic Conditions including:

E4.10.2.1. Amyloidosis.

E4.10.2.2. Dermatomyositis.

E4.10.2.3. Dermatographism.

E4.10.2.4. Eczema.

E4.10.2.5. Chronic Lymphedema.

E4.10.2.6. Erythema Multiforme.

E4.10.2.7. Hyperhidrosis.

E4.10.2.8. Leukemia Cutis or Mycosis Fungoides.

E4.10.2.9. Neurofibromatosis.

E4.10.2.10. Psoriasis.

E4.10.2.11. Parapsoriasis.

E4.10.2.12. Scleroderma.

E4.10.2.13. Pemphigus.

E4.10.2.14. Exfoliative Dermatitis.

E4.10.2.15. Epidermolysis Bullosa.

E4.10.2.16. Urticaria.

E4.10.2.17. Lichen Planus.

E4.10.2.18. Cutaneous Lupus Erythematosus.

E4.10.3. Localized Conditions

E4.10.3.1. Radiodermatitis. Particularly if there is malignant degeneration not amenable to therapy.

E4.10.3.2. Intractable Plantar Keratosis.

E4.10.3.3. Scars and Keloids. Locally extensive and adherent so as to interfere with the function of a body part or prevent the wearing of the uniform.

E4.10.3.4. Xanthoma.

E4.10.3.5. Cysts and Tumors. When not amenable to accepted therapy.

E4.10.3.6. Atopic Dermatitis.

E4.10.3.7. Ulcers of the skin. When not responsive to therapy.

E4.10.4. Infectious Conditions

E4.10.4.1. Acne, Cystic, Severe. When unresponsive to therapy.

E4.10.4.2. Dermatitis Herpetiformis.

E4.10.4.3. Panniculitis.

E4.10.4.4. Cutaneous Tuberculosis.

E4.10.4.5. Elephantiasis.

E4.10.5. Other Chronic Skin Disorders.

#### E4.11. ENDOCRINE SYSTEM AND METABOLIC CONDITIONS

E4.11.1. General. Any abnormality that does not respond to therapy satisfactorily or where replacement therapy presents significant management problems.

E4.11.2. Diabetes

E4.11.2.1. All cases requiring oral hypoglycemics.

E4.11.2.2. All cases requiring insulin and/or restrictive diet for control.

E4.11.2.3. When individuals requiring insulin for maintenance are under poor control ("brittle diabetics").

E4.11.3. Acromegaly.

E4.11.4. Adrenal Hyper or Hypofunction.

E4.11.5. Diabetes Insipidus.

E4.11.6. Hyper or Hypothyroidism. When not controlled by accepted therapy.

E4.11.7. Hyper or Hyoparathyroidism. Especially when residuals or complications of surgical treatment (renal, skeletal or mental alterations) prevent performance of duty.

E4.11.8. Hyperinsulinism. When caused by malignancy or not readily controlled.

E4.11.9. Gout. In advanced cases with frequent (>3/yr) acute exacerbations or

severe bone, joint, or renal damage.

E4.11.10. Osteomalacia. With residuals that prevent the performance of duties.

E4.11.11. Hypogammaglobulinemia.

E4.11.12. Hypercoagulable States.

E4.11.13. Heat Injury

E4.11.13.1. Recurrent Heat Exhaustion. Manifested by collapse, including syncope, occurring during or immediately following exercise or in an environment of increased heat. Must occur at least three or more times in twenty-four months. No remedial factor can be identified.

E4.11.13.2. Heat Stroke. Hyperpyrexia (core temperature >106 degrees Fahrenheit), collapse, encephalopathy and organ damage and/or systemic inflammatory activation during the episode. In the absence of encephalopathy, exertional rhabdomyolysis and myoglobinuria are sufficient. A trial of duty may be recommended if complicating factors have been identified and there are no residuals.

#### E4.12. NERVOUS SYSTEM

E4.12.1. General. (To better measure conditions involving the nervous system, it is mandatory that certain yardsticks be employed. In DEMENTIA AND HEAD TRAUMA CASES , neuropsychiatric measurements should be performed as early as possible. In MIGRAINE CASES, the number of incapacitating episodes (those that require the individual to stop the activity in which engaged and seek medical treatment) per week, month or year should be noted and verified by a physician. In SEIZURE DISORDER CASES, the evaluation will be done by a neurologist. An EEG, MRI/CT will be included in the initial examination. When subsequent seizure episodes occur while on medical therapy, blood levels of prescribed medication(s) will be determined. All cases of neuropathies will have EMG and nerve conduction studies performed. Cases of multiple sclerosis will have an MRI. Estimation of the degree of social and industrial impairment incurred by the Service member due to migraine and seizure disorder should be included.)

E4.12.2. Neurogenic Muscular Atrophy

E4.12.2.1. Amyotrophic Lateral Sclerosis.

E4.12.2.2. All Primary Muscle Disorders.

E4.12.2.2.1. Facioscapulohumeral Dystrophy.

E4.12.2.2.2. Limb Girdle Dystrophy.

E4.12.2.2.3. Myotonia Dystrophy.

E4.12.2.3. Myasthenia Gravis. Other than solely ocular.

E4.12.2.4. Polio.

E4.12.3. Progressive Degenerative Disorders.

E4.12.3.1. Parkinson's Disease.

E4.12.3.2. Huntington's Chorea.

E4.12.3.3. Hepatolenticular Degeneration.

E4.12.3.4. Friedreich's Ataxia.

E4.12.4. Demyelinating Disorders.

E4.12.4.1. Multiple Sclerosis.

E4.12.4.2. Optic Neuritis, recurrent or with residuals.

E4.12.4.3. Transverse Myelitis.

E4.12.5. Residuals of Cerebrovascular Accidents.

E4.12.6. Residuals of Traumatic Brain Injury.

E4.12.7. Headaches. Headaches, Migraine, Tension, Vascular, Cluster Types.  
When manifested by documented frequent incapacitating attacks.

E4.12.8. Seizure disorders.

E4.12.9. Narcolepsy.

E4.12.10. Sleep Apnea Syndrome, when complicated by requirement for an

appliance such as CPAP for control.

E4.12.11. Peripheral Nerve Dysfunctions

E4.12.11.1. Neuralgia. When severe, persistent, and not responsive to therapy.

E4.12.11.2. Neuritis.

E4.12.11.3. Paralysis.

E4.12.12. Syringomyelia.

E4.12.13. General Neurological Disorders. Any other neurological condition, regardless of etiology, when, after adequate treatment, residual symptoms prevent the satisfactory performance of duty.

E4.13. PSYCHIATRIC DISORDERS

E4.13.1. General

E4.13.1.1. The terminology and diagnostic concepts used in this section are in consonance with the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV).

E4.13.1.2. The Multiaxial System of Diagnosis will be used for all psychiatric conditions that are the subject of an MEB:

- AXIS I. Clinical Psychiatric Disorders and Other Psychiatric conditions that may be a focus of clinical attention.
- AXIS II. Personality Disorders; Mental Retardation.
- AXIS III. General Medical Disorders.
- AXIS IV. Psychosocial and Environmental problems.
- AXIS V. Global Assessment of Function (GAF).

E4.13.1.3. All AXES I and II diagnoses will be assessed as to the Impairment for Military Duty as well as the Impairment for Social and Industrial functioning. This applies even though conditions normally placed on Axis II do not render a Service member medically unable to perform assigned duties. (See Enclosure 1 of DOD Instruction 1332.39 (reference (i)) on VASRD under "Psychoses".)

E4.13.1.4. Personality, Sexual, or Factitious Disorders, Disorders of impulse control not elsewhere classified, Adjustment Disorders, Substance-related Disorders, Mental Retardation (primary), or Learning Disabilities are conditions that may render an individual administratively unable to perform duties rather than medically unable, and may become the basis for administrative separation. These conditions do not constitute a physical disability despite the fact they may render a member unable to perform his or her duties.

E4.13.1.5. Any MEB listing a psychiatric diagnosis must contain a thorough psychiatric evaluation and include the signature of at least one psychiatrist (identified as such) on the MEB signatory face sheet.

E4.13.2. Disorders with Psychotic Features (Delusions or prominent Hallucinations). One or more psychotic episodes, existing symptoms or residuals thereof, or a recent history of a psychotic disorder.

E4.13.3. Affective Disorders (Mood Disorders). When the persistence or recurrence of symptoms requires extended or recurrent hospitalization, or the need for continuing psychiatric support.

E4.13.4. Anxiety, Somatoform Dissociative Disorders (Neurotic Disorders). When symptoms are persistent, recurrent, unresponsive to treatment, require continuing psychiatric support, and/or are severe enough to interfere with satisfactory duty performance.

E4.13.5. Organic Mental Disorders. Dementia or organic personality disorders that significantly impair duty performance.

E4.13.6. Eating Disorders. When unresponsive to a reasonable trial of therapy or interferes with the satisfactory performance of duty.

#### E4.14. NEOPLASMS

##### E4.14.1. Malignant Neoplasms

E4.14.1.1. Malignancies which are unresponsive to therapy or whose residuals prevent satisfactory performance of duty.

E4.14.1.2. When the service member with a malignant neoplasm refuses

accepted therapy.

E4.14.1.3. When, for a variety of reasons, a service member, who has been treated for a malignant neoplasm, will leave active duty before having had an adequate period of observation to determine whether a cure has been effected. These do not include basal cell carcinomas or small squamous cell carcinomas.

E4.14.2. Benign Neoplasms. Usually benign tumors do not prevent satisfactory performance of duty.

E4.14.2.1. When the Service member refuses accepted medical treatment.

E4.14.2.2. Ganglioneuroma.

E4.14.2.3. Meningeal Fibroblastoma.

E4.14.2.4. Pigmented Villonodular Synovitis.

#### E4.15. GULF WAR CASES

E4.15.1. Comprehensive Clinical Evaluation Program (CCEP) participants who are diagnosed with conditions that are cause for referral into the DES shall receive a MEB to determine if the case is to be referred to the PEB. Referral of a CCEP participant can occur at any point during CCEP process once a condition which is cause for referral into the DES is identified. However, CCEP participants who have undiagnosed medical complaints should not be referred until they have completed Phase II of the CCEP protocol.

E4.15.2. All disability cases that involve service members who have undergone any part of the CCEP shall include:

E4.15.2.1. A medical board report, or addendum to an original medical board report, with a summary of the CCEP findings.

E4.15.2.2. Copies of all CCEP documentation (e.g., test results, consultation reports, et al).

E4.15.3. Failure to include the foregoing information in any case referred to the PEB for adjudication shall result in its return to the convening authority.



Attachments - 1.

1. Minimum Requirements For Medical Evaluation Board (MEB) Addenda and Narrative Summary With Annotations

E4.A1. ENCLOSURE 4 ATTACHMENT 1

MINIMUM REQUIREMENTS FOR MEDICAL EVALUATION BOARD (MEB)  
ADDENDA AND NARRATIVE SUMMARY WITH ANNOTATIONS

E4.A1.1.1. PURPOSE. This attachment details the minimum medical information requirements to be annotated in any Medical Evaluation Board or addendum. This information must be documented and approved prior to forwarding the case to the Physical Evaluation Board (PEB).

E4.A1.1.2. MEDICAL EVALUATION BOARD (MEB) DOCUMENTATION

E4.A1.1.2.1. Required Information

E4.A1.1.2.1.1. Member's name, rank, grade, and social security number

E4.A1.1.2.1.2. The specialty of the signatory physicians.

E4.A1.1.2.1.3. The Clinical Department and/or Service.

E4.A1.1.2.1.4. The Medical Treatment Facility and its location.

E4.A1.1.2.1.5. Date Medical Evaluation Board (MEB) was conducted.

E4.A1.1.2.2. On each page:

E4.A1.1.2.2.1. Member's Last name, last four digits of Social Security Number, and date typed or transcribed in bottom margin.

E4.A1.1.2.2.2. Page number will be annotated at the bottom center of the page.

E4.A1.1.2.3. Reason for Doing the MEB (e.g., physician-directed, command-directed).

E4.A1.1.2.4. Service Member's Eligibility for MEB.

E4.A1.1.2.5. Military History

E4.A1.1.2.5.1. Date of first and most recent entry into service.

E4.A1.1.2.5.2. Estimated termination of Service.

E4.A1.1.2.5.3. Administrative Actions ongoing, pending, or completed (e.g., Line of Duty Investigations, Courts-martial, Selective Early Retirement, Bars, Retirement or Separation Dates).

E4.A1.1.2.6. Chief Complaint. Preferably stated in Service member's own words.

E4.A1.1.2.7. History of Present Illness. Exact details, including pertinent dates regarding injuries, how incurred, and a statement of the final Line of Duty (LOD) determination, if available. Enclose and summarize any pertinent previous MEBs.

E4.A1.1.2.8. Past Medical History

E4.A1.1.2.8.1. Past injuries and illnesses.

E4.A1.1.2.8.2. Prior disability ratings (e.g., given by the DES or Department of Veterans Affairs).

E4.A1.1.2.8.3. Past hospitalizations and relevant outpatient treatment, including documentation of diagnosis and therapy, pertinent dates, and location should be listed.

E4.A1.1.2.8.4. Social information should be provided which includes but is not limited to:

E4.A1.1.2.8.4.1. Living arrangements (e.g., by oneself, with spouse and children, with parents and siblings).

E4.A1.1.2.8.4.2. Marital status (single, married, separated, divorced, and the type of relationship (harmony or strife)).

E4.A1.1.2.8.4.3. Leisure activity (sports, hobbies, TV, reading)

E4.A1.1.2.8.4.4. Acquaintances (male, female, both sexes, many, few).

E4.A1.1.2.8.4.5. Substance use or abuse (alcohol, drugs)

E4.A1.1.2.8.4.6. Police encounters/record.

E4.A1.1.2.8.5. Illnesses, conditions, and prodromal symptoms, existing prior to service (referred to as EPTS or EPTE conditions).

E4.A1.1.2.9. Laboratory Studies. All studies that support and quantify the diagnosis(es) should be included as should any studies that conflict with the diagnosis(es).

E4.A1.1.2.10. Present Condition and Current Functional Status

E4.A1.1.2.10.1. The current clinical condition of the service member should be noted including required medications and any non-medication treatment regimens (e.g., physical therapy) in progress.

E4.A1.1.2.10.2. Functional status.

E4.A1.1.2.10.2.1. The Service member's functional status as to the ability to perform his or her required duty should be indicated.

E4.A1.1.2.10.2.2. If possible, a summation of the member's ability to perform the civilian equivalent of their assigned duties should be indicated.

E4.A1.1.2.10.3. A statement should be given regarding the prognosis for functional status after completion of treatment if chronic treatment is not necessary.

E4.A1.1.2.10.4. A statement should be given regarding the prognosis for functional status in cases requiring chronic treatment.

E4.A1.1.2.10.5. The stability of the current clinical condition and functional status should be addressed.

E4.A1.1.2.10.6. Statement of compliance with treatment recommendations and reasonableness of any refusal of recommended treatment procedures.

E4.A1.1.2.10.7. Requirement for monitoring including frequency of indicated treatment and/or therapy visits and associated operational assignment limitations.

E4.A1.1.2.11. Conclusions

E4.A1.1.2.11.1. An informed opinion should be stated as to the Service member's ability to meet current Retention Standards.

E4.A1.1.2.11.2. If a Service member does not meet Retention Standards, the specific reasons why should be stated.

E4.A1.1.2.11.3. Treatment recommendations including medications, procedures, and behavior and/or lifestyle modifications. Include a statement concerning the member's compliance. If non-compliant, indicate whether the non-compliance is reasonable.

E4.A1.1.2.11.4. Under no circumstances is the narrative to indicate the members is unfit, nor recommend a disability percentage rating. It is the PEB's responsibility to determine fitness and disability percentage ratings. The MEB may state something to the effect, "the member is referred to the PEB because we are of the opinion that the member's condition may interfere with the performance of his or her duties because the member does not meet medical retention standards as described in..."

E4.A1.1.2.12. Diagnosis(es). The diagnostic terminology used by the MEB should correlate, if at all possible, with that of the Veterans Affairs Schedule for Rating Disabilities (VASRD). Because the Physical Evaluation Boards are required to assess a Service member's status based on the VASRD, a clearer understanding of that status is facilitated when the same terminology is used by the MEBs and the PEBs.

E4.A1.1.2.13. Profile. (If required by service regulation).

E4.A1.1.2.13.1. The Physical Profile of the service member should agree with the severity of the medical impairment as expressed in by the MEB.

E4.A1.1.2.13.2. The Physical Profile (PULHES) of the SF-88 should agree with that of the Physical Profile Form as well as that noted in the MEB cover sheet.

E4.A1.1.3. PHYSICAL EXAMINATION (PE). A complete Physical Examination must be recorded in the MEB. For all conditions, hand dominance must be stated. Selected specialty-related considerations and guidelines follow.

E4.A1.1.3.1. Cardiology

E4.A1.1.3.1.1. Results of special studies to support and quantify the cardiac impairment should be noted e.g. treadmill and thallium stress tests, angiography, and other special studies.

E4.A1.1.3.1.2. It is imperative that the Functional Therapeutic Classification of the cardiac condition be included. Either the New York or Canadian classification system may be used.

E4.A1.1.3.2. Gastroenterology. Service members with fecal incontinence should have recorded findings of rectal examination e.g., digital exam, manometric studies as indicated, and radiographic studies. The degree and frequency of the incontinence should be noted as well as the incapacitation caused by the condition.

E4.A1.1.3.3. Neurosurgery

E4.A1.1.3.3.1. For Vertebral Disc problems, radicular findings on PE should be supported by laboratory studies such as CAT scan, MRI, EMG, NCV. In cases where surgery has been performed, both pre- and postoperative deep tendon reflexes should be documented.

E4.A1.1.3.3.2. For head injuries neuropsychiatric assessment should be accomplished in all head injury cases. Results of any clinically indicated neuropsychological testing should be included.

E4.A1.1.3.4. Ophthalmology. If retention standards are not met for reasons related to vision, visual fields must be included in the PE and verified by an ophthalmologist. Specialist examination should include uncorrected and corrected central visual acuity. Snellen's test or its equivalent will be used and if indicated measurements of the Goldman Perimeter chart will be included.

E4.A1.1.3.5. Orthopedics

E4.A1.1.3.5.1. Range of Motion (ROM) measurements must be documented for injuries to the extremities. The results of the measurement should be validated and the method of measurement and validation should be stated.

E4.A1.1.3.5.2. In cases involving back pain, the use of Waddell's signs should be included in assessing the severity and character of the pain. (Waddell G,

McCulloch JA, Kummel E, Venner RM. Non-organic physical signs in low back pain. *Spine*. 1980;5:117-125. Waddell G, Somerville D, Henderson I, Newton M. Objective clinical evaluation of physical impairment in chronic low back pain. *Spine*. 1992;17:617-628.)

E4.A1.1.3.6. Otolaryngology: Audiograms must include speech discrimination scores.

E4.A1.1.3.7. Psychiatry (Also refer to pages 76 - 77 paragraph E4.13 )

E4.A1.1.3.7.1. Particular attention should be paid to documenting all prior psychiatric care. Supportive data should be obtained for verification of the patient's verbal history.

E4.A1.1.3.7.2. Psychometric assessment should be carried out if such assessment will help quantify the severity of certain conditions and allow a reference point for future evaluation.

E4.A1.1.3.7.3. The Diagnostic and Statistical Manual of Mental Disorders (most recent edition) will be used for diagnostic terminology. The Multiaxial System of Assessment will be used to include Axes I-V. The degree of industrial and industrially related social impairment must be individually determined and documented, for each Axis I and Axis II diagnosis, and correlated to the Service member's clinical manifestations. Increased severity of symptoms due to transient stressors associated with the PEB and prospect of separation or retirement and relocation or re-employment will not be considered in determining the degree of impairment. In addition relationship of the impairment to military and civilian performance is required. The service member's total impairment for civilian industrial adaptability from all sources (Axes I, II, III) should be determined and documented. The contribution of each condition to the total adaptability impairment should then be individually noted and correlated with the service member's clinical manifestations.

E4.A1.1.3.7.4. Every effort must be made to distinguish symptoms and impairment resulting from personality disorder or mal-adaptive traits from impairments based on other psychiatric conditions.

E4.A1.1.3.8. Pulmonary. When an MEB is held for restrictive or obstructive pulmonary disease, documentation will be provided of pulmonary function testing carried out when service member is on and off therapeutic

medication. There must be three pulmonary function tests (PFTs) done off medication, two of which must be in agreement within the five percent (5%) level, and three done on medication, two of which must agree within the five percent level.

E4.A1.1.3.9. Urology

E4.A1.1.3.9.1. Cases involving neurogenic bladder must include studies that document the condition.

E4.A1.1.3.9.2. All cases involving incontinence must include studies that document the condition.

E4.A1.1.3.9.3. Cases involving incontinence and/or neurogenic bladder should have documentation regarding severity as indicated by the number of times self catheterization is required, the number and type of pads required in a day, or the soilage frequency.



## E5. ENCLOSURE 5

### CONDITIONS NOT CONSTITUTING A PHYSICAL DISABILITY

E5.1.1. PURPOSE. To detail conditions which do not constitute a physical disability.

#### E5.1.2. GENERAL CONSIDERATIONS

E5.1.2.1. Certain conditions and defects of a developmental nature designated by the Secretary of Defense do not constitute a physical disability and are not ratable in the absence of an underlying ratable causative disorder. If there is a causative disorder it will be rated in accordance with other provisions of this Instruction.

E5.1.2.2. These conditions include but are not limited to those listed in paragraph E5.1.3., below.

E5.1.2.3. Such conditions should be referred for appropriate administrative action under other laws and regulations.

#### E5.1.3. DEVELOPMENT DEFECTS AND OTHER SPECIFIC CONDITIONS

E5.1.3.1. Enuresis

E5.1.3.2. Sleepwalking and/or Somnambulism

E5.1.2.3. Dyslexia and Other Learning Disorders

E5.1.2.4. Attention Deficit Hyperactivity Disorder

E5.1.2.5. Stammering or Stuttering

E5.1.2.6. Incapacitating fear of flying confirmed by a psychiatric evaluation.

E5.1.2.7. Airsickness, Motion, and/or Travel Sickness.

E5.1.2.8. Phobic fear of Air, Sea and Submarine Modes of Transportation

E5.1.2.9. Certain Mental Disorders including:

- E5.1.2.9.1. Uncomplicated Alcoholism or other Substance Use Disorder
- E5.1.2.9.2. Personality Disorders
- E5.1.2.9.3. Mental Retardation
- E5.1.2.9.4. Adjustment Disorders
- E5.1.2.9.5. Impulse Control Disorders
- E5.1.2.9.6. Homosexuality
- E5.1.2.9.7. Sexual Gender and Identity Disorders, including Sexual Dysfunctions and Paraphilias
- E5.1.2.9.8. Factitious Disorder
- E5.1.2.10. Obesity.
- E5.1.2.11. Overheight.
- E5.1.2.12. Psuedofolliculitis barbae of the face and/or neck.
- E5.1.2.13. Medical Contraindication to the Administration of Required Immunizations.
- E5.1.2.14. Significant allergic reaction to stinging insect venom.
- E5.1.2.15. Unsanitary habits including repeated venereal disease infections.
- E5.1.2.16. Certain Anemias (in the absence of unfitting sequelae) including G6PD Deficiency, other inherited Anemia Trait, and Von Willebrand's Disease.
- E5.1.2.17. Allergy to Uniformed Clothing.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

---

BROCK STONE, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, et al.,

*Defendants.*

---

)  
)  
)  
)  
)  
) Civil Action No. 17-cv-2459 (MJG)  
)  
)  
)  
)  
)

**DECLARATION OF MARK J. EITELBERG  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Mark J. Eitelberg, declare as follows:

1. I am a Professor Emeritus at the Naval Postgraduate School in Monterey, California. I have personal knowledge of the matters stated in this declaration and can competently testify to these facts.
2. I received a Master of Public Administration degree from New York University in 1973 and a Ph.D. in Public Administration in 1979, also from New York University. I joined the faculty of the Naval Postgraduate School as an Adjunct Research Associate Professor in 1982. I was tenured as an Associate Professor in 1995 and promoted to Professor of Public Policy in 1999. I retired from federal service in April 2017. Upon retirement, in recognition of my distinguished service, I was designated Emeritus Professor of the Naval Postgraduate School. I served with the New Jersey Army National Guard and the U.S. Army Reserve from 1970 to 1976, the last two years as Staff Sergeant.
3. My teaching and research at the Naval Postgraduate School focused on military manpower and personnel policy analysis and military sociology/psychology. Among my research interests are the following: population participation ("representation") in the military;

the All-Volunteer Force; military force management and manpower policy; military manpower selection, classification, and utilization; and equal opportunity and diversity management. My honors include the Robert M. Yerkes Award (for outstanding contributions to military psychology by a non-psychologist) from the Society for Military Psychology, a division of the American Psychological Association, and the Department of the Navy Superior Civilian Service Award. I have served on the Board of Editors of the journals *Armed Forces & Society* and *Military Psychology*. I was Editor-in-Chief of *Armed Forces & Society* from 1998 through 2001. A true and correct copy of my curriculum vitae and a list of my publications are attached to this declaration as Exhibit A.

4. I am aware that, on June 30, 2016, the Department of Defense announced it would begin allowing transgender persons to serve openly in the military. As stated in the official announcement and news release (NR-246-16): “Effective immediately, service members may no longer be involuntarily separated, discharged or denied reenlistment solely on the basis of gender identity. Service members currently on duty will be able to serve openly.” This change in policy followed a careful review by a comprehensive working group that included high-ranking uniformed and civilian personnel as well as medical experts and other highly knowledgeable persons. The new policy assured current service members that they could reveal their gender identity if they chose to do so. The policy also established procedures for transgender service members to receive appropriate medical care for gender transition. Subsequently, many transgender service members informed their chain of command and their peers that they are transgender.

5. I am also aware that, in a series of informal comments on July 26, 2017, and later in a formal memorandum on August 25, 2017, President Donald Trump directed that the policy

allowing transgender individuals to serve openly in the military “return to the longstanding policy and practice” that prohibited transgender persons from serving in any capacity. Up to this point, for over one year previously, transgender service members were told that the Department of Defense had “ended” its ban on transgender Americans serving in the U.S. military. Under this policy and a forthcoming implementation plan, transgender service members will once again be subject to discharge by the Department of Defense on March 23, 2018.

6. Based on my knowledge, experience, and research in the fields of military manpower and personnel policy, military sociology, and military psychology, the newly announced policy is significantly harming service members who have disclosed they are transgender. This is not merely a potential problem or future hardship due to the scheduled March 23, 2018 date on which they will become subject to being separated. The new policy prevents transgender service members from serving equally with their peers; it imposes substantial limitations on their opportunities within the military; and it negatively impacts their day-to-day relationships with co-workers and other service members.

7. Military service opportunities are generally structured through career tracking by occupational area within each separate service, with scheduled training and skill-level assessments, operational assignments (or tours) and deployments, windows for advancement, and increased responsibilities based on experience, time-in-service, conduct, and performance. At the same time, as with any occupation, discretionary judgments or decisions within a service member’s chain of command can have a strong impact on one’s job opportunities or daily life. Naturally, these decisions are influenced by expectations regarding a service member’s future in the military. From an operational perspective, commanders understandably are reluctant to invest significant resources in the training or development of individuals who might leave

military service in the near future, or to entrust them with important assignments. This dynamic is similar to what occurs in other large organizations when an employee is known to be departing several months in advance. Transgender service members who informed others of their gender identity based on the government's pledge that they could serve openly as of June 30, 2016, believing that "ending the ban" would not be temporary, have no secure future in the military beyond March 23, 2018.

8. Transgender service members leaving military service would likely be held in their present duty location, pending a confirmed date of their involuntary separation. Lost opportunities and personal problems would ensue, particularly if the service member has a family, children in school, or other dependents. Previously scheduled training, deployment, change of duty station, or other planned career events would be canceled by the military to save related costs, minimize organizational disruption, and simplify discharge. Some of these service members would continue to work in their present positions until separation; others would be temporarily "stashed" in another work unit; and some might be placed in a "make-work" situation or "holding pattern" while awaiting separation. If the person has a particularly important skill, knowledge, or expertise, she or he may be asked to train a replacement. In other cases, an individual scheduled for discharge may be gradually relieved of duties or assignments as their responsibilities are delegated to others. Depending on the supervisor's views and management style, this might mean the person slated for discharge will be required to perform tasks no one else wants or be assigned less challenging, repetitive tasks that do not enhance their skill development.

9. Such reductions in responsibility have an impact even on service members whose departure from the military is voluntary and who have begun to make plans for their post-

military life. The impact is much more severe for those who had been planning to remain in the military but are unexpectedly facing the prospect of involuntary separation, because their accumulated efforts to excel or advance and their career aspirations essentially disappear upon discharge. The potential harm to these women and men economically is undeniable; added to this is the psychological distress of being told that their performance in service to the nation is meaningless when measured against their gender identity. They had volunteered to serve their country, to accept the associated risks, and to perform well and honorably. The military considered them qualified to serve when they joined. Surely, many would want to understand why their gender identity now makes them unqualified to serve their country, and to such a degree that they should be removed from the military.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: October 22, 2017

  
\_\_\_\_\_  
Mark J. Eitelberg



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

---

BROCK STONE, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, et al.,

*Defendants.*

---

)  
)  
)  
)  
)  
) Civil Action No. 17-cv-2459 (MJG)  
)  
)  
)  
)  
)

**DECLARATION OF ERIC K. FANNING  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Eric K. Fanning, declare as follows:

1. I served as Secretary of the Army from May 18, 2016 to January 20, 2017.
2. I received a Bachelor's Degree in History from Dartmouth College in 1990. From 1991 until 1996, I worked in various government positions in Washington, D.C., as a research assistant with the House Armed Services Committee, a special assistant in the Office of the Secretary of Defense, and Associate Director of Political Affairs at the White House. From 1997 to 1998, I worked on the national and foreign assignment desks at CBS News in New York. Subsequently, I worked at Robinson, Lerer & Montgomery, a strategic communications firm. From 2001 to 2006, I was Senior Vice President for Strategic Development at Business Executives for National Security, a Washington, D.C.-based think tank, where I was in charge of international programs and all regional office operations in six cities across the country. I next served as managing director at CMG, another strategic communications firm. From 2008 to 2009, I was Deputy Director of the Commission on the Prevention of Weapons of Mass Destruction Proliferation and Terrorism, which issued its report in December of 2008.

3. From 2009 to 2013, I served as the Deputy Under Secretary of the Navy and Deputy Chief Management Officer. In this role, I led the department's business transformation and governance processes and coordinated efforts to identify enterprise-wide efficiencies. From April 18, 2013 to February 17, 2015, I served as Under Secretary of the Air Force after being nominated by the President to that position and confirmed by the Senate. From June 21, 2013 through December 20, 2013, I served as Acting Secretary of the Air Force.

4. In March 2015, I was assigned as the Special Assistant to the Secretary and Deputy Secretary of Defense (Chief of Staff). In this role, I helped manage Secretary of Defense Ashton Carter's transition into office, built his leadership team, and oversaw the day-to-day staff activities of the Office of the Secretary of Defense.

5. On June 30, 2015, President Barack Obama directed me to serve as Acting Under Secretary of the Army and Chief Management Officer. In that position, I served as the Secretary of the Army's senior civilian assistant and principal adviser on matters related to the management and operation of the Army, including development and integration of the Army Program and Budget. From November 3, 2015 to January 11, 2016, I served as Acting Secretary of the Army. On November 3, 2015, President Obama nominated me to serve as Secretary of the Army, and the Senate confirmed my nomination on May 17, 2016.

6. As Secretary of the Army, I was head of the Department of the Army and had statutory responsibility for all matters relating to the United States Army: manpower, personnel, reserve affairs, installations, environmental issues, weapons systems and equipment acquisition, communications, and financial management. Subject to the authority, direction, and control of the Secretary of Defense, the Secretary of the Army is responsible for all affairs of the Department of the Army, including the morale and welfare of personnel. My personnel-related

oversight responsibilities included the development and implementation of recruitment, training, retention, and medical policies for active duty and reserve Army personnel. For duties other than those as a member of the Joint Chiefs of Staff, the Chief of Staff of the Army, the most senior uniformed Army officer, operated under my authority, direction, and control.

7. I oversaw the Department of the Army's participation in the Working Group that comprehensively reviewed military policy with regard to transgender persons serving openly in each of the service branches and which attempted to identify any practical, objective impediments to such service. It was based upon that review and the recommendations of that group that the Department of Defense announced on June 30, 2016, that transgender service members could openly serve in the U.S. military.

8. I am aware of the announcements of a new policy on transgender service, both through Twitter in late July 2017, and then in a Presidential Memorandum ("the Memorandum") issued by the White House on August 25, 2017. Although providing the Secretaries of Defense and Homeland Security the opportunity to review the current policies, the Memorandum sets March 23, 2018 as the date by which the June 2016 policy "shall" be reversed (section 3) and transgender individuals will be subject to discharge as a result of disclosure of their transgender status.

9. Based on my knowledge and experience in military personnel and readiness challenges, as a result of service as a senior executive in each of the three military departments as well as Chief of Staff to the Secretary of Defense, the recently announced policy change is causing significant harm to current service members who have already disclosed their status as an individual who is also transgender to their commanders.

10. The Memorandum asserts that the “previous Administration” had an “[in]sufficient basis” for allowing open service, and therefore, this Administration is directing the reversal of policy changes that had enabled open service based on its “meaningful concerns” about the impact of open service on “under military effectiveness and lethality, disrupt unit cohesion, or tax military resources.”

11. In my experience, this communicates that the Commander in Chief of the U.S. military believes that transgender service members are unfit for military duty solely because of their transgender status. It degrades the value of transgender individuals not only to those service members themselves, but gives license to their leaders and fellow service members to do the same, in an environment where the ability to unqualifiedly and mutually rely on each other is an indispensable element of service. The Memorandum on its face marks these service members as deserving of impending involuntary discharge.

12. The Memorandum alone, and certainly when animated by the President’s tweets, causes harm by preventing transgender service members from serving on equal terms with other service members based on their merit; serves to substantially limiting their advancement and promotion opportunities in the military; and undermines their standing with superiors and peers, as described above. Opportunity to succeed and advance in the military should not depend on gender identity, nor any other factor other than ability to meet the required standards.

13. The harm extends beyond the individuals involved to the whole ethos of the military as a meritocracy where all Americans who want to serve and can meet its standards should be afforded the opportunity to do so. Unjustified, categorical bans on Americans qualified and ready to serve diminishes that organizing principle.

14. Furthermore, the Presidential Memorandum and Secretary of Defense Jim Mattis' August 29, 2017 announcement that he will "carry out the president's policy direction" by "develop[ing] a study and implementation plan" sends the clear message to American society that the U.S. Army is not, as General Mark Milley, the Army's Chief of Staff and highest ranked officer, declared in 2016 "open to all Americans who meet the standard, regardless of who they are."

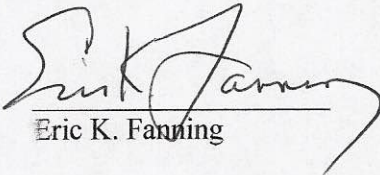
15. That declaration is essential to ensuring the military has access to the best and brightest America has to offer and that those who seek to serve know that they will be judged by their performance alone, rather than the artificial prejudices that once hampered the advancement and acceptance of African Americans, women, religious minorities, and gays and lesbians in our nation's armed forces.

16. In addition, when the military fails to keep pace with the demographic change of our nation and departs from the core principle of opportunity for all that can meet its high standards, it results in an erosion of understanding between those who serve and those who freedom those service members defend. The President's tweets and directive undoubtedly exacerbate this divide, both by creating a single class of Americans he deems unfit to serve and dividing the nation by telling them that only these individuals are unfit.

17. Finally, during my tenure as Secretary of the Army, I am unaware of any instance prior to or after June 2016 when a transgender person seeking to enlist or accept a commission in the Army was granted a waiver from the Army's medical accession standards.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: October 20, 2017



Eric K. Fanning

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

---

BROCK STONE, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, et al.,

*Defendants.*

---

)  
)  
)  
)  
)  
) Civil Action No. 17-cv-2459 (MJG)  
)  
)  
)  
)  
)

**DECLARATION OF DEBORAH LEE JAMES  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Deborah Lee James, declare as follows:

1. I served as the Secretary of the United States Air Force ("USAF") from December 20, 2013 to January 20, 2017.

2. I hold a Bachelor's Degree in Comparative Area Studies from Duke University (1979), and a Master's Degree in International Affairs from Columbia University (1981). From 1983 until 1993, I worked as a professional staff member for the Armed Services Committee of the United States House of Representatives, including as a senior advisor to the Subcommittee for Military Personnel and Compensation. From 1993 to 1998, I served as Assistant Secretary of Defense for Reserve Affairs, responsible for advising the Secretary of Defense on all matters pertaining to roughly 1.8 million National Guard and Reserve personnel. I then held a variety of senior positions at Science Applications International Corporation (SAIC), including as President of the Technical and Engineering Sector overseeing more than 8,000 employees.

3. As Secretary of the USAF, I functioned as the chief executive of the Department of the Air Force, with the authority to conduct all of its affairs, subject to the authority, direction, and control of the Secretary of Defense. As Secretary, I had comprehensive oversight

responsibility for (i) the Department of the Air Force's annual budget, (ii) overseeing the organization, training, supplying, equipping and mobilization of USAF personnel, and (iii) overseeing the construction and maintenance of military equipment, buildings, and structures. In connection with my personnel-related oversight responsibilities, I administered the development and implementation of recruitment, retention, and medical policies for active duty and reserve USAF personnel. Among the people who directly reported to me was the Chief of Staff of the USAF, the most senior uniformed USAF officer.

4. As Secretary, I was responsible for supervising the Department of the Air Force's participation in a working group convened by the Department of Defense in 2015 to identify the practical issues related to transgender Americans serving openly in the Armed Forces, and to develop an implementation plan that addressed those issues with the goal of maximizing military readiness (the "Working Group").

5. Based on the Working Group's analysis and recommendations, the Department of Defense announced in June 2016 that it would begin to allow transgender people to serve openly in the Armed Forces.

6. On July 26, 2017, President Donald Trump issued a statement that transgender individuals will not be permitted to serve in any capacity in the Armed Forces. On August 25, 2017, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security to reverse the policy adopted in June 2016 that permitted military service by openly transgender persons. The President's memorandum stated that the military would return to the pre-June 2016 policy on March 23, 2018.

7. Based on my experience regarding military personnel, and in particular personnel and operations of the USAF, the President's announced decision to ban openly transgender



people from serving in the military effective March 23, 2018 is presently harming transgender people currently serving in the military in several significant respects.

8. Airmen are typically deployed for periods of time that exceed several months, and planning for a deployment begins several months in advance of the deployment. Commanders in charge of overseeing deployments must take into account the certainty with which Airmen will be available for the entire length of a deployment when making assignment decisions.

9. Given the President's announcement that transgender service members will be subject to separation from the military beginning March 23, 2018, commanders cannot rely on transgender Airmen being able to complete deployments that continue beyond that date. Transgender Airmen with deployment terms that extend beyond March 2018 will thus lose opportunities for assignments because command will not be able to determine with certainty that transgender Airmen will be present for the entire duration of the deployment. In addition to negatively impacting individual Airmen, this uncertainty harms USAF readiness and capabilities where commanders are not able to make assignments based solely on the capabilities and experiences of those under their command.

10. Even outside the deployment context, transgender Airmen will lose out on assignments, opportunities, and experiences they would otherwise receive but for the President's announcement that they will be subject to separation in March 2018. Commanders will be reluctant to invest time and money on training transgender Airmen for important or significant assignments or tasks where commanders believe the Airmen will be expected to leave the USAF in the near future.

11. In addition, the President's announced ban on transgender people serving in the military creates a sub-class of service members, placing transgender people on unequal footing

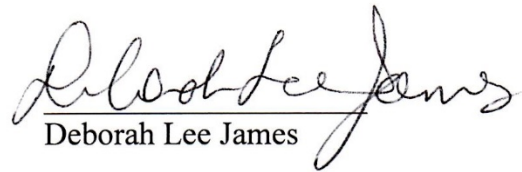
as compared to their non-transgender peers for reasons having nothing to do with their capabilities or past performance, and suggesting that transgender Airmen are unworthy of their comrades' trust and support. A lack of trust among service members is deeply concerning, as trust and respect throughout the chain of command is essential to promote military effectiveness. Thus, in addition to causing present harm to transgender Airmen, the President's ban will have a deleterious effect on the USAF's effectiveness and capabilities as well.

12. The President's announced ban is also anathema to the ethos of the military in general, and in particular the USAF. In the USAF, individual Airmen are given assignments and receive commendations and promotions on the basis of their individual merit and skill set. The USAF, and the military in general, are weakened when this fundamental building block of their identities is fractured through suggesting that service members should be judged based on characteristics having nothing to do with their ability to perform their job.

13. Finally, I am not aware of any instance – before or after June 2016 – where a transgender person seeking to join the military was granted a waiver to the ban on service of openly transgender individuals. Even if a transgender person were to seek a waiver at this time, doing so would be futile in light of the President's order making transgender service members subject to separation beginning in March 2018.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: October 21, 2017

  
Deborah Lee James

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

---

BROCK STONE, et al.,

*Plaintiffs,*

v.

DONALD J. TRUMP, et al.,

*Defendants.*

---

)  
)  
)  
)  
)  
) Civil Action No. 17-cv-2459 (MJG)  
)  
)  
)  
)  
)

**DECLARATION OF RAYMOND EDWIN MABUS, JR.  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, Raymond Edwin Mabus, Jr., declare as follows:

1. I served as the United States Secretary of the Navy from May 19, 2009 to January 20, 2017.

2. Prior to serving as Secretary of the Navy, I earned a Bachelor's degree in English and Political Science from the University of Mississippi in 1969, a Master's Degree in political science from Johns Hopkins University in 1970, and a J.D. from Harvard Law School in 1976. Prior to attending law school, I served from 1970 until 1972 in the Navy aboard the cruiser USS Little Rock, achieving the rank of Lieutenant, junior grade. Following law school, I worked as a law clerk in the United States Court of Appeals for the Fifth Circuit. From 1977 until 1978, I worked as legal counsel for the Cotton Subcommittee of the Agriculture Committee of the United States House of Representatives. From 1979 to 1980, I was an associate at the law firm of Fried, Frank, Harris, Shriver and Kampleman in Washington, D.C. and from 1980 to 1983, I was Legal Counsel and Legislative Assistant to the Governor of Mississippi. From 1984 to 1988, I served as Mississippi State Auditor (an elected position), and from 1988 to 1992 as Governor of Mississippi. From 1994 to 1996 I served as the United States Ambassador to Saudi

Arabia. From 1998 to 2000 I served as President of Frontline Global Services, a consulting company. From 2003-2007 I served as Chairman of Foamex, Incorporated, a public manufacturing company, and from 2006 to 2007 as Foamex's Chief Executive Officer as well.

3. As Secretary of the Navy, I functioned as the chief executive of the Department of the Navy, with the authority to conduct all of its affairs. As Secretary, I had comprehensive oversight responsibility for (i) the Department of the Navy's annual budget, (ii) overseeing the recruitment, organization, training, supplying, equipping, mobilizing, and demobilizing of Navy personnel, and (iii) overseeing the construction, outfitting, and repair of naval equipment, ships, and facilities. I was also responsible for the formulation and implementation of policies and programs that are consistent with the national security policies and objectives established by the President and the Secretary of Defense.

4. In connection with my personnel-related oversight responsibilities, I oversaw the administration of recruitment, retention, and medical policies for active duty and reserve Navy personnel. As Secretary, I performed these duties before, during, and after the end of the "Don't Ask, Don't Tell" ban on gay service members serving openly in the military in 2011.

5. Also during this period, I oversaw the Navy and the Marine Corps through the end of United States military operations in Iraq and the surge of tens of thousands of United States troops in Afghanistan. I am keenly aware that the recruitment and retention of capable and qualified service members is of critical importance to the readiness of the Navy and the Marines.

6. I was part of a Working Group that comprehensively reviewed military policy with regard to transgender people serving across the service branches. It was based upon that review and the recommendations of that group that the Department of Defense announced in June 2016 that it would begin allowing transgender people to serve openly in the military.

7. I am aware that in a series of announcements made on Twitter on July 26, 2017, and then again in a formal memorandum issued by the White House on August 25, 2017, President Trump announced the reversal of military policy stating that transgender individuals would no longer be able to serve in any capacity. The memorandum set March 23, 2018 as the date when military policy would revert to the pre-June 2016 policy whereby transgender individuals are subject to discharge upon disclosure of their transgender status.

8. Based on my experience in military personnel and operations, the recently announced policy change is presently causing significant harms to current servicemembers who have disclosed that they are transgender. Those harms are not speculative or future harms. They are current harms that prevent transgender service members from serving on equal terms with non-transgender service members and that impose substantial limitations on their opportunities within the military.

9. Consideration of the ways in which deployment decisions are made highlights the current limitations and lost opportunities being experienced by transgender service members. Consistent with naval operations, ships may deploy for up to 9 months at a time. Commanders making decisions about how to staff naval operations must consider the length of time that a sailor will be available for a deployment. If a sailor may not be available for the full length of a deployment, command knows that they will have to expend significant resources to backfill staffing needs in order to address the diminishment of resources. Rather than face those challenges, command will predictably make assignments based on certainty about sailors' ability to serve the full length of deployment.

10. Because of the announcement of the ban on transgender people being able to serve after March 2018, command lacks the requisite certainty that transgender service members will be able to complete the terms of their deployments where they extend beyond that date.

11. Similarly, command must regularly make personnel decisions that relate to “permanent change of station” (PCS) moves. PCS moves are made to ensure maximum utilization of personnel and to achieve military missions. PCS moves involve transporting service members and their families to a different base and duty station, often across the country or the world. The introduction of any uncertainty with regard to a service member’s future service, or status, changes command’s consideration of PCS moves and military operations staffing. Based on my experience, the announced ban on transgender people serving is impacting PCS moves.

12. As a result of the announced ban, transgender service members are losing opportunities for assignments that they are capable of doing. These include lost opportunities for deployment, training, and assignments. These lost opportunities are based not on individual assessment of the service member’s merit but rather based on whether the person is transgender. These lost opportunities, in addition to depriving transgender members of the military of the ability to serve on equal footing with their peers, hinder transgender service members opportunities for advancement and promotions as well.

13. The impact of this immediate harm reaches beyond the individual service member and affects the institution of the military as a whole. The military is designed to be a meritocracy where individuals receive opportunities and tackle assignments based on their ability to do the job. The institution is weakened when people are denied the ability to serve not because they are unqualified or because they cannot do the job but because of who they are.

14. The ban on transgender service members weakens the military in a second way as well. With an all-volunteer force, which is the current structure of the military, a small segment of the population is responsible for the security of the whole. In this circumstance, it becomes even more important to have a diverse military in order to maintain a strong connection between those who serve to protect society and the society that the force is protecting. Banning a segment of the community from service weakens the bond of that connection between the military and society and sends a message that certain segments of the community are not within the scope of the mission. That message interferes with and diminishes military readiness and lethality.

15. I know of no instance either prior to June 2016 or since when a transgender person seeking to enlist was granted a waiver to the ban on service. In any case, it would be futile for a transgender person to seek a waiver to join the military at this point in time since, according to the announced policy, they would be subject to administrative discharge as soon as March 2018.

16. This sudden reversal of the DoD policy permitting open service undermines the morale and readiness of other groups who must now deal with the stress and uncertainty created by this dangerous precedent, which represents a stark departure from the foundational principle that military policy will be based on military, not political, considerations. In 2011, the “Don’t Ask, Don’t Tell” policy prohibiting gay, lesbian, and bisexual people from openly serving in the military (Department of Defense Directive 1304.26) was repealed. More recently, DoD also removed remaining barriers for women serving in certain ground combat positions. The sudden reversal of the DoD’s policy with respect to transgender service members sets a precedent suggesting that these policies may be abruptly reversed for baseless reasons as well.

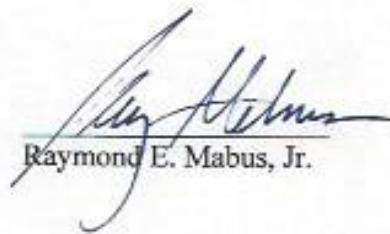


17. This sudden reversal may also have a chilling effect on the confidence of other service members that they will continue to be able to serve. Religious and ethnic minorities who have seen an increase in discrimination under the current administration may fear that the military may seek to ban them next, creating a culture of fear that is anathema to the stability and certainty that makes for an effective military.

18. This sudden reversal undermines the confidence of all service members that important military policy decisions will be made under careful review and consistent with established process. Rational decision making in the adoption of and change to policy impacts the military's ability to recruit and retain competent, high-performing people. The sudden reversal of policy makes recruitment and retention more difficult, as does the damage done to the military's image and reputation as promoting fairness and equality and of being open to all qualified Americans. That image and reputation are critical to the military's ability to attract talented and idealistic young people. Actions that tarnish that reputation cause real harm.

I declare under the penalty of perjury that the foregoing is true and correct.

DATED: October 19, 2017



Raymond E. Mabus, Jr.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF KATE COLE**  
**IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, KATE COLE, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

2. In October 2016 I began working with military medical staff to develop an approved military medical treatment plan for my gender dysphoria diagnosis. My treatment plan completed the review process and was approved by my command in February 2017.

3. I then filed a request to have my gender marker in the Defense Enrollment Eligibility Report System (DEERS) updated to correctly reflect my female gender in June 2017. My gender marker was updated in August 2017.

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. [REDACTED]

6. Even though this medical care was rescheduled after the filing of this lawsuit and took place under Interim Guidance issued on September 14, 2017, my treatment plan recommends further medical procedures that will not occur until after the Interim Guidance expires, and thus will be denied to me under President Trump's Transgender Service Member Ban.

7. [REDACTED] I had planned to schedule [REDACTED] early in 2018, but I have now recently received orders to enroll in Drill Sergeant School starting on January 3, 2018, with an anticipated graduation date of March 7, 2018. It will not be possible for me to [REDACTED] during this time.

8. Following my return from Drill Sergeant School, I am scheduled to change station from Fort Polk, Louisiana to Fort Benning, Georgia. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. There is thus no possibility that I will be able to undergo [REDACTED] [REDACTED] before the Interim Guidance expires. My access to this medically necessary care will thus be barred by the implementation of the President's Transgender Service Member Ban.

10. [REDACTED]

[REDACTED]

██████████ That means that I will also be barred from undergoing this medically-necessary ██████████ by the implementation of the President's Transgender Service Member Ban.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 26 day of October, 2017 in Fort Polk, Louisiana.



\_\_\_\_\_  
KATE COLE

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF SEVEN ERO GEORGE  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, SEVEN ERO GEORGE, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.
2. In October 2016 I met with an army recruiter in Eastpointe, Michigan to pursue an active duty commission in the United States Army through the direct commissioning program, pursuant to the applicable references: Army Regulation 135-101 (the regulation governing appointment of officers in the Army Medical Department); and Army Regulation 601-100 (governing appointment of commissioned officers generally). I have a bachelor's degree in General Studies from the University of Michigan, Ann Arbor, so I understood that I would be eligible to commission as an officer at that time, and I began completing application paperwork to do so. My understanding is based on (and consistent with) the requirements of the references listed above. I was also stable in my gender transition, with no further surgeries required under my medical treatment plan. A true and correct copy of the Request For Conditional Release form I subsequently completed, and which was signed by the General in command of the 127th Wing of the Air National Guard, is attached hereto as **Exhibit 1**.

3. However, based on conversations with the recruiter and other research I conducted, I came to understand that I would not be able to commission until the military's historical ban on transgender servicemember accessions officially expired. Additionally, my gender marker in the Defense Enrollment Eligibility Report System (DEERS) still listed me as female. Faced with those two barriers, I was forced to hold off on commissioning until I could at least update my gender in the DEERS system. During this time, I would diligently work to get my gender marker updated to accurately reflect my male gender. I believed that the gender marker process could be completed relatively quickly and simply, and that it would be easier to do in my current command, which was and continues to be supportive of me.

4. Unfortunately, the process of updating my gender marker was anything but quick or simple. It has been so complicated that I have had to engage a lawyer to assist me. As described in my prior declaration, I submitted paperwork in connection with that process from December 2016 until May 2017. I heard nothing further until September 2017, subsequent to the filing of my prior declaration, when I was informed that I once again needed to provide additional paperwork, which I submitted to my command on October 19, 2017. It is my present understanding that I have submitted all requisite paperwork for the processing of my gender marker update. I have now been working with my lawyer on this process for approximately a year and while I expect it will be completed by the end of the year, given the delays by the military thus far I cannot say that for certain.

5. Because the ban on transgender servicemember accessions has not yet expired and because of the repeated delays in updating my gender marker, I have had to adjust my career plans. I am currently focusing on my education so that when I am able to commission, I will be closer to my ultimate goal of becoming an Army nurse. I am currently on track to

graduate from Henry Ford College in December 2017 with an Associate's Degree in Nursing. Thereafter, I plan to attend the University of Michigan, Flint, where I have been accepted into an RN-to-BSN (Registered Nurse to Bachelor's of Science in Nursing) completion program for a Bachelor's Degree in Nursing starting in January. This is usually a two-year program, but because I already have a Bachelor's Degree in another discipline, I expect to be able to complete the degree in 12-18 months.

6. If I were free to commission in the army, I would do so immediately. The only reasons I have not done so already is the protracted delay in the processing of my DEERS gender marker update and the military's historical ban on transgender servicemember accessions.

7. I have continued to prepare myself to commission immediately in the event that my gender marker is updated and the policy barriers are removed. This includes speaking to multiple individuals about recommending me for the direct commissioning program listed above. One of my teachers at Henry Ford College, Julie Powell, is a former Navy Nurse, and she has agreed to write me a letter of recommendation.

8. My recently-retired former commander, Lieutenant Colonel Richard T. Walmsley (Ret.) has also agreed to write me a letter of recommendation. As reflected on Exhibit 1, he also endorsed my request for "conditional release," one of the required pieces of my application for Army direct commissioning (in accordance with the reference, AR 135-101, paragraph 1-10(a)(4)).

9. Throughout this process I have also attempted to continue to improve my military record.

10. Contrary to Paragraph 3 of the Declaration of Helen Harris, which I have read, I have in fact requested to attend Technical Training School on multiple occasions. The



first time was in March 2015, but I was informed that my request could not be approved. I was next scheduled to attend Technical Training School in March 2016, but that assignment was postponed and eventually cancelled. In August 2017 I began preparing another Technical Training School application package. This time, I was told that my request could not be approved while my gender marker change was pending.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 26 day of October, 2017 in Warren, MI.

  
\_\_\_\_\_  
SEVEN ERO GEORGE



**REQUEST FOR CONDITIONAL RELEASE**

(Read Privacy Act Statement and Instructions on back before completing this form.)

**SECTION I - REQUEST FOR RELEASE****1. SERVICE MEMBER DATA**

a. NAME (Last, First, Middle Initial) George, Seven E	b. PAY GRADE E03	c. SSN or EDIPI [REDACTED] 7612	d. SERVICE COMPONENT Air Force	
e. CURRENT UNIT/ COMMAND 127TH WING SQD SECURITY FORCES	f. ADDRESS			
	(1) STREET [REDACTED]	(2) CITY [REDACTED]	(3) STATE MI	(4) ZIP CODE [REDACTED]

**2. RECRUITING OFFICE ADDRESS**

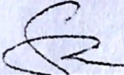
a. STREET 15810 NINE MILE RD	b. CITY EASTPOINTE	c. STATE MI	d. ZIP CODE 48021
---------------------------------	-----------------------	----------------	----------------------

**3. ACKNOWLEDGEMENT OF SERVICE MEMBER**


a. I request a conditional release to process for entrance into another component of the Military Service. If I am a member of the National Guard or Reserve, I understand that I must attend all scheduled training until such time as I am enlisted into another Service. I also understand that I am to keep my current commander informed of any change in my status.

b. OFFICER MEMBER ONLY. I hereby tender my resignation from the \_\_\_\_\_ (current component); request that it be accepted contingent upon actual appointment or enlistment in the \_\_\_\_\_ (requesting component), and be effective the day preceding the date of my acceptance of appointment or enlistment.

c. ENLISTED MEMBER ONLY. I understand I will be discharged from my current status effective the day preceding the date of my enlistment or appointment.

d. MEMBER SIGNATURE 	e. DATE SIGNED 01NOV2016
--	-----------------------------

**4. RECRUITER REQUEST FOR CONDITIONAL RELEASE**

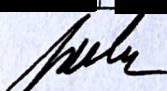
a. Request conditional release to enlist/appoint member into the <u>Army Regular</u> (Service/Component).			
b. NAME OF RECRUITER (Last, First, Middle Initial) Maki, Michael, J	c. SIGNATURE 		d. DATE SIGNED 01NOV2016
e. TITLE SSG			

**SECTION II - APPROVAL/DISAPPROVAL****5. (X as applicable)**

a. APPROVED. Individual is recommended and conditional release is granted. The release is valid until \_\_\_\_\_

b. DISAPPROVED. Release is not granted. (Explain in "Remarks.")

**6. AUTHORIZING OFFICIAL**

a. NAME (Last, First, Middle Initial) Stocum, John D.	b. TITLE 127th Wing Commander			
c. TELEPHONE NUMBER (Include area code) [REDACTED]	d. ADDRESS			
	(1) STREET [REDACTED]	(2) CITY [REDACTED]	(3) STATE MI	(4) ZIP CODE [REDACTED]
e. SIGNATURE 				f. DATE SIGNED 1 DEC 16

**SECTION III - NOTIFICATION OF ENLISTMENT/APPOINTMENT ACTION**

7. The member was administered the oath of enlistment or appointment into \_\_\_\_\_  
THIS FORM AND A COPY OF THE OATH MUST BE RETURNED TO THE ADDRESS IN ITEM 6.d. TO EFFECT THE MEMBER'S DISCHARGE OR WITHDRAWAL OF FEDERAL RECOGNITION.

**8. CERTIFYING OFFICIAL**

a. NAME (Last, First, Middle Initial)	b. TITLE	c. UNIT/COMMAND		
d. TELEPHONE NUMBER (Include area code)	e. ADDRESS			
	(1) STREET	(2) CITY	(3) STATE	(4) ZIP CODE
f. SIGNATURE				g. DATE SIGNED



**SECTION IV - REMARKS**

**PRIVACY ACT STATEMENT**

**AUTHORITY:** 10 U.S.C. Sections 261, 516, 651, 716, 3013, 5013, 8013, 12104, 12105, 12106, 12107, 12208, 12213, 12214, and 12645; 32 U.S.C. Section 323; and DoD Instruction 1205.05, Transfer of Service Members Between Reserve and Regular Components of the Military Services.

**PRINCIPAL PURPOSE(S):** To document coordination and concurrence of one Military Service for discharge and accession to another Military Service.

**ROUTINE USE(S):** None.

**DISCLOSURE:** Voluntary; however, failure to furnish all requested information may result in delay or denial of release from current Military Service.

**INSTRUCTIONS**

**GENERAL INSTRUCTIONS.**

When this form is not computer generated, use typewriter or dark ink for all entries. Enter all dates in YYMMDD format. Use full street address, city, state and ZIP code for addresses. Use last name, first name, and middle initial format. Use short title Service/Component names: USA, ARNGUS, USAR, USN, USNR, USMC, USMCR, USAF, ANGUS, USAFR, USCG, USCGR.

**SECTION I.** Completed by recruiter and applicant.

Item 1. Enter applicant's name, pay grade, Social Security Number or Electronic Data Interchange Personal Identifier, current Service/Component, and current unit/command address.

Item 2. Enter recruiter's office address, if applicable.

Item 3. For item 3.b., complete the name of the gaining and losing components. Member signs and dates appropriate blocks.

Item 4. Recruiter, if applicable, completes 4.a. through 4.e. and sends this document to the address in Item 1.e.

**SECTION II.** Completed by applicant's unit commander or designated representative within 30 days of receipt.

Item 5. If block 5.a. is marked, enter the ending date of this conditional release. If block 5.b. is marked, indicate in Section IV, "Remarks," the reason for disapproval and return to the originator not later than the expiration date in Item 5.a.

Item 6. Enter name, title, signature and date for authorizing official. Indicate in Items 6.c. and d. the address and telephone number for returning completed Section III. Send completed Section II to the address in Item 2.

**SECTION III.** Completed by enlisting/appointing official within 10 days of enlistment or appointment.





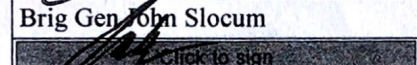




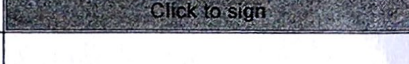
Item 7. Indicate service to which applicant was enlisted/appointed.


Item 8. Completed by individual certifying enlistment/appointment action. Certifying official ensures a copy of the completed DD Form 368 and a copy of the oath are mailed to the address in Item 6.d.

**SECTION IV - REMARKS.**

Use as necessary. Reference each item on the form to which the remark pertains. (For example: "Item 5.b. Disapproved for the following reason: .....")



	TO	ACTION	SIGNATURE (Surname), GRADE AND DATE		TO	ACTION	SIGNATURE (Surname), GRADE AND DATE
1	UNIT / CC	Coord	Lt Col Richard Walmsley 	6			
2	GROUP / CC	Coord	Col Daniel Whipple 	7			
3	WING / CC	Coord / Sign	Brig Gen John Slocum 	8			
4				9			
5				10			



SURNAME OF ACTION OFFICER AND GRADE	SYMBOL	PHONE	TYPIST'S INITIALS	SUSPENSE DATE
Richard T. Walmsley, O-5	MI ANG/JFHQ		SJL	20161120

SUBJECT	DATE
Release from the Michigan Air National Guard.	20161108

**SUMMARY**

PURPOSE: Obtain WING/CC coordination and signature on "Release from the Michigan Air National Guard " (Atch 1)

**BACKGROUND:**

- Airman First Class  George is transferring to the Army/Active Duty.
- A1C  George will need to be released from the MI Air National Guard if he is selected.

**DISCUSSION:**

- This is to request approval to be released from the MI ANG if he is selected.

**RECOMMENDATION:** Wing/CC approve "policy letter" at Attachment 1 for distribution to "the MI ANG units".

Thank you,

RICHARD T. WALMSLEY , Lt Col, MI ANG  
Commander

1 Attachment:  
1. Release from the Michigan Air National Guard/DD Form 368

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF TEAGAN GILBERT  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, TEAGAN GILBERT, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

2. On October 20, 2017, I was informed that my formal application to have the gender marker in my official Navy personnel files and the Defense Enrollment Eligibility Report System (DEERS) changed to female had been approved, and my gender marker had been updated. I had been readying my paperwork for this application since approximately September 2016.

3. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

4. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

6. I am scheduled to resume classes at Arizona State University in January of 2018, and expect to graduate in the Spring of 2019 with a bachelor's degree in Earth and Space Exploration, with a concentration in Geological Sciences and an undergraduate certificate in Geographic Information Systems.

7. I am obtaining my bachelor's degree because it is a requirement to commission as an officer.

8. Once I have received my bachelor's degree, I intend to apply to commission as an officer in the Navy. In preparation for that, while finishing my degree, I have worked to locate mentors within my unit who would be willing to recommend me in connection with my application to commission. Earlier this month, I discussed my candidacy with Captain Colin Campbell, and he said that he would write me a letter of recommendation when I intend to apply.

9. In preparation for commissioning I am also in the process of re-enlisting in the Navy for another six-year term. My term of service runs out in February 2018 and I want to make sure my re-enlistment is completely finalized well before then so that I am on track to commission, as I have been planning since approximately 2011.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 26 day of October, 2017 in Peoria, Arizona.



---

TEAGAN GILBERT



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF TOMMIE PARKER  
IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

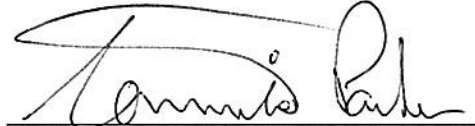
I, TOMMIE PARKER, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.
2. Subsequent to the filing of my prior declaration, my commanding officer informed me that he would recommend I be approved for active duty reenlistment for an additional term of three years when my current term of service expires in January 2018. I intend to serve out this additional term of service. As referenced in Paragraph 4 of the Declaration of Major Kathleen P. Sileno, which I have read, this additional service time would make me eligible for Active Federal Military retirement.
3. Even if my reenlistment package is approved while the Secretary of Defense's Interim Guidance is in effect, I would still face discharge under the terms of President Trump's Transgender Service Member Ban. As explained in my prior declaration, this discharge would be devastating to me and my family both emotionally and financially, and would jeopardize the retirement benefits I have worked toward my entire career.



I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 25<sup>th</sup> day of October, 2017 in Sparrow Bush, New York.

  
TOMMIE PARKER

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND**

Brock Stone, et al.,

Plaintiffs,

v.

Donald J. Trump, et al.,

Defendants.

Case No. 1:17-cv-02459 (MJG)

**SUPPLEMENTAL DECLARATION OF BROCK STONE**  
**IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

I, BROCK STONE, hereby declare:

1. The facts set forth in this declaration are based on my personal knowledge.

2. I first disclosed that I was transgender when I was stationed in Fort

Gordon, Georgia prior to the Open Service Directive being issued. [REDACTED]

[REDACTED]

[REDACTED]

3. Because the Open Service Directive had only recently issued, both the

Navy as a whole and my command in particular were still in the process of developing regulations and processes to provide transgender service members with medical care. I was one of the first service members to disclose my transgender status and seek medical care to treat my diagnosed gender dysphoria at my local medical facility, which at the time was Eisenhower Army Medical Center ("EAMC") in Fort Gordon. [REDACTED]

[REDACTED]

4. At the time there was not yet an established process in place for me to prepare an official medical treatment plan with local medical staff for submission to my Navy command. Policies were still being developed to implement the Open Service Directive at the branch, fleet, and command levels. As a result I continued [REDACTED], but the lack of an established process prevented me from developing an official treatment plan, and I accordingly could not schedule any medically indicated surgeries through military medical providers.

5. In May 2017 my endocrinologist at EAMC at last began developing a written medical treatment plan for me.

6. As I worked on that plan in consultation with medical staff at EAMC, I was advised that the treatment plan could not be approved so close to my transfer to Fort Meade. I was told I could take my plan with me when I transferred, to aid in formalizing a treatment plan upon arrival at my new base.

7. When I transferred to Fort Meade in July 2017 I was told that this was not the case. I had to begin the process of developing a medical treatment plan all over again with Fort Meade-area medical staff following my transfer.

8. It was important to me that the other Sailors serving in my command get to know me first and foremost for my work and ability as a Sailor, so my initial focus after my transfer was simply on doing my duties and acclimating to my new base. As such I waited approximately one-and-one-half months to disclose my transgender status to my command through the Judge Advocate. My command has been, and continues to be, extremely supportive of me.

9. I first began taking steps to develop a new medical treatment plan in Fort Meade within several weeks of my arrival there. At that time I attempted to schedule an appointment with a new Primary Care Manager (“PCM”) at Walter Reed National Military Medical Center in Bethesda, Maryland. I first met with my PCM to begin developing a treatment plan on August 21, 2017, which was the earliest appointment I could book.

10. [REDACTED]

[REDACTED] That endocrinologist in turn sent me to a medical case manager, who in turn referred me back to my PCM. On September 26, 2017, I was able to meet with my PCM a second time. On this second meeting, my PCM at last collected the medical information needed to begin drafting my treatment plan.

11. Since then, I have continued to provide minor corrections to my treatment plan in consultation with my PCM and my medical case manager. To date, my plan is still going through the approval process. My current understanding is that my treatment plan will be sent to the medical review board at Walter Reed in November 2017, and, if approved, will thereafter be submitted to Navy Medicine East for final medical approval. My understanding is this process could take several more months. Assuming it is approved, it will then be returned to me in final form, at which time I will submit it to Captain Joey Johnson immediately.

12. Although it is my understanding that I have submitted all requisite paperwork to complete my treatment plan and I am optimistic that it will be approved without further incident, the extended delays in preparing it has compromised my ability to obtain medically necessary health care. It has been more than sixteen months since my gender dysphoria diagnosis and I still do not have a final, fully-approved treatment plan in place.

13. [REDACTED]

14. However, given the repeated delays in the development of this treatment plan, I am highly concerned that these dates will be further postponed. That timing may also need to be further adjusted on account of my work duties. Because my plan will likely not be submitted to my commanding officer for another month or more, I do not know if the proposed timing under the treatment plan will be feasible given my obligations to my command. [REDACTED]

[REDACTED] There is a small pool of qualified medical providers and a high demand for the care especially with the impending cut off on March 23, 2018 so I am extremely worried that I will not get my health care before the ban goes into effect.

15. Given the above factors, I am highly concerned that I will not be able to actually undergo one or both of the medically-necessary [REDACTED] on my plan before March 23, 2018. Realistically, my [REDACTED] would thus not occur until well after the date that the Transgender Service Member Ban is scheduled to go into effect. As a result, if that policy goes into effect, I will be denied medically-necessary treatment.

16. Finally, I have read Captain Johnson's declaration, and I understand that promotion to the rank of Chief Petty Officer is highly competitive. I by no means believe that I am entitled to such a promotion, or that I am in any way guaranteed such a promotion. I also

understand that, currently, per Captain Johnson's declaration, the Chief Petty Officer selection board does not consider transgender status in making such determinations.

17. However, I will lose any chance of being promoted to Chief Petty Officer if I am discharged from the Navy pursuant to the President's Transgender Service Member Ban. I have worked toward this promotion my entire career. Once the Interim Guidance expires and the Secretary of Defense implements the President's Transgender Service Member Ban, I will be at immediate risk of losing not only my chance of promotion, but also the whole career I have built for myself in the Navy.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 27 day of October, 2017 in ODENTON, MARYLAND.

  
\_\_\_\_\_  
BROCK STONE