No. 18-56539

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AIDEN STOCKMAN, *et al.*,
Plaintiffs-Appellees,

STATE OF CALIFORNIA,
Intervenor-Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, *et al.*,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

GOVERNMENT'S MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

Pursuant to Federal Rule of Appellate Procedure 8, the government respectfully requests a stay of the district court's nationwide preliminary injunction pending this Court's disposition of the appeal and, if this Court affirms, pending the disposition of a petition for a writ of certiorari and any further proceedings in the Supreme Court. At a minimum, the government respectfully requests that the Court stay the nationwide scope of the injunction for the same period. The preliminary injunction bars the military from implementing a policy that Secretary of Defense James Mattis announced earlier this year after an extensive review of military service by transgender individuals, and even a stay of only the nationwide scope of the injunction—which would prevent the injunction from sweeping beyond the individual plaintiffs in this case—would ensure that the injunction does not cause more harm to the government than is necessary while this appeal is pending. The Supreme Court has previously stayed a nationwide injunction against another military policy to the extent it swept beyond the parties to the case, *see U.S. Dep't of Def. v. Meinhold*, 510 U.S. 939 (1993), and this Court should follow the same course in this appeal.

As set forth below, on November 23, the Solicitor General filed a petition for a writ of certiorari before judgment in the pending appeal. The Solicitor General has determined that, if necessary, the government will file in the Supreme Court a request, as an alternative to certiorari before judgment, for a stay of the district court's preliminary injunction. The government therefore filed a motion to stay the preliminary

injunction in district court on November 28 and requested a decision by December 3 to allow the government to seek similar relief in this Court. Doc.130; *see also See* S. Ct. 23.3. The district court has not ruled on that motion. Accordingly, the government respectfully requests that this Court stay the district court's preliminary injunction, or at a minimum stay the nationwide scope of the injunction. Absent relief from the district court or this Court, the Solicitor General plans to file a stay application in the Supreme Court on December 13, 2018, in order to ensure that the stay can be considered by the Court along with the pending certiorari petition under the Court's distribution schedule.[1]

BACKGROUND

A. Factual Background

This motion incorporates, and does not restate in full, the background on the relevant military policies found in its opening brief in the related *Karnoski* preliminary-injunction appeal. Govt.Br. 4-13, *Karnoski v. Trump*, No. 18-35347 (9th Cir. filed May 29, 2018). Briefly, this appeal involves challenges to government policies concerning military service by transgender individuals. In February 2018, Secretary of Defense James Mattis proposed a new military policy, Add.38, 41, and, in March 2018, the

[1] Government counsel has contacted Amy Quartarolo, counsel for the original plaintiffs, and Sharon O'Grady, counsel for California. Both the original plaintiffs and the State of California oppose the government's request for stay of the preliminary injunction.

President "revoke[d]" his prior 2017 presidential memorandum on this issue, Add.36; *see* Add.86 (earlier 2017 presidential memorandum), to allow the military to adopt the Secretary's policy.

B. Procedural History

1. On September 5, 2017, plaintiffs—current and aspiring service members and an advocacy organization—brought this action, challenging the constitutionality of the earlier 2017 presidential memorandum and seeking a preliminary injunction barring its enforcement. As relevant here, plaintiffs alleged that the 2017 presidential memorandum violates their Fifth Amendment right to equal protection. Doc.1 at 4. The State of California subsequently intervened in this suit as a plaintiff. Doc.60.

Similar suits were filed in the District of Columbia, the Western District of Washington, and the District of Maryland. *See Doe 2 v. Trump*, No. 17-cv-01597 (D.D.C. filed Aug. 9, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash. filed Aug. 28, 2017); *Stone v. Trump*, No. 17-cv-2459 (D. Md. filed Aug. 28, 2017). The suit from the Western District of Washington is now pending before this Court in *Karnoski v. Trump*, No. 18-35347 (9th Cir.), and the Court heard oral argument on October 10, 2018. This Court previously denied a stay pending appeal in *Karnoski*. *See* Order, *Karnoski* (9th Cir. July 18, 2018).

2. In December 2017, the district court issued a nationwide preliminary injunction, requiring the military to maintain and implement the policy that preceded the 2017 presidential memorandum. Add.35. The court construed the President's 2017

tweets and memorandum as reflecting a "ban" on military service by "transgender people." Add.32. The court determined that such "discrimination on the basis of one's transgender status is subject to intermediate scrutiny." Add.33. And in the court's view, the government's justifications for the "ban[]" did not survive such scrutiny. *Id.* The court therefore concluded that respondents were likely to succeed in their equal-protection challenge. *Id.* The other courts in the three other related actions (*Doe*, *Karnoski*, and *Stone*) also entered nationwide preliminary injunctions.

3. In March 2018, the government informed the district court that the President had issued the new memorandum, which revoked his 2017 memorandum (and any other similar directive) and allowed the military to adopt Secretary Mattis's proposed policy. Doc.82, at 4; *see* Doc.80. In light of that new policy, the government moved to dissolve the December 2017 injunction. Doc.82.

In September 2018, the district court denied the government's motion. Add.1-14. The court found "the new policy" to be "essentially the same as the first policy," "continu[ing]" the "ban[]" on "transgender people" in the military that the President had supposedly "announced" in 2017. Add.10. The court reiterated its determination that "intermediate scrutiny" applies to "transgender discrimination." Add.11. And it concluded that the military's justifications for "the transgender ban" were still not "persuasive" enough to survive such scrutiny. Add.13.

The government appealed, and this Court has set a briefing schedule, with the government's opening brief due on December 14, 2018.

4. On November 20, 2018, the government filed a motion to hold the briefing schedule in abeyance pending the related appeal of *Karnoski v. Trump*, No. 18-35347 (9th Cir. oral argument heard Oct. 10, 2018), and any further proceedings before the Supreme Court in that case. As the government explained in that motion, "[r]egardless of the outcome, a decision by this Court in *Karnoski* would be binding circuit precedent that would control this appeal." Govt.Mot.3 (Nov. 20, 2018). This Court has not yet ruled on the motion.

In that motion, the government also informed this Court that in light of the importance of the issues at stake and the military's compelling interest in maintaining an effective national defense, the Solicitor General intends to preserve the opportunity for the Supreme Court to hear and decide these issues during the current Term. On November 23, the Solicitor General filed a petition for a writ of certiorari before judgment in this case, as well as in *Karnoski* and *Doe*. *See Trump v. Karnoski*, No. 18-676 (U.S.); *Trump v. Doe*, No. 18-677 (U.S.); *Trump v. Stockman*, No. 18-678 (U.S.). The government's filing of the petition on November 23 would allow the petition to be distributed on December 26, 2018, for consideration at the Court's January 11, 2019 conference, without a motion for expedition. *See* Govt.Mot.4-5 (Nov. 20, 2018); *see also* Govt. Letter, *Trump v. Stockman*, No. 18-678 (U.S. Nov. 23, 2018). The government also indicated that "[a]n abeyance of the briefing schedule in this case is warranted regardless of whether the Supreme Court ultimately grants the petitions for certiorari." Govt.Mot.5 (Nov. 20, 2018).

The Solicitor General also intends to file, as an alternative to certiorari before judgment, a request for a stay pending resolution of the government's appeal in this Court and any further proceedings in the Supreme Court. The Solicitor General would file the stay applications on December 13 so that the applications may be considered when the certiorari petitions are distributed. Pursuant to Supreme Court Rule 23.3 and Federal Rule of Appellate Procedure 8, the government asked the district court for a stay on November 28, 2018 and requested an expedited ruling by December 3, explaining that it would seek similar relief in this Court by that date. Doc.130. To allow the district court as much time as possible to rule on the motion, the government attempted to file the stay motion on November 21, 2018—less than a week after docketing the notice of appeal in this case. *See* Doc.130 at 2 n.1. On November 21, the government contacted counsel for plaintiffs and provided them with a nearly identical motion filed in the related case of *Doe 2 v. Trump*, No. 17-cv-01597 (D.D.C filed Nov. 21, 2018). Plaintiffs, citing Local Rule 7-3, declined to provide their position on the stay motion until November 27—even though they had previously opposed the government's motion to dissolve the preliminary injunction, as well as a narrowed injunction. *See* Doc. 47, at 39-40; Doc. 98. Had plaintiffs provided their position on November 21, the district court in this case may well have issued a ruling by the time of the filing of this motion, as in *Doe*. *See Doe 2 v. Mattis*, No. 17-1597, 2018 WL 6266119 (D.D.C. Nov. 30, 2018).

The present motion is proper under Federal Rule of Appellate Procedure 8 because the district court has not yet ruled on the government's stay motion (which included a request for expedited relief), and thus has "failed to afford the relief requested." *See* Fed. R. App. P. 8(a)(2)(A)(ii). In any event, awaiting a decision from the district court would be impracticable in light of the Solicitor General's determination that it is necessary to seek relief from the Supreme Court by December 13 to allow the stay application to be considered together with the petition for a writ of certiorari before judgment. *See* Fed. R. App. P. 8(a)(2)(A)(i). As we have explained, the Solicitor General filed the certiorari petition on November 23, and asked that it be distributed by December 26, to provide the Supreme Court with the opportunity to consider this dispute during the current Term without any need for expedition. *See* Govt. Letter, *Trump v. Stockman*, No. 18-678 (U.S. Nov. 23, 2018) (explaining timing considerations). Absent relief from the district court or this Court, the Solicitor General plans to file a stay application in the Supreme Court on December 13, 2018.

ARGUMENT

The government respectfully requests that this Court stay the district court's preliminary injunction pending the resolution of the appeal and any further proceedings in the Supreme Court. At a minimum, the Court should stay the nationwide scope of the injunction pending those proceedings.

The government emphasizes that it requests such a stay separate and apart from whether this Court grants the government's pending November 20, 2018 motion to

hold the briefing schedule in abeyance pending this Court's resolution of *Karnoski* and any further proceedings before the Supreme Court, and, conversely, this Court should consider the government's motion for abeyance even absent a stay of the preliminary injunction.

In considering whether to grant a stay pending appeal, courts consider four factors: (1) the applicant's likelihood of success on the merits; (2) whether the applicant will suffer irreparable injury; (3) the balance of hardships to other parties interested in the proceeding; and (4) the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). This Court reviews a grant of a preliminary injunction for abuse of discretion, but legal conclusions are reviewed de novo. *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (en banc). All of those factors support a stay of the preliminary injunction or, at a minimum, its nationwide scope.

I. The Government Is Likely To Succeed On The Merits Of Its Appeal

A. As explained in the government's opening brief in *Karnoski* (at 20-38), plaintiffs' equal-protection challenge to the Mattis policy lacks merit. Under the Mattis policy, individuals may "not be disqualified from service solely on account of their transgender status." Add.60. Like the prior policy issued by then-Secretary of Defense Ashton Carter, the Mattis policy turns on a medical condition (gender dysphoria) and medical treatment (gender transition)—not any suspect or quasi-suspect classification. Add.48-49. Rational-basis review therefore applies, and the Mattis policy satisfies that deferential review because it reflects, *inter alia*, the military's reasoned and considered

judgment that "making accommodations for gender transition" would "not [be] conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality." Add.82.

B. Even if plaintiffs were likely to succeed on their constitutional claims, the nationwide scope of the preliminary injunction is improper. *See Karnoski*.Govt.Br.54-55; *Karnoski*.Reply.26-27. As the government has explained, extending the injunction beyond the individual plaintiffs transgresses both Article III and longstanding equitable principles by affording relief that is not necessary to redress any cognizable, irreparable injury to plaintiffs. *Id.* Longstanding historical practice confirms that injunctions are limited to what is necessary to remedy a plaintiff's injury. *See Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring) (explaining that nationwide injunctions "are a recent development, emerging for the first time in the 1960s and dramatically increasing in popularity only very recently").

Moreover, nationwide injunctions "take a toll on the federal court system—preventing legal questions from percolating through the federal courts, encouraging forum shopping, and making every case a national emergency for the courts and for the Executive Branch."" *Hawaii*, 138 S. Ct. at 2425 (2018) (Thomas, J., concurring). Nationwide injunctions enable all potential claimants to benefit from nationwide injunctive relief in a single district court, even when plaintiffs have never sought to certify a class, much less shown that they would satisfy the prerequisites of Federal Rule

of Civil Procedure 23. *See Zepeda v. INS*, 753 F.2d 719, 727-29 & n.1 (9th Cir. 1983). This creates an inequitable "one-way-ratchet" under which any prevailing party obtains relief on behalf of all others, while the government must prevail in every forum, every time, to gain the benefits of prevailing in any one case. *City of Chicago v. Sessions*, 888 F.3d 272, 298 (7th Cir. 2018) (Manion, J., concurring in the judgment and dissenting in part).

Here, as in *Karnoski*, there is no basis for affording relief that goes beyond redressing any harm to the individual plaintiffs themselves. *See Karnoski*.Govt.Br.54-55; *Karnoski*.Reply.26-27.[2] Even if plaintiffs had shown any cognizable, irreparable injuries from the application of the Mattis policy to particular individuals, those purported injuries would be fully redressed by an injunction limited to those individuals. Nor does the facial nature of plaintiffs' challenge exempt them from Article III or equitable principles that limit the remedy to addressing plaintiffs' injury. *See Karnoski*.Reply.27.

II. The Balance Of Equities Strongly Supports A Stay Of The Injunction In Its Entirety Or At Least To The Extent It Sweeps Beyond Plaintiffs

The nationwide injunction in this case causes direct, irreparable injury to the interests of the government and the public, which merge here. *See Nken*, 556 U.S. at 435. It does so by forcing the military to maintain a policy that it has determined poses

[2] Even if California had standing to challenge the Mattis policy, it has not identified any individuals beyond some of the individual plaintiffs in this case whose disqualification would even arguably impose an irreparable injury on California. Similarly, the plaintiff organization has identified no members beyond the individual plaintiffs in this case who would suffer an irreparable injury.

"substantial risks" and threatens to "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." Add.39; *cf. Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). Given this severe harm to the federal government—which far outweighs respondents' speculative claims of injury—the Court should stay the injunction in its entirety.

At a minimum, the Court should issue a stay of the nationwide scope of the injunction, thereby barring the implementation of the Mattis policy only as to the individual plaintiffs in this case. That is what the Supreme Court did in *Meinhold*. In that case, a discharged Navy servicemember brought a facial constitutional challenge against the Department's "then-existing policy regarding homosexuals." *Meinhold v. U.S. Dep't of Defense*, 34 F.3d 1469, 1473 (1994). After the district court enjoined the Department from "taking any actions against gay or lesbian servicemembers based on their sexual orientation" nationwide, the Supreme Court stayed that order "to the extent it conferred relief on persons other than [the plaintiff]." *Id.* (citing *Meinhold*, 510 U.S. 939).

This Court should follow the same course here. Indeed, this case and others involving constitutional challenges to the Mattis policy illustrate the distinct harms to

the federal government from nationwide injunctions. The government is currently subject to four different nationwide preliminary injunctions, each threatening to require the government to maintain the Carter accession and retention standards. Even if the government were to prevail before this Court—which has before it two of these injunctions (in *Karnoski v. Trump*, No. 18-35347, and in this case)—the government would still need to proceed with its appeal before the D.C. Circuit, *see Doe 2 v. Trump*, No. 18-5257. And even then, the government would still be subject to a fourth nationwide preliminary injunction, issued by the district court in Maryland. *See Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017). Although the government moved eight months ago to dissolve that injunction in light of the new Mattis policy, *see* Doc.120, *Stone*, No. 17-cv-2459 (D. Md. Mar. 23, 2018), the district court in Maryland has not ruled on the government's pending motion.

Given the injunctions' nationwide scope, the government would have to succeed in vacating all four before it could safely begin implementing the Mattis policy. So long as a single one of those injunctions remains in place, the military will be forced to maintain the Carter policy nationwide—a policy that it has concluded poses a threat to "readiness, good order and discipline, sound leadership, and unit cohesion," which "are essential to military effectiveness and lethality." Add.82; *see* Add.85 (explaining that the "risks" associated with maintaining the Carter policy should not be incurred "given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability" of servicemembers).

Thus, if this Court declines to stay the district court's injunction in its entirety, it should at least stay the nationwide scope of the injunction, thereby barring the implementation of the Mattis policy only as to the individual plaintiffs in this case. Plaintiffs will suffer no injury—let alone irreparable injury—if the nationwide scope of the injunction is stayed pending the resolution of the government's appeal and any further proceedings in the Supreme Court. Accordingly, the balance of equities warrants, at a minimum, such a partial stay.

CONCLUSION

The government respectfully requests that this Court stay the preliminary injunction in its entirety pending the disposition of this appeal, and, if this Court affirms, pending the disposition of a petition for a writ of certiorari and any further proceedings in the Supreme Court. At a minimum, this Court should issue a stay of the nationwide scope of the injunction, thereby barring the implementation of the Mattis policy only as to the individual plaintiffs in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Motion complies with the type-volume limitation of Ninth Circuit Rules 27-1 and 32-3 because it contains 3,251 words. This Motion complies with the typeface and the type style requirements of Federal Rule of Appellate Procedure 27 because this brief has been prepared in a proportionally spaced typeface using Word 14-point Garamond typeface.

s/ Tara S. Morrissey
Tara S. Morrissey

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey

No. 18-56539

IN THE UNITED STATES COURT OF APPEALS
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AIDEN STOCKMAN, *et al.*,
Plaintiffs-Appellees,

STATE OF CALIFORNIA,
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ADDENDUM TO MOTION FOR STAY PENDING APPEAL

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STATEMENTS, GUIDANCE, AND MEMORANDA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-01799 JGB (KKx)**	Date	September18, 2018
Title	***Aiden Stockman, et al. v. Donald J. Trump, et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: Order DENYING Defendants' Motion to Dissolve the Preliminary Injunction (Dkt. No. 82) (IN CHAMBERS)

On March 23, 2018, Defendants Donald J. Trump ("President Trump"), in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security (collectively, "Defendants") filed a Motion to Dissolve the Preliminary Injunction. ("Motion," Dkt. No. 82.) Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California (collectively, "Plaintiffs") filed an opposition on April 25, 2018. ("Opposition," Dkt. No. 98.) Defendants filed a reply on May 7, 2018. ("Reply," Dkt. No. 105). The Court held a hearing on this matter on July 30, 2018. Upon consideration of the papers filed in support of and in opposition to this Motion, as well as the oral arguments presented by the parties, the Court DENIES Defendants' Motion.

I. BACKGROUND

A. Procedural History

On September 5, 2017, Plaintiffs filed a complaint against Defendants, asserting four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process;

(3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression. ("Complaint," Dkt. No. 1 ¶¶ 49–77.) Plaintiffs seek declaratory relief. (Id.) Plaintiffs filed a Motion for Preliminary Injunction on October 2, 2017. ("MPI," Dkt. No. 15.) The Court granted Plaintiffs' MPI on December 22, 2017. ("December Order," Dkt. No. 79.)

B. Factual History

The parties do not dispute the basic facts in this case. In June 2016, after multiple years of data review, the Department of Defense ("DOD") announced it would implement a new policy which allowed transgender people to serve openly in the United States military ("June 2016 Policy"). (See generally Dkt. No. 28, Exh. C.) On July 26, 2017, President Trump changed course, and tweeted:

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

("President Trump's Twitter Proclamation," Dkt. No. 28, Exh. F.)

On August 25, 2017, President Trump issued a memorandum ("2017 Presidential Memorandum") formalizing the policy he announced via Twitter. (Dkt. No. 28, Exh. G.) The 2017 Presidential Memorandum contained several operative prongs: (1) it indefinitely extended the prohibition preventing transgender individuals from entering the military (the "Accession Directive"); (2) it required the military to authorize the discharge of transgender service members (the "Retention Directive"); and (3) it largely halted the use of DOD or Department of Homeland Security ("DHS") resources to fund sex reassignment surgical procedures for current military members ("Sex Reassignment Surgery Directive") (collectively, "Directives"). (Id. at 47.) The DOD was to submit a plan implementing the 2017 Presidential Memorandum by February 2018. (Id.)

On September 14, 2017, Defendant Mattis, the current Secretary of Defense, issued an "Interim Guidance" which established the temporary DOD policy regarding transgender persons. DoD Interim Guidance on Military Service by Transgender Individuals (September 2017), available at https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited September 13, 2018). While the Interim Guidance was in effect, no current transgender service member could be discharged or denied reenlistment solely based on their transgender status. Id.

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1. Military Transgender Policy before July 2017

In August 2014, the DOD removed references to mandatory exclusion based on gender and identity disorders from its physical disability policy. ("Declaration of Eric K. Fanning," Dkt. No. 22 ¶¶ 12–13.) Additionally, the DOD directed each branch of the armed forces to assess whether there remained any justification to prohibit service by openly transgender individuals. (Id. at 13.)

In July 2015, then-Secretary of Defense Ashton B. Carter created a group to begin comprehensively analyzing whether any justification remained which validated the ban on open service by transgender individuals. ("Declaration of Brad Carson," Dkt. No. 26 ¶¶ 8–9.) The working group created by Secretary Carter included the Armed Services, the Joint Chiefs of Staff, the service secretaries, and other specialists from throughout the DOD (the "Working Group"). (Id. ¶ 9.) As part of the review process, the Working Group analyzed evidence from a variety of sources, including scholarly materials and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders of units with transgender service members. (Id. ¶ 10.)

In addition, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides analysis to the military, to complete a comprehensive study on the impact of permitting transgender individuals to serve openly. (Id. ¶ 11.) The 113-page study, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Report," Dkt. No. 26, Exh. B), examined factors such as the health care costs and readiness implications of allowing open service by transgender persons. The RAND Report also analyzed the other 18 foreign militaries which permit military service by transgender individuals, focusing on Australia, Canada, Israel, and the United Kingdom—the four countries "with the most well-developed and publicly available policies on transgender military personnel." (RAND Report at 23.) This comparative analysis found no evidence that allowing open service by transgender persons would negatively affect operational effectiveness, readiness, or unit cohesion. (Id. at 24.) Moreover, the RAND Report concluded healthcare costs for transgender service members would "have little impact on and represents an exceedingly small proportion of [the DOD's] overall health care expenditures." (Id. at 22–23.) Specifically, the RAND Report found health care costs would increase "by between $2.4 million and $8.4 million annually." (Id. at 22.) By contrast, the overall healthcare cost of those serving in the active component of the military is approximately $6 billion annually, while the overall healthcare cost for the DOD is $49.3 billion annually. (Id. at 22–23.) Furthermore, the RAND Report noted discharging transgender service members, "[a]s was the case in enforcing the policy on homosexual conduct, [] can involve costly administrative processes and result in the discharge of personnel with valuable skills who are otherwise qualified." (Id. at 77.) At the conclusion of its analysis, the Working Group "did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested . . . that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion." (Declaration of Eric K. Fanning ¶ 27.)

Based on the results of this review process, on June 30, 2016, Secretary Carter issued a Directive-type Memorandum announcing transgender Americans may serve openly and without fear of being discharged based solely on that status. ("DTM 16-005," Dkt. No. 22, Exh. C.) Secretary Carter stated:

> These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention, is consistent with military readiness and with strength through diversity.

(Id. at 135.)

Some of the highest ranking military officials in the country concurred with this assessment. (See generally Declaration of Eric K. Fanning; "Declaration of Michael Mullen," Dkt. No. 21; "Declaration of Raymond E. Mabus," Dkt. No. 23; "Declaration of Deborah L. James," Dkt. No. 24.) According to the directive, transgender individuals would be permitted to enlist in the military and serve openly beginning on July 1, 2017. (DTM 16-005, at 137.) This date was later postponed to January 1, 2018. (See Dkt. No. 28, Exh. E.) The DOD also issued handbooks, regulations, and memoranda which instructed military commanders how to implement the new policies, set forth guidance related to medical treatment provisions, and expressly prohibited discrimination on the basis of gender identity. (See "Transgender Service in the U.S. Military," Dkt. No. 22, Exh. 6.)

The former military leaders among the Working Group, such as former Secretary of the Army Eric K. Fanning, former Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, former Secretary of the Navy Raymond E. Maubus, and former Secretary of the Air Force Deborah L. James, have all explicitly drawn parallels between allowing open service by transgender persons and permitting open service by gay and lesbian persons. (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.) These leaders contend that many of the same concerns relating to open transgender service were vocalized, and eventually allayed, in the context of ending "Don't Ask Don't Tell." (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Admiral Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.)

2. Military Transgender Policy after July 2017

On July 26, 2017, President Trump changed course, announcing via Twitter that transgender individuals would not be permitted to serve in the military. (President Trump's Twitter Proclamation.) One month later, his 2017 Presidential Memorandum promulgated the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive. (2017 Presidential Memorandum.) President Trump claimed the Obama Administration had "dismantled the [DOD and DHS's] established framework by permitting transgender individuals

to serve openly in the military." (Id.) Additionally, he stated the Obama Administration failed to identify a sufficient basis to conclude ending the longstanding policy against open transgender service "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." (Id.)

The military reception to President Trump's policy change was somewhat critical. Current Chairman of the Joint Chiefs of Staff Joseph Dunford disagreed with the decision to reinstate the transgender ban, stating he "believe[s] that any individual who meets the physical and mental standards . . . should be afforded the opportunity to continue to serve." (Dkt. No. 28, Exh. I.) He also previously told lawmakers transgender troops have served the military honorably, and he would continue to abide by this sentiment for as long as he holds his position. (Id.) Additionally, it is not clear whether the nation's top military leaders were consulted about this policy change prior to President Trump's Twitter Proclamation. (See Dkt. No. 28, Exh. M.) Moreover, after the promulgation of President Trump's tweets, 56 retired generals and admirals signed a declaration stating a ban on open service by transgender persons would degrade military readiness. (Dkt. No. 28, Exh. O.)

The Accession Directive would have extended the policy prohibiting open accession into the military beyond January 1, 2018. The Retention and Sex Assignment Surgery Directives were to take effect on March 23, 2018. (Id.) However, a series of judicial orders, including the Court's December Order, preliminarily enjoined the government from enacting these policies. See Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017); Stone v. Trump, 280 F. Supp. 3d 753 (D. Md. 2017); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017). To date, these injunctions remain in place.

3. The Mattis Memorandum

On February 22, 2018, Defendant Mattis promulgated a memorandum which recommended that President Trump revoke his prior 2017 Presidential Memorandum in order for the military to implement a new policy. ("Mattis Memorandum," Dkt. No. 83-1.) Defendant Mattis states he "created a Panel of Experts [("the Panel")] comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider [the issue of transgender military service] and develop policy proposals based on data, as well as their professional military judgment . . . ." (Id. at 1.) The Panel "met with . . . transgender Service members" and "reviewed available information on gender dysphoria . . . and the effects of gender dysphoria on military effectiveness, unit cohesion, and resources." (Id. at 1–2.) Based on the work of the Panel, the DOD concluded there are "substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria, and require, or have already undertaken, a course of treatment to change their gender." (Id. at 2.) Additionally, exempting those individuals could "undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality." (Id.) The Mattis Memorandum also criticized the RAND Report, noting it "contained significant shortcomings," "referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and

erroneously relied on the selective experiences of foreign militaries . . . ." (Id.) Defendant Mattis concluded the DOD should adopt the following policies:

> Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and received medically necessary treatment for gender dysphoria.
>
> Transgender persons who require or have undergone gender transition are disqualified from military service.
>
> Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

(Id. at 2–3.) Defendant Mattis also sent President Trump a report which detailed why, in the opinion of the DOD, this new policy would be necessary to further the interests of the military. ("DOD Report," Dkt. No. 83-2.) President Trump issued a new memorandum on March 23, 2018, which revoked the 2017 Presidential Memorandum and allowed the DOD to implement its preferred policy. ("2018 Presidential Memorandum," Dkt. No. 83-3.) Given these developments, Defendants ask the Court to dissolve the preliminary injunction issued in the Court's December Order. (Motion at 2.)

4. Karnoski v. Trump

On April 13, 2018, the Honorable Marsha J. Pechman issued an order which partially granted plaintiffs' motion for summary judgment in a similar case. Karnoski v. Trump, No. C17-1297-MJP, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018). In Karnoski, the defendants made several of the same arguments advanced here, such as mootness, standing, and level of deference to the DOD Report. Id. Judge Pechman held that discrimination against transgender persons should be subject to strict scrutiny. Id. at *10–11. However, the court declined to determine the level of deference due to the DOD Report. Id. at 11–13. Additionally, the court held that the preliminary injunction already issued should remain in effect, and struck the defendants' motion to dissolve the preliminary injunction. Id. at *14. The defendants appealed this decision, and that appeal is currently pending before the Ninth Circuit. The Ninth Circuit recently ruled that the preliminary injunction should remain in place during the pendency of the appeal in order to preserve the status quo. (Karnoski, et al. v. Trump, et al., No. 18-35347, Dkt. No. 90.) Thus, under the current legal landscape, the Ninth Circuit has begun the process of reviewing the Karnoski decision, including the order upholding the preliminary injunction and striking

defendants' motion to dissolve, and has maintained the preliminary injunction while Karnoski is under review.

II. LEGAL STANDARD

The basic function of a preliminary injunction is to preserve the relative positions of the parties until a trial on the merits. Univ. of Texas v. Camenisch, 451 U.S. 390, 392 (1981). To obtain a preliminary injunction, a party must either show (1) a combination of probable success and the possibility of irreparable harm, or (2) the balance of hardship tips in its favor and the party has raised serious questions. Arcamuzi v. Continental Air Lines, Inc., 819 F.2d 935, 937 (9th Cir. 1987); see also Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (holding that, to obtain a preliminary injunction, a movant must show: (1) likelihood of success on the merits; (2) irreparable harm; (3) balance of equities tips in his favor; and (4) an injunction is in the public interest). A district court has discretion to dissolve or to modify a preliminary injunction if factual or legal circumstances have changed since the issuance of the injunction. See Mariscal-Sandoval v. Ashcroft, 370 F.3d 851, 859 (9th Cir. 2004). "A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000).

III. DISCUSSION

A. Mootness

Defendants contend Plaintiffs' challenge is now moot because any dispute over the new policy "presents a substantially different controversy" than Plaintiffs' challenge to the 2017 Presidential Memorandum. (Motion at 8.) Defendants state the appropriate question is whether the "challenged conduct continues" or whether the policy "has been sufficiently altered as to present a substantially different controversy from the one [previously] decided." (Id. (quoting Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 508 U.S. 656, 662 n.3 (1993)).) Defendants argue Plaintiffs' original challenge was premised on the assumption that President Trump had ordered a categorical ban excluding transgender individuals for reasons not supported by prevalent military judgment. (Motion at 8.) The new policy, Defendants argue, contains several exceptions which would allow "some" transgender individuals to serve and is the product of "independent military judgment following extensive study." (Id.) Defendants maintain this new policy turns "on the basis of a medical condition and its associated treatment," and does not implement the 2017 Presidential Memorandum. (Reply at 2.) These arguments fail.

The enactment of a new policy does not moot a challenge to a previous one where, as here, the new one differs little from the first. In City of Jacksonville, the city enacted an ordinance which required it to set aside a certain percentage of its money each year for "Minority Business Enterprises" ("MBE's"). 508 U.S. at 658. The plaintiff challenged this policy, and a district court entered a preliminary injunction against the city. Id. at 659. The city later repealed

its MBE ordinance and replaced it with a new ordinance which had three principal differences: (1) it now applied just to women and black people, not to women and other minority groups; (2) the percentage of money set aside for these businesses became a percentage range rather than a set percentage figure; and (3) there were now five alternative methods for achieving the city's participation goals. Id. at 661. In its discussion on mootness, the Supreme Court noted:

> There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so. *Nor does it matter that the new ordinance differs in certain respects from the old one*. City of Mesquite [,455 U.S. 283 (1982),] does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular, insofar as its "Sheltered Market Plan" is a "set aside" by another name—*it disadvantages them in the same fundamental way*.

Id. at 669 (emphasis added). Here, President Trump stated the essence of the first policy in his Twitter proclamation: transgender people will no longer be able to serve in the U.S. military. (President Trump's Twitter Proclamation.) In keeping with that proclamation, the first policy banned the accession and retention of transgender individuals. (2017 Presidential Memorandum). The policies described in the 2017 Presidential Memorandum and the 2018 Presidential Memorandum are fundamentally the same. Indeed, President Trump specifically announced this review process along with the first policy. (2017 Presidential Memorandum). This new policy specifically bans transgender individuals from serving in the military in a manner consistent with their gender identity. (Mattis Memorandum.) It excludes anyone who requires or has undergone gender transition, and requires proof that a person has been stable in their birth sex for the last thirty-six months. (Id.) In sum, it disadvantages transgender service members "in the same fundamental way." City of Johnsonville, 508 U.S. at 669.

Defendants contend this policy has exceptions which will allow some transgender individuals to serve in the military (Motion at 5–6), yet these very exceptions expose the policy as being substantially the same as the first. To start, all transgender individuals "who require or have undergone gender transition are disqualified from military service." (Mattis Memorandum at 2–3.) Yet, transgender individuals "without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex." (Mattis Memorandum at 2–3.) Additionally, people *with* gender dysphoria who do not require or have not undergone gender transition are exempted from the policy as long as they are "willing and able to adhere to all standards associated with their biological sex." (Id.) Taken together, it is clear that a diagnosis of gender dysphoria is neither necessary nor sufficient to be excluded from the military under this new policy. What is both necessary and sufficient to be excluded, irrespective of a diagnosis of gender dysphoria, is a person serving consistent with their

transgender identity. In short, the policy aims to eliminate a person's *trans*ness, and nothing else. See Karnoski, 2018 WL 1784464, at *12 ("Requiring transgender people to serve in their biological sex does not constitute open service in any meaningful way, and cannot reasonably be considered an exception to the Ban. Rather, it would force transgender service members to suppress the very characteristics that defines them as transgender in the first place.") (internal quotation marks omitted); see also Christian Legal Soc'y v. Martinez, 561 U.S. 661, 689 (2010) (rejecting purported distinction between targeting same-sex intimate conduct and discriminating against gay people).

For the purpose of mootness, the controversy presented by the new policy is substantively the same as the controversy presented by the old policy. Transgender individuals will be disadvantaged "in the same fundamental way." City of Jacksonville, 508 U.S. at 669. Defendants have appropriately informed the Court that it must decide whether the challenged conduct continues. (Motion at 8.) It clearly does.

B. Constitutional Review

1. Military Deference and Rational Basis Review

Defendants argue this new policy triggers rational basis review because it "draws lines on the basis of a medical condition (gender dysphoria) and an associated treatment (gender transition), not on transgender status." (Motion at 10.) This characterization, however, does not match reality. As noted above, a diagnosis of gender dysphoria is neither necessary nor sufficient for a person to be excluded from the military under this new policy. Yet the discussion does not end here, as Defendants also argue they are entitled to deference becasue the new policy is a military decision. (Id. (citing, e.g., Rostker v. Goldberg, 453 U.S. 57, 67 (1981) ("Congress is [not] free to disregard the Constitution when it acts in the area of military affairs . . . but the tests and limitations to be applied may differ because of the military context"); Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society.")).) This deferential review is most appropriate when the military acts with measure, and not "unthinkingly or reflexively." Rostker, 453 U.S. at 72.

In the Court's December Order, it noted "the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban." (December Order at 18.) Following the promulgation of this Order, Defendants conducted their own study and have submitted their own report. (DOD Report; Mattis Memorandum.) The DOD has concluded that "accommodating gender transition would create unacceptable risks to military readiness; undermine good order, discipline, and unit cohesion; and create disproportionate costs." (Motion at 15 (citing Mattis Memorandum at 2).) However, there are several reasons why the DOD Report and the new policy are not entitled to military deference.

First, the new policy and DOD Report represent after-the-fact justifications for the military ban on transgender service members. The relevant timeline is as follows: On July 26, 2017, President Trump announced that "*After consultation with my Generals and military experts*, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military." (President Trump's Twitter Proclamation (emphasis added).) With this statement, President Trump made two things clear: (1) he had already consulted the relevant military experts who presumably provided information on how to proceed; and (2) the decision had been made to ban transgender individuals from serving in the military. The Interim Guidance and 2017 Presidential Memorandum formalized the policy announced in the initial proclamation. Following a series of defeats in the courts, including specific rebukes for not having an adequate military record to justify the ban, the DOD now, in 2018, has conducted a study which attempts to rationalize a decision made on July 26, 2017—a decision which, purportedly, already followed such a consultation with military experts.

As noted above, the new policy is essentially the same as the first policy, which distinguishes this case from Trump v. Hawaii, 138 S. Ct. 2392 (June 26, 2018). There, the Supreme Court upheld President Trump's authority to restrict entry of nationals from seven countries "whose systems for managing and sharing information about their nationals the President deemed inadequate." Id. at 2404. The immigration policy at issue underwent two substantive revisions before being squarely presented to the Supreme Court. Id. at 2403–04. In that case, there were serious allegations of religious animus levied at President Trump due to pronouncements, on multiple occasions, that he sought to implement a "Muslim ban." Id. at 2435–38 (Sotomayor, J. dissenting) (noting that President Trump, as a candidate, was "calling for a total and complete shutdown of Muslims entering the United States," which progressed to a characterization of his policy as "a suspension of immigration from countries where there's a proven history of terrorism") (internal quotation marks omitted) . Notably, the final immigration policy before the Supreme Court did not concern a total Muslim ban as originally called for by then-Candidate Trump. Instead, the policy before the Supreme Court concerned seven specific countries, only five of which contained Muslim-majority populations. Id. at 2421. This, then, would cover only 8% of the world's Muslim population. Id. Additionally, three Muslim-majority countries were specifically removed from an earlier iteration of this immigration policy. Id. at 2422.

This case is distinguishable from Hawaii. Here, Trump specifically announced that he was banning transgender people from the military. This second iteration of the policy continues to do exactly that. The evolving limiting principles present in the Hawaii immigration policy revisions are absent here. Additionally, then-Candidate Trump specifically called for a Muslim ban at some point in the future. Here, President Trump announced the United States Government will not accept or allow transgender individuals, a decision which had followed military consultation. This language directly implies the necessary study has already concluded. For these reasons, Hawaii is inapposite to the present discussion.

Perhaps conceding the DOD Report represents an after-the-fact justification for the original transgender ban, Defendants argue Schlesinger v. Ballard, 419 U.S. 498 (1975), offers an

example of when the Supreme Court accepted such a justification. (Motion at 11.) There, the Court upheld a statutory scheme under which male naval officers who failed to be promoted were subject to a shorter mandatory discharge schedule than female officers under the same circumstances. Schlesinger, 419 U.S. at 499–505. In discussing the rationale behind this difference in treatment, the Supreme Court noted that "Congress may thus quite rationally have believed that women line officers had less opportunity for promotion than did their male counterparts . . . ." Id. at 577. Defendants note that the dissent criticized the majority for "conjur[ing] up a legislative purpose." Id. at 500 (Brennan, J. dissenting). Plaintiffs contend the Supreme Court looked to whether a sufficient justification for the law existed at the time of its enactment. (Opposition at 12.) Upon review of this case, it is unclear whether the language Defendants quote represents an acceptance of an after-the-fact justification. However, language in other Supreme Court cases is not so ambiguous. See United States v. Virginia, 518 U.S. 515, 531 (1996) (noting that the government must proffer a justification which is "exceedingly persuasive," "genuine," "not hypothesized," not "invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations"); Sessions v. Morales-Santana, 137 S. Ct. 1678, 1696 (2017) ("It will not do to hypothesize or invent governmental purposes for gender classifications *post hoc* in response to litigation.") (internal quotations omitted).

For these reasons, the Court finds Defendants are not entitled to rational-basis review pursuant to the doctrine of military deference. Although Karnoski explicitly found that transgender discrimination should be subject to strict scrutiny, this Court has already found that intermediate scrutiny is appropriate. (December Order at 19 (citing Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("both [the Gender Motivated Violence Act and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for the purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." Additionally, sex-based discrimination can include discrimination based on someone failing "to conform to socially-constructed gender expectations."); Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Olive v. Harrington, No. 115CV01276BAMPC, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016)).)

2. Intermediate Scrutiny

"A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants revision or dissolution of the injunction." Sharp v. Weston, 233 F.3d 1166, 1170 (9th Cir. 2000). Under intermediate scrutiny, Defendants must proffer a justification for this new policy which is substantially related to an exceedingly persuasive justification. Virginia, 518 U.S. at 533. Defendants state the transgender ban advances three separate interests: (1) promoting military readiness based on deployability; (2) promoting unit cohesion based on concerns about maintaining sex-based standards; and (3) lowering costs. (Motion at 14–23.) The Court previously considered and rejected Defendants' third argument. (December Order at 19 ("[Defendants'] reliance on cost is unavailing, as precedent shows the ease of cost and administration cannot not survive intermediate scrutiny even if it is significant. Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973)").) Accordingly, the Court will focus on Defendants' first two arguments.

i. Military Readiness

Notably, Defendants continue to assert the operative question is whether a person suffers from gender dysphoria. (Motion at 15.) However, as discussed above, this focus misses the mark, as a diagnosis of gender dysphoria is neither necessary nor sufficient to be excluded from the military under this policy. Consequently, the Court is not persuaded by Defendants' fears of increased mental instability for those who suffer from gender dysphoria. (Id. at 14–16.) People with gender dysphoria are explicitly exempted from this new policy as long as they do not present as transgender. (Mattis Memorandum at 2–3.) Likewise, Defendants' concern that those who undergo gender transition surgery could negatively affect deployability is not substantially related to the actual effect of this policy. Defendants state the majority of current transgender service member treatment plans include a request for gender transition surgery. (Motion at 22–23.) However, the Mattis Memorandum bans all individuals who present as transgender from the military, not only those who have undergone gender transition surgery. (Mattis Memorandum at 2–3.) The decision to ban the accession of people who have undergone gender transition surgery is thus one part of the whole policy, and the purported rationalization for this decision, though contested by Plaintiffs, cannot be used to justify the whole policy even if assumed to be valid. In sum, the concerns voiced by Defendants are not substantially related to the effect of the policy, nor are these concerns exceedingly persuasive.

ii. Unit Cohesion

Defendants first argue that any transgender service member accommodation policy which "does not require full sex-reassignment surgery could 'erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline.'" (Motion at 18 (quoting DOD Report at 37).) Defendants premise their argument by stating the only feasible way for transgender service members to serve in the military would involve requiring them to submit to sex reassignment surgery. (Id. at 18–19.) Defendants then state that allowing service members "who have developed . . . the anatomy of their identified gender to use the facilities of either their identified gender or biological sex would invade the expectations of privacy of the non-transgender service members who share those quarters." (Id. at 19 (citing DOD Report at 37) (internal quotations omitted).) Thus, Defendants argue the military faces two choices: create separate facilities for transgender service members, which is deemed "logistically impracticable," or be presented with "irreconcilable privacy demands." (Id. (citing DOD Report at 37).) Additionally, Defendants cite to a specific instance where a commanding officer faced dueling equal opportunity complaints—one from a transgender woman with male sex organs who wanted to use the female shower facilities, and one from the other female service members in the unit. (Id.)

In response, Plaintiffs cite to a litany of non-binding cases to support their contention that Courts across the country have held that allowing transgender individuals to live in accord with their identity does not threaten the privacy or safety interests of others. (Opposition at 7 (citing, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034,

1046–47 (7th Cir. 2017); M.A.B. v. Bd. of Educ. of Talbot Cty., 286 F. Supp. 3d 704, 724–26 (D. Md. 2018)).) Defendants note that none of Plaintiffs' cited cases concern the military context. (Reply at 10.)

The military has often used concerns regarding unit cohesion to contest permitting open service by individuals in minority groups. In Log Cabin Republicans v. U.S., the court ruled that that the military's "don't ask, don't tell" policy ("DADT"), which banned open service by gay persons, violated the First Amendment of the Constitution. 716 F. Supp. 2d 884 (C.D. Cal. 2010).[1] The court made this determination despite the government's argument that DADT "is necessary to protect unit cohesion and heterosexual service members' privacy." Id. at 920. In finding DADT "is not necessary to protect the privacy of service [] members," id. at 923, the court relied upon testimony given by various officers in the military who attested there was no nexus between DADT and a loss of unit cohesion. Id. at 921–22; see also Witt v. U.S. Dep't of Air Force, 739 F. Supp. 2d 1308, 1315 (W.D. Wash. 2010) (finding that open gay service would not affect unit cohesion, and noting that the "men and women of the United States military have over the years demonstrated the ability to accept diverse peoples into their ranks and to treat them with the respect necessary to accomplish the mission, whatever that mission might be. That ability has persistently allowed the armed forces of the United States to be the most professional, dedicated and effective military in the world."). Notably, these concerns were also present in "past efforts to stop the integration of blacks and women into the armed forces; efforts bolstered by arguments that history and common sense proved wrong." Witt v. U.S. Dep't of Air Force, 444 F. Supp. 2d 1138, 1143 (W.D. Wash. 2006), aff'd in part, rev'd in part sub nom. Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008); see also Dahl v. Sec'y U.S. Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) (citing a DOD report as stating "Most of the issues raised regarding the effect that admitting declared homosexuals would have on unit cohesion . . . are also reminiscent of the arguments advanced against the 1948 order to desegregate military establishments, and later the arguments that sought to minimize the role of women Armed Forces. Those who resist changing the traditional policies support their position with statements of the negative effects on discipline, morale, and other abstract values of military life.").

In the history of military service in this country, "the loss of unit cohesion" has been consistently weaponized against open service by a new minority group. Yet, at every turn, this assertion has been overcome by the military's steadfast ability to integrate these individuals into effective members of our armed forces. As with blacks, women, and gays, so now with transgender persons. The military has repeatedly proven its capacity to adapt and grow stronger specifically by the inclusion of these individuals. Therefore, the government cannot use "the loss of unit cohesion" as an excuse to prevent an otherwise qualified class of discrete and insular minorities from joining the armed forces. The Court finds this justification of the transgender ban is not exceedingly persuasive and cannot survive intermediate scrutiny.

[1] A subsequent opinion vacated this decision on the grounds that the original case had become moot due to Congress voluntarily enacting the Don't Ask, Don't Tell Repeal Act of 2010. Log Cabin Republicans v. U.S., 658 F.3d 1162 (9th Cir. 2011).

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendants' Motion to Dissolve the Preliminary Injunction.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 17-1799 JGB (KKx)**	Date	December 22, 2017
Title	***Aiden Stockman et al. v. Donald J. Trump et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

MAYNOR GALVEZ	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) DENYING Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure (Dkt. No. 36); and (2) GRANTING Plaintiffs' Motion for Preliminary Injunction (Dkt. No. 15)**

Two motions are before the Court. First, Plaintiffs Aiden Stockman, Nicolas Talbott, Tamasyn Reeves, Jaquice Tate, John Doe 1, John Doe 2, Jane Doe, and Equality California (collectively, "Plaintiffs") have filed a Motion for Preliminary Injunction. ("MPI," Dkt. No. 15.) Second, Defendants Donald J. Trump ("President Trump"), in his official capacity as President of the United States; James N. Mattis, in his official capacity as Secretary of Defense; Joseph F. Dunford, Jr., in his official capacity as Chairman of the Joint Chiefs of Staff; Richard V. Spencer, in his official capacity as Secretary of the Navy; Ryan D. McCarthy, in his official capacity as Acting Secretary of the Army; Heather A. Wilson, in her official capacity as Secretary of the Air Force; and Elaine C. Duke, in her official capacity as Acting Secretary of Homeland Security (collectively, "Defendants,") have filed a Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. ("MTD," Dkt. No. 36.)

The Court held a hearing on these matters on December 11, 2017. After considering the issues raised in oral argument, the papers filed supporting and opposing these motions, and the amici briefs, the Court DENIES Defendants' Motion to Dismiss. Additionally, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction.

I. BACKGROUND

A. Procedural History

On September 5, 2017, Plaintiffs filed a complaint against Defendants, asserting four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process; (3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression. ("Complaint," Dkt. No. 1 ¶¶ 49–77.) Plaintiffs seek declaratory relief.

Plaintiffs filed their MPI on October 2, 2017. (Dkt. No. 15.) Defendants filed their MTD and Opposition to Plaintiffs' MPI on October 23, 2017. (Dkt. No. 36.) Plaintiffs filed a Reply for their Motion to Preliminary Injunction and an Opposition to Defendants' Motion to Dismiss on November 6, 2017. ("MPI Reply," Dkt. No. 47.) Defendants filed their MTD reply on November 13, 2017. ("MTD Reply," Dkt. No. 61.)

B. Factual History

The parties do not dispute the basic facts in this case. In June 2016, after multiple years of data review, the Department of Defense ("DOD") announced it would implement a new policy allowing transgender people to serve openly in the United States military ("June 2016 Policy"). (See generally Dkt. No. 28, Exh. C.) In reliance on this policy change, many transgender individuals came out to their chain of command without incident. On July 26, 2017, President Trump changed course, tweeting:

> After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

("President Trump's Twitter Proclamation," Dkt. No. 28, Exh. F.)

On August 25, 2017, President Trump issued a memorandum ("Presidential Memorandum") formalizing the policy he announced via Twitter. (Dkt. No. 28, Exh. G.) The Presidential Memorandum contains several operative prongs: (1) it indefinitely extends the prohibition preventing transgender individuals from entering the military (the "Accession Directive"); (2) it requires the military to authorize the discharge of transgender service members (the "Retention Directive"); and (3) it largely halts the use of DOD or Department of Homeland Security ("DHS") resources to fund sex reassignment surgical procedures for current military members ("Sex Reassignment Surgery Directive") (collectively, "Directives"). (Id. at 47.) The DOD must submit a plan implementing the Presidential Memorandum by February 2018. (Id.)

On September 14, 2017, Defendant Secretary of Defense James Mattis ("Defendant Mattis") issued an "Interim Guidance"[1] which established the temporary DOD policy regarding transgender persons. (MTD at 7). While the Interim Guidance is in effect, no current transgender service member will be discharged or denied reenlistment solely based on their transgender status. Id. Defendant Mattis must present a plan to implement the Presidential Memorandum to President Trump by February 21, 2018. (Id.)

1. Military Transgender Policy before July 2017

In August 2014, the DOD removed references to mandatory exclusion based on gender and identity disorders from its physical disability policy. ("Declaration of Eric K. Fanning," Dkt. No. 22 ¶¶ 12–13.) Additionally, the DOD directed each branch of the armed forces to assess whether there remained any justification to prohibit service by openly transgender individuals. (Id. at 13.)

In July 2015, then-Secretary of Defense Ashton B. Carter created a group to begin comprehensively analyzing whether any justification remained validating the ban on open service by transgender individuals. ("Declaration of Brad Carson," Dkt. No. 26 ¶¶ 8–9.) The working group created by Secretary Carter included the Armed Services, the Joint Chiefs of Staff, the service secretaries, and other specialists from throughout the DOD (the "Working Group"). (Id. ¶ 9.) The review process included analyzing evidence from a variety of sources, such as scholarly materials and consultations with medical experts, personnel experts, readiness experts, health insurance companies, civilian employers, and commanders of units with transgender service members. (Id. ¶ 10.)

Additionally, the Working Group commissioned the RAND Corporation, a nonprofit research institution that provides analysis to the military, to complete a comprehensive study on the impact of permitting transgender individuals to serve openly. (Id. ¶ 11.) The 113-page study, "Assessing the Implications of Allowing Transgender Personnel to Serve Openly" (the "RAND Report," Dkt. No. 26, Exh. B), examined factors such as the health care costs and readiness implications of allowing open service by transgender persons. The RAND Report also analyzed the other 18 foreign militaries which permit military service by transgender individuals, focusing on Australia, Canada, Israel, and the United Kingdom—the four countries "with the most well-developed and publicly available policies on transgender military personnel." (RAND Report at 23.) This comparative analysis found no evidence that allowing open service by transgender persons would negatively affect operational effectiveness, readiness, or unit cohesion. (Id. at 24.) Moreover, the RAND Report concluded healthcare costs for transgender service members would "have little impact on and represents an exceedingly small proportion of [the DOD's] overall health care expenditures." (Id. at 22–23.) Specifically, the RAND Report found health care costs would increase "by between $2.4 million and $8.4 million annually." (Id. at 22.) By

[1] Neither party has included a copy of the Interim Guidance as an exhibit, but a copy may be found at https://defense.gov/Portals/1/Documents/PDFs/Military-Service-By-Transgender-Individuals-Interim-Guidance.pdf (last visited December 8, 2017).

contrast, the overall healthcare cost of those serving in the active component of the military is approximately $6 billion annually, while the overall healthcare cost for the DOD is $49.3 billion annually. (Id. at 22–23.) Furthermore, the RAND Report noted discharging transgender service members, "[a]s was the case in enforcing the policy on homosexual conduct, [] can involve costly administrative processes and result in the discharge of personnel with valuable skills who are otherwise qualified." (Id. at 77.) At the conclusion of its analysis, the Working Group "did not identify any basis for a blanket prohibition on open military service of transgender people. Likewise, no one suggested . . . that a bar on military service by transgender persons was necessary for any reason, including readiness or unit cohesion." (Declaration of Eric K. Fanning ¶ 27.)

Based on the results of this review process, on June 30, 2016, Secretary Carter issued a Directive-type Memorandum announcing transgender Americans may serve openly and without fear of being discharged based solely on that status. ("DTM 16-005," Dkt. No. 22, Exh. C.) Secretary Carter stated:

> These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability and retention, is consistent with military readiness and with strength through diversity.

(Id. at 135.)

This assessment was shared by some of the highest ranking military officials in the country. (See generally Declaration of Eric K. Fanning; "Declaration of Michael Mullen," Dkt. No. 21; "Declaration of Raymond E. Mabus," Dkt. No. 23; "Declaration of Deborah L. James," Dkt. No. 24.) According to the directive, transgender individuals would be permitted to enlist in the military and serve openly beginning on July 1, 2017. (DTM 16-005, at 137.) This date was later postponed until January 1, 2018. (See Dkt. No. 28, Exh. E.) The DOD also issued handbooks, regulations, and memorandums which provided instruction to military commanders in how to implement the new policies, set forth guidance related to medical treatment provisions, and expressly prohibited discrimination on the basis of gender identity. (See "Transgender Service in the U.S. Military," Dkt. No. 22, Exh. 6.)

The former military leaders among the Working Group, such as, former Secretary of the Army Eric K. Fanning, former Chairman of the Joint Chiefs of Staff Admiral Michael Mullen, former Secretary of the Navy Raymond E. Maubus, and former Secretary of the Air Force Deborah L. James, have all explicitly drawn parallels connecting the allowance of open service by transgender persons to the allowance of open service by gay and lesbian persons. (See Declaration of Eric K. Fanning ¶¶ 10–16; Declaration of Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.) These leaders contend many of the same worries accompanying allowing open transgender service were vocalized, and eventually allayed, in the context of ending "Don't Ask Don't Tell." (See Declaration of Eric K.

Fanning ¶¶ 10–16; Declaration of Admiral Michael Mullen ¶¶ 9–15; Declaration of Raymond E. Mabus ¶¶ 19, 24; Declaration of Deborah L. James ¶ 44.)

2. Military Transgender Policy after July 2017

On July 26, 2017, President Trump changed course, announcing via Twitter that transgender individuals would not be permitted to serve in the military. (President Trump's Twitter Proclamation.) One month later, his Presidential Memorandum promulgated the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive. (Presidential Memorandum.) President Trump stated the Obama Administration had "dismantled the [DOD and DHS's] established framework by permitting transgender individuals to serve openly in the military." (Id.) Additionally, he stated the Obama Administration failed to identify a sufficient basis to conclude ending the longstanding policy against open transgender service "would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." (Id.) The Accession Directive extends the policy prohibiting open accession into the military beyond January 1, 2018. The Retention and Sex Assignment Directives take effect on March 23, 2018. (Id.)

On September 14, 2017, Defendant Mattis issued the Interim Guidance, which stated the accession prohibition "remain[s] in effect because current or history of gender dysphoria or gender transition does not meet medical standards." (Interim Guidance.) The Interim Guidance notes this general prohibition is still "subject to the normal waiver process." (Id.) By February 21, 2018, Defendant Mattis must submit to President Trump "a plan to implement the policy and directives in the Presidential Memorandum." (Id.)

Regarding the Sex Assignment Directive, the Interim Guidance provides "[s]ervice members who receive a gender dysphoria diagnosis from a military medical provider will be provided treatment for the diagnosed medical condition." (Id.) However, "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except 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 language essentially mirrors that of the Presidential Memorandum. (Presidential Memorandum.)

The reception to President Trump's policy change by the military has been somewhat critical. Current Chairman of the Joint Chiefs of Staff Joseph Dunford disagrees with the decision to reinstate the transgender ban, stating he "believe[s] that any individual who meets the physical and mental standards . . . should be afforded the opportunity to continue to serve." (Dkt. No. 28, Exh. I.) He has also previously told lawmakers transgender troops have served the military honorably and he would continue to abide by this sentiment for as long as he holds his position. (Id.) Additionally, it is not clear the nation's top military leaders were consulted about this policy change prior to President Trump's Twitter Proclamation. (See Dkt. No. 28, Exh. M.) Moreover, after the promulgation of President Trump's tweets, 56 retired generals and admirals signed a declaration stating a ban on open service by transgender persons would degrade military readiness. (Dkt. No. 28, Exh. O.)

C. The Plaintiffs

1. Aiden Stockman

Plaintiff Aiden Stockman is a transgender man from California who intended to join the Air Force. ("Stockman Declaration," Dkt. No. 16 ¶ 1.) Plaintiff Stockman has conducted online research to prepare for the enlistment process, including talking to friends and neighbors stationed at an Air Force base near his home. (Id. ¶ 9.) He came out to his family as transgender during his sophomore year of high school. (Id. ¶ 4.) During his junior year, he took the Armed Services Vocational Aptitude Battery ("ASVAB") test in hopes he could join the military upon graduation. (Id. ¶ 10.) Plaintiff Stockman intends to undergo chest surgery, also called "top surgery" as soon as possible, likely in the spring of 2018. (Id. ¶ 11.) He states that if the ban were lifted, he would go talk with a recruiter about enlisting as soon as his chest surgery is completed. (Id. ¶ 15.)

2. Nicolas Talbott

Plaintiff Nicolas Talbott is a transgender man from Ohio who intended to join the Air Force National Guard. ("Talbott Declaration," Dkt. No. 17 ¶ 1.) Plaintiff Talbott came out as transgender to his mother at the age of 16 and, in 2012, started taking hormones according to his transition plan. (Id. ¶¶ 5–6.) He states he tried to enlist but the military recruiters would not allow him because of his transgender status. (Id. ¶ 7.) After he learned the accession ban was lifted in June 2016, Plaintiff Talbott spoke with an Air Force National Guard recruiter who advised him to enlist. (Id. ¶ 11.) Plaintiff Talbott was told to get letters certifying that being transgender had no adverse effects on his ability to serve and that older, unrelated injuries would also have no adverse effects. (Id.) He then began studying for the ASVAB in anticipation of being allowed to join the military, but President Trump's Twitter Proclamation discouraged him. (Id. ¶ 14.) Plaintiff Talbott maintains he would seek immediate enlistment were the ban lifted today. (Id. ¶ 16.)

3. Tamasyn Reeves

Plaintiff Tamasyn Reeves is a transgender woman from California who wants to serve in the Navy. ("Reeves Declaration," Dkt. No. 18 ¶ 1.) Plaintiff Reeves had tried to enlist in the military in 2010, but was rejected because she, at the time, identified as gay. (Id. ¶ 5.) In 2011, she learned about what it means to be transgender and started coming out to her colleagues and friends. (Id. ¶ 6.) A year later, she started taking hormones to begin her medical transition. (Id. ¶ 7.) The policy change June 2016 excited Plaintiff Reeves, and she intended to enlist as soon as she finished her college degree. (Id. ¶ 9.) The revived ban, however, sunk her hopes. (Id. ¶ 10.) She states she would immediately talk to a recruiter about enlisting upon receiving her degree in the spring of 2018 if the ban was lifted. (Id. ¶ 12.)

4. Jaquice Tate

Plaintiff Jaquice Tate is a transgender man currently serving as a Sergeant in the Army. ("Tate Declaration," Dkt. No. 19 ¶ 1.) He enlisted in 2008 and has served domestically, in Germany, and on deployment in Iraq. (Id. ¶ 4.) For his service in Iraq, he was awarded an Army Commendation Medal. (Id. ¶ 6.) He has also received multiple Army Achievement Medals, Certificates of Appreciation, and two Colonel Coins of Excellence. (Id. ¶ 11.) Plaintiff Tate, in reliance on the June 2016 Policy, came out to his chain of command. (Id. ¶ 19.) In Fall of 2016, Plaintiff Tate, in conjunction with his chain of command and his doctor, created his medical transition plan. (Id. ¶ 21.) Consequently, he started taking hormones in February 2017 and received approval for chest surgery. (Id.) Plaintiff Tate expects to receive chest surgery in late 2017 or early 2018. (Id.) Plaintiff Tate feels as though the ban demeans his years of military service. (Id. ¶ 23.)

5. John Doe 1

Plaintiff John Doe 1 is a transgender man who currently serves as a Non-Commissioned Officer in the Air Force. ("John Doe 1 Declaration," Dkt. No. 29, Exh. 2.) Plaintiff John Doe 1 grew up in a military family and intends to make a career out of his military service. (Id. ¶¶ 2–3.) He has received numerous commendations and endorsements from his chain of command. (Id. ¶¶ 7–8.) In April 2017, in reliance on the June 2016 Policy, he came out to his chain of command and received a medical transition plan. (Id. ¶ 17.) Plaintiff John Doe 1 fears he will be discharged under the express terms of the ban. (Id. ¶ 19.) He understands the Sex Reassignment Surgery Directive denies him transition-related medical care. (Id. ¶ 21.) Consequently, he intends to pay out-of-pocket for chest surgery. (Id.) Plaintiff John Doe 1 is bewildered at how he went from first in his class at Airmen Leadership School to being deemed unfit to serve. (Id. ¶ 25.)

6. John Doe 2

Plaintiff John Doe 2 is a transgender man who currently serves in the Army. ("John Doe 2 Declaration," Dkt. No. 29, Exh. 3.) Plaintiff John Doe 2 enlisted in 2015 at the age of 17, and earned two Colonel Coins of Excellence by August 2017. (Id. ¶ 6.) He possess technical expertise pertaining to the operations, diagnostics, and maintenance of multichannel communications systems necessary for the Army to make real-time tactical decisions. (Id. ¶ 5.) His position requires Secret-level security clearance. (Id.) He expects to serve in the Army until he is eligible to receive retirement benefits. (Id. ¶ 11.) While Plaintiff John Doe 2 realized he was transgender in his junior year of high school, he did not come out to anyone until he joined the Army. (Id. ¶¶ 15, 18.) In reliance on the June 2016 policy change, he came out to his chain of command and began researching the new policies and guidance. (Id. ¶¶ 20–21.) He worked with an Army doctor to develop a medical transition plan and treatment. (Id. ¶ 21.) After meeting with his commander and doctors, Plaintiff John Doe 2 was approved for chest surgery, and expects to have it completed in March 2018. (Id. ¶ 22.) He anticipates completing his medical transition by 2020. (Id.) However, after the promulgation of the Presidential Memorandum, he fears being subject to an imminent involuntary discharge. (Id. ¶¶ 28–29.)

7. Jane Doe 2

Plaintiff Jane Doe is a transgender woman currently serving in the Air Force. ("Jane Doe Declaration," Dkt. No. 29, Exh. 4.) Plaintiff Jane Doe entered the military in 2010, having already completed her college degree. (Id. ¶¶ 2–3.) As a consequence, she entered the military as an Airman First Class. (Id. ¶ 3.) After basic training, she was stationed domestically then selected for deployment in the Middle East. (Id.) She has received an Air Force Commendation Medal for distinctly exemplary service. (Id. ¶ 5.) Plaintiff Jane Doe intends on serving in the military until she is eligible for a pension and retirement benefits. (Id. ¶ 9.) While she identified as transgender at age 14, she waited until college to come out to those closest to her. (Id. ¶ 11.) In reliance on the June 2016 policy change, she came out to the rest of her family and to the public, updating her social media to her correct gender. (Id. ¶ 13.) With her chain of command and doctor, she created a medical transition plan which had received all the necessary approvals. (Id. ¶ 14.) She fears the Presidential Memorandum will strip her of her career, salary, and housing. (Id. ¶¶ 15–18.)

8. Equality California

Plaintiff Equality California ("EQCA") is an organization dedicated to LGBTQ civil rights. ("Declaration of Rick Zbur," Dkt. No. 20 ¶ 2.) Its membership includes transgender individuals in active service, transgender military veterans, and transgender individuals who have intend to pursue long-term military careers. (Id. ¶ 4.)

D. Pending Cases

On October 30, 2017, the Honorable Colleen Kollar-Kotelly of the D.C. District Court issued a nationwide injunction concerning the Accession and Retention Directives. See Doe 1 v. Trump, --- F. Supp. 3d ----, CV 17-01597 (CKK), 2017 WL 4873042, at *2 (D.D.C. Oct. 30, 2017). That court, however, dismissed the Sex Reassignment Surgery Directive claim, holding the plaintiffs lacked standing to challenge that directive. Id. at *23–24. The court noted one plaintiff, who had her transition-related procedure canceled by the Defense Health Agency, later received a waiver and is currently having her request processed. Id. at *24. A second plaintiff's prospective harm was deemed too speculative, as her transition treatment plan would not begin until after she returned from active duty in Iraq. Id. Finally, a third plaintiff is set to begin transition surgery before the ban would go into effect, also excluding him from harm. Id. The court concluded "no Plaintiffs have demonstrated that they are substantially likely to be impacted by the Sex Reassignment Surgery Directive, and none have standing to challenge that directive." Id.

The court in Doe 1 conducted a lengthy analysis regarding the import of the Presidential Memorandum. As here, Defendants in Doe 1 essentially argued "the Presidential Memorandum merely commissioned an additional policy review; that review is underway; nothing is set in stone, and what policy may come about is unknown; and regardless, Plaintiffs are protected by

the Interim Guidance." Id. at *17. Finding the defendants' arguments to be a "red herring," the court stated:

> The President controls the United States military. The directives of the Presidential Memorandum, to the extent they are definitive, are the operative policy toward military service by transgender service members. The Court must and shall assume that the directives of the Presidential Memorandum will be faithfully executed. See Nat'l Mining Ass'n v. U.S. Army Corps of Engineers, 145 F.3d 1399, 1408 (D.C. Cir. 1998) (assessing "faithful" application of agency rule). Consequently, the Interim Guidance must be read as implementing the directives of the Presidential Memorandum, and any protections afforded by the Interim Guidance are necessarily limited to the extent they conflict with the express directives of the memorandum.
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> . . .
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> Nothing in the August 2017 Statement by Secretary Mattis, or the Interim Guidance, can or does alter these realities. The Statement provides that Secretary Mattis will establish a panel of experts "to provide advice and recommendations on the implementation of the president's direction." After the "panel reports its recommendations and following ... consultation with the secretary of Homeland Security," Secretary Mattis will "provide [his] advice to the president concerning implementation of his policy direction." Put differently, the military is studying how to implement the directives of the Presidential Memorandum. Such a policy review and implementation plan are likely necessitated by the fact that—as borne out by the RAND Report and the declarations submitted by the Pseudonym Plaintiffs—transgender service members occupy a variety of crucial positions throughout the military, including active duty postings in war zones. Presumably, the removal and replacement of such individuals during a time of war cannot occur overnight. Accordingly, Defendants are correct that policy decisions are still being made. But the decisions that must be made are how to best implement a policy under which transgender accession is *prohibited*, and discharge of transgender service members is *authorized*. Unless the directives of the Presidential Memorandum are altered—and there is no evidence that they will be—military policy toward transgender individuals must fit within these confines.
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> . . .
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> Finally, although Defendants make much of the protections afforded by the Interim Guidance to transgender individuals, that protection is necessarily qualified by the Presidential Memorandum. The Interim Guidance provides that: "*As directed by the [Presidential] Memorandum*, no action may be taken to involuntarily separate or discharge an otherwise qualified Service member solely on the basis of a gender dysphoria diagnosis or transgender status." (Emphasis added). The protections

> afforded by the Presidential Memorandum lapse by February 21, 2018, and discharge must be authorized by March 23, 2018. The Interim Guidance can do nothing to obviate these facts. Nor is standing vitiated by the mere possibility that the President may alter the directives of the Presidential Memorandum. See Appalachian Power Co. v. EPA, 208 F.3d 1015, 1022 (D.C. Cir. 2000) ("[A]ll laws are subject to change. Even that most enduring of documents, the Constitution of the United States, may be amended from time to time. The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment."). Nor is there evidence that such a change may occur, given the President's unequivocal pronouncement that "the United States government will not accept or allow transgender individuals to serve in any capacity in the U.S. military."

Id. at *17–18 (emphasis in original). The Court considers Doe to be persuasive authority, and finds its analysis sound and useful.

On November 21, 2017, the Honorable Marvin J. Garbis of the District of Maryland issued a nationwide injunction concerning the Accession Directive, the Retention Directive, and the Sex Reassignment Surgery Directive. Stone v. Trump, --- F. Supp. 3d ---- No. CV MJG-17-2459, 2017 WL 5589122, at *16 (D. Md. Nov. 21, 2017). Distinguishing the plaintiffs before it from the plaintiffs in Doe 1, the Stone court noted plaintiffs Stone and Cole were "highly unlikely to complete their medically-necessary surgeries before the effective date of the Directive." Id. at *13. Additionally, while the Doe 1 court found a disqualifying lack of certainty impeded the plaintiffs' standing, the Stone court stated there is "no lack of certainty regarding when transition treatment will begin for [plaintiffs] Stone and Cole since treatment has already begun, and [their] surgeries are endangered by the Directive's deadline." Id. That court approvingly cited the standing and constitutional analysis in Doe 1. Id. at *10, 15.

II. MOTION TO DISMISS

Defendants present a two-pronged challenged to Plaintiffs' Complaint. First, they assert Plaintiffs lack standing and do not face an imminent threat of future injury. Alternatively, they assert Plaintiffs' claims are unripe and not yet fit for judicial determination. (MTD at 11.) For the reasons stated below, the Court concludes it has jurisdiction to determine the constitutionality of the Accession Directive, Retention Directive, and Sex Reassignment Surgery Directive.

A. Legal Standard

Under Rule 12(b)(1), a party may bring a motion to dismiss for lack of subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A challenge to the court's jurisdiction may be facial or factual. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004) (citing White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000)). In a facial attack, the moving party asserts the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. Safe Air, 373

F.3d at 1039. By contrast, in a factual attack, the moving party disputes the truth of allegations that, by themselves, would otherwise invoke federal jurisdiction. Id.

When considering a factual attack, a court applies a standard similar to that used in deciding summary judgment motions. Evidence outside the pleadings may be considered, but all factual disputes must be resolved in favor of the nonmoving party. See Dreier v. United States, 106 F.3d 844, 847 (9th Cir. 1996). If the moving party presents admissible evidence in support of its motion, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." Savage v. Glendale Union High Sch., 343 F.3d 1036, 1039 n.2 (9th Cir. 2003).

In a facial challenge, "a court examines the complaint as a whole to determine whether the plaintiff has alleged a proper basis of jurisdiction." Watson v. Chessman, 362 F. Supp. 2d 1190, 1194 (S.D. Cal. 2005). Again, a plaintiff's complaint is treated similarly to a summary judgment motion: the allegations are treated as true and all inferences are drawn in favor of the plaintiff. Id. "The court will not, however, infer allegations supporting federal jurisdiction; federal subject matter must always be affirmatively alleged." Id. (quoting Century Sw. Cable Television, Inc. v. CIIF Assocs., 33 F.3d 1068 (9th Cir. 1994)). When a plaintiff relies on the general federal question statute, 28 U.S.C. § 1331, "a claim not arising under the United States Constitution, or any federal statute . . . . will not generally survive a Rule 12(b)(1) facial attack." Id. (internal citations and quotation marks omitted).

B. Standing

"Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to make out a concrete 'case' or 'controversy' to which the federal judicial power may extend under Article III, § 2." Pershing Park Villas Homeowners Ass'n v. United Pacific Ins. Co., 219 F.3d 895 (9th Cir. 2000). "[T]he irreducible constitutional minimum of standing" is comprised of three elements: (1) an injury-in-fact; (2) a causal connection between the injury and challenged conduct such that the injury is "fairly traceable" to the challenged action; and (3) it must be "likely," not merely "speculative" that the injury can be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992). The injury-in-fact must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." Id. at 560. "The party invoking federal jurisdiction bears the burden of establishing these elements." Id. at 561.

"The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013). Thus, the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of Government was unconstitutional." Id. (quoting Raines v. Byrd, 521 U.S. 811, 819 (1997)). Importantly, when there are multiple plaintiffs, "[a]t least one plaintiff must have standing to seek each form of relief requested in the complaint." Town of Chester, N.Y. v. Laroe Estates, Inc., 137 S. Ct. 1645, 1650–51 (2017).

Defendants argue Plaintiffs have not demonstrated injury-in-fact. (MTD at 17.) For the foregoing reasons, the Court finds Plaintiffs met their burden and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives.

1. Accession Directive

The Accession Directive indefinitely extends the prohibition preventing transgender individuals from entering the military. The prohibition would have expired on December 31, 2017. Defendants argue no Plaintiff "has been denied accession into the military, which could be denied for numerous reasons wholly unrelated to an applicant's transgender status." (Id. at 18.) Additionally, "allegations of speculative future harms are insufficient to establish standing." (Id.) Defendants have made this argument twice before, to no avail. See Stone, 2017 WL 5589122, at *11; Doe 1, 2017 WL 4873042, at *20–22. Citing Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 205, (1995), Gratz v. Bollinger, 539 U.S. 244, 251 (2003), and Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 709–10 (2007), the Doe 1 court noted the appropriate inquiry is two-pronged: (1) whether the plaintiff is "very likely" to apply for accession "in the relatively near future"; and (2) whether the plaintiff is "substantially likely to hit a barrier when he applies for accession." Doe 1, 2017 WL 4873042, at *21. The court found it was likely one of the plaintiffs will graduate from the Naval Academy and attempt to accede, and "[a]nything else is the product of mere speculation." Id. Likewise, based on a plaintiff's declarations and testimony showing he had already met with a recruiting officer and had plans to accede which "are not speculative," the Stone court also found a plaintiff faced a "substantial risk" that his "attempt to accede . . . will be prohibited solely on the basis of his transgender status." Stone, 2017 WL 5589122, at *11. Defendants' argument leaves this Court similarly unpersuaded.

Here, Plaintiffs Stockman, Talbott, and Reeves have separately demonstrated an affirmative intent to join the military, going as far as to take the ASVAB, speaking with military recruiters, and attempting to join even before Secretary Carter promulgated DTM 16-005. (See Declaration of Aiden Stockman ¶¶ 9–11; Declaration of Nicolas Talbott ¶¶ 7–16; Declaration of Tamasyn Reeves ¶¶ 7–12.) These Plaintiffs all declare that, were the ban lifted today, they would seek enlistment. See Declaration of Aiden Stockman ¶ 15; Declaration of Nicolas Talbott ¶ 16; Declaration of Tamasyn Reeves ¶ 12.) While Defendants argue Plaintiffs may be eligible for individualized waivers (MTD at 18), Plaintiffs contend, and the Doe 1 court agreed, transgender people have never been eligible for medical waivers. See Doe 1, 2017 WL 4873042, at *21 (finding "no evidence that waivers are actually made available to transgender individuals, or that they will be"); Supplemental Declaration of Eric K. Fanning, Dkt. No. 47-1 ¶ 11; Supplemental Declaration of Raymond Edwin Maybus Jr., Dkt. No. 47-2 ¶ 10.) Additionally, even if Plaintiffs could successfully apply for a waiver, the need to apply for one when no other group must do so is likely also a violation of equal protection rights. See Hawaii v. Trump, 859 F.3d 741, 767–68 (9th Cir. 2017) (holding a plaintiff need not wait for a denial of discretionary waiver from the travel ban in order to challenge the ban), vacated as moot on other grounds, 2017 WL 4782860, at *1 (U.S. Oct. 24, 2017); Doe 1, 2017 WL 4873042, at *21 (stating "even if a bona fide waiver

process were made available . . . [this] would not vitiate the barrier that [the plaintiff] claims is violative of equal protection.")

Based on the submitted declarations, the Court is convinced Plaintiffs Stockman, Talbott, and Reeves are highly likely to apply for accession in the relatively near future and are substantially likely to hit a barrier upon that application. This injury is concrete, particularized, imminent, and not at all hypothetical. Consequently, Plaintiffs have standing to challenge the Accession Directive.

2. Retention Directive

Beginning on March 23, 2018, the Retention Directive authorizes the discharge of military members solely on the basis of their transgender status. (See Presidential Memorandum; President Trump's Twitter Proclamation.) Defendants argue Plaintiffs merely "*may* be discharged from the military in the future" and note, as of yet, no transgender service member has been discharged. (MTD at 17 (emphasis added).) Consequently, "Plaintiffs' speculation that they may be discharged in the future is insufficiently concrete and imminent to establish standing." Id. However, by characterizing Plaintiffs' fear as "speculation," Defendants ignore the surrounding political and legal realities. The Commander-in-Chief of the military, President Trump, announced:

> After consultation with my Generals and military experts, please be advised that the United States Government *will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military*. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.

(President Trump's Twitter Proclamation, (emphasis added).)

This proclamation has been expanded into a full Presidential Memorandum, which proclaims the Retention Directive is set to begin on March 23, 2018. (Presidential Memorandum.) Nonetheless, Defendants untenably argue that Plaintiffs' fear of being discharged is speculative because no one has yet been discharged. (MTD at 17.) This logic falls apart under scrutiny, however, as the Presidential Memorandum does not even take effect until 2018. The Presidential Memorandum is clear in its intent, force, and impending effect.

Plaintiffs argue courts routinely decide questions of constitutionality before the promulgation of implementing regulations. (MPI Reply at 10, citing Union Pac. R.R. Co. v. Cal. Pub. Utils. Comm'n, 346 F.3d 851, 872 n.22 (9th Cir. 2003) (holding statutory challenge justiciable despite absence of implementing regulations "because it is clear that any standard required" would violate the constitution although no standard had yet issued); Nance v. EPA, 645 F.2d 701, 713, 717 (9th Cir. 1981) (holding statutory challenge justiciable although the "EPA has not yet promulgated regulations under the amended act).) The Court agrees with Plaintiffs' position. Plaintiffs Tate, John Doe 1, and John Doe 2, all current military service members,

plausibly fear discharge once the Retention Directive becomes operative. (See Tate Declaration ¶ 25; John Doe 1 Declaration ¶ 19; John Doe 2 Declaration ¶¶ 28–29.) This fear is appropriately born out of President Defendant Trump's Twitter Proclamation, the Presidential Memorandum, and the Interim Guidance. Consequently, the Court finds Plaintiffs Tate, John Doe 1, and John Doe 2 face concrete, particularized, and imminent injury. Accordingly, they have standing to challenge the constitutionality of the Retention Directive.

3. Sex Reassignment Surgery Directive

The Court believes it useful to juxtapose Plaintiffs against the plaintiffs in Doe 1. The Doe 1 plaintiffs failed this first prong of the standing inquiry, as the court found "the risk of being impacted by the Sex Reassignment Surgery Directive is not sufficiently great to confer standing." 2017 WK 4873042 at * 23. As previously discussed, that court noted Jane Doe 1's transition related procedure had been canceled, but defendants had submitted a declaration stating Jane Doe 1 had received a "health care waiver necessary to receive a transition-related surgery [and] is currently being processed." Id. at 24. This finding rendered Jane Doe 1 ineligible to challenge the Sex Reassignment Surgery Directive. Additionally, Jane Doe 3 would not have begun her transition plan until after she returns from active deployment in Iraq. Id. The court found "[g]iven the possibility of discharge, the uncertainties attended by the fact that she has yet to begin any transition treatment, and the lack of certainty on when such treatment will begin, the prospective harm . . . is too speculative to constitute an injury in fact." Id. Finally, one of the named plaintiffs had stated that he would transition prior to applying for accession; therefore, he also failed to show injury-in-fact. Id.

Here, Plaintiff John Doe 1 received a medical transition plan in April 2017. (John Doe 1 Declaration ¶ 17.) He has also received a diagnosis of gender dysphoria. ("John Doe 1 Supplemental Declaration," Dkt. No. 47-6 ¶ 2.) As a part of his plan, he is to begin taking Hormone Replacement Therapy ("HRT") "later this year," "once [he receives] final approvals from the Medical Multidisciplinary Team and [his] commander." (Id. ¶ 3.) He is scheduled to receive chest surgery in mid-2018 and sex organ surgery in 2020. (Id. ¶¶ 4–5.) Plaintiff John Doe 2 received a formal diagnosis of gender dysphoria in October 2016. ("John Doe 2 Supplemental Declaration," Dkt. No. 47-7 ¶ 2.) He began HRT in March 2017. (Id. ¶ 3.) His transition plan includes a projected chest surgery date in April 2018 and sex organ surgery by the end of 2021. (Id. ¶¶ 4–5.)

According to the Presidential Memorandum, "no new sex reassignment surgical procedures for military personnel will be permitted after March 22, 2018, except 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." (Presidential Memorandum.) In deciding whether Plaintiffs have standing to challenge the Sex Reassignment Surgery Directive, the Court ordered the parties to submit supplemental briefing discussing the definition of the terms "necessary to protect the health" and "begun a course of treatment to reassign his or her sex." (Dkt. No. 66.) Additionally, the Court asked the parties to discuss whether and how these terms apply to Plaintiffs John Doe 1 and John Doe 2. (Id.) In response to the Court's order, Defendants argue

the Sex Reassignment Surgery Directive is currently under review and the final definitions of these terms are not yet ascertainable. (Dkt. No. 70, at 3.) Thus, Defendants contend Plaintiffs have not demonstrated injury-in-fact because no one yet knows what the future policy will be. (Id.) Despite this hand waiving, Defendants suggest the definitionally hollow term "necessary to protect the health" may equate to the legally hefty term "medically necessary." (Id. at 5–6.) However:

> As of now, Defendants therefore cannot state what the full scope and impact of [the] future policy will be with respect to sex reassignment surgery until the pending review is completed, including whether or not [the] current understanding of the terms 'necessary to protect the health' or 'begun a course of treatment to reassign his or her sex' will be altered in the future.

(Id. at 6.)

By contrast, Plaintiffs contend reading the Sex Reassignment Surgery Directive in context of the overall directive shows that it is intended to deny coverage of the surgery except in cases where the surgery is "necessary to protect the health of a transgender service member *for a reason unrelated to gender transition*." (Dkt. No. 72 (emphasis in original).) Plaintiffs note the Sex Reassignment Surgery Directive is not an isolated order but is part of a larger policy directive excluding transgender people from military service. (Id.) They argue the purpose of the Directive is to "hasten the departure of transgender individuals from the military, both by sending a clear message that they are unwelcome and by causing some current service members to leave military service because they cannot obtain needed medical care." (Id. at 4.) Moreover, Plaintiffs believe Defendants chose the ambiguous phrase "necessary to protect the health" as a way of intentionally avoiding the common legal term "medically necessary." (Id. at 5.) The interpretation must be different because then the surgeries would continue whenever they were proscribed as part of a gender transition plan, a reading which would "essentially nullify the Directive and contravene President Trump's premise about the cost of surgical care." Stone, 2017 WL 558122 at *13. Notably, Defendants made the same argument before the Stone court, which stated:

> [I]f the exception were to be interpreted under the broad terms proposed by Defendants, the 'exception' would essentially nullify the Directive and Contravene President Trump's premise about the cost of surgical care . . . Defendants may not evade judicial review by advancing (or, in this case, weakly suggesting) an interpretation of the challenged action that is both implausible and would fatally undercut the President's announced policy.

Id. at *13 (citation omitted).

This Court is equally unpersuaded by Defendants' construction of the Sex Reassignment Surgery exception. If the Sex Reassignment Surgery Directive means anything, it means a transgender service member cannot receive the surgery simply because it is "medically

necessary." President Trump stated the policy change is occurring because the military would be "burdened with the tremendous medical costs." (President Trump's Twitter Proclamation.) Allowing sex reassignment surgeries whenever they became medically necessary would result in the exception swallowing the rule and would do nothing to address President Trump's concerns. Perhaps anticipating this outcome, Defendants equivocate in their briefing, only suggesting that "necessary to protect the health" might equate to "medical necessity" instead of firmly proffering a definition. Defendants hesitated when deciding whether the exception applies to Plaintiffs (MTD Reply at 7, (stating that Plaintiffs "potentially fall within the exception to the funding directive")), and now attempt to forge that hesitation into an axe sharp enough to chop down Plaintiffs' standing argument. As Defendants are not able to outright state Plaintiffs fit into the exception and are entitled to the surgery, Plaintiffs' fears that the surgery will be denied are plausible given the plain words of President Trump. Consequently, Plaintiffs John Doe 1 and John Doe 2 have demonstrated injury-in-fact as it pertains to the Sex Reassignment Surgery Directive.

As an aside, despite the Court's order for supplemental briefing, neither party addressed the meaning of "begun a course of treatment to reassign his or her sex." This definition could be impactful as it is not at all clear Plaintiff John Doe 1 stands on the same jurisdictional footing as Plaintiff John Doe 2. Without supplemental briefing the Court cannot be certain, but it appears Plaintiff John Doe 1 may not have yet started HRT, while Plaintiff John Doe 2 began it earlier this spring. (Compare John Doe 1 Supplemental Declaration ¶ 3 with John Doe 2 Supplemental Declaration ¶ 3.) Consequently, Plaintiff John Doe 1 may not have sufficiently "begun a course of treatment to reassign his or her sex," and thus would be ineligible for the exception regardless if the surgery was "necessary to protect" his health.

C. Ripeness

Alternatively, Defendants argue this case should be dismissed because it is not ripe to be adjudicated. A dispute is ripe when it presents concrete legal issues in actual cases. Colwell v. HHS, 558 F.3d 1112, 1123 (9th Cir. 2009). "Ripeness and standing are closely related because they originate from the same Article III limitation." Montana Envtl. Info. Ctr. v. Stone-Manning, 766 F.3d 1184, 1188 (9th Cir. 2014) (citing Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014)). In fact, "in many cases, ripeness coincides squarely with standing's injury in fact prong." Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134, 1138 (9th Cir. 2000) (en banc) ("The constitutional component of the ripeness inquiry is often treated under the rubric of standing. . . . Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline.")

Plaintiffs have satisfied the injury-in-fact requirements and have standing to challenge the Accession, Retention, and Sex Reassignment Surgery Directives. Thus, Plaintiffs also have established constitutional ripeness. Bishop Paiute Tribe v. Inyo Cty., 863 F.3d 1144, 1153 (9th Cir. 2017). Defendants' ripeness argument is not based in constitutional ripeness, but prudential ripeness. Whether a dispute is ripe depends on "the fitness of the issues for judicial decision" and "the hardship to the parties" of withholding review. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99, 105 (1977).

This case is fit for judicial decision. President Trump has unambiguously stated his policy intentions, then formalized those intentions into an operative Presidential Memorandum. "The only uncertainties are how, not if, the policy will be implemented and whether, in some future context, the President might be persuaded to change his mind and terminate the policies he is now putting into effect." Stone, 2017 WL 5589122, at *14. The constitutionality of the Directives within the Presidential Memorandum are fit for constitutional review; indeed, the Accession Directive goes into effect within a few short weeks. (Presidential Memorandum.) The Court need not wait for the Presidential Memorandum to be fully implemented before determining its constitutionality. Union Pac. R.R. Co., 346 F.3d at 872 n.22. Additionally, Plaintiffs would bear the brunt of the harm were judicial review withheld. Plaintiffs have demonstrated "they are already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge, . . . the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments. Waiting until after the Directives have been implemented to challenge their alleged violation of constitutional rights only subjects them to substantial risk of even greater harms." Stone, 2017 WL 5589122, at *14; Doe 1, 2017 WL 4873042, at *24–25 ("The directives are known, and so are the circumstances under which they were issued. They cannot be more concrete, and future policy by the military—absent action from the president—cannot change what the directives require. . . . Furthermore, the nature of the equal protection analysis in this case, which asses the facial validity of the Presidential Memorandum, means that the Court would not benefit from delay—the salient facts regarding the issuance of the Presidential Memorandum are not subject to change.")

Accordingly, having found Plaintiffs have standing to challenge the Directives, and that this case is ripe for judicial adjudication, the Court DENIES Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. MOTION FOR PRELIMINARY INJUNCTION

A. Legal Standard

A plaintiff seeking a preliminary injunction must establish that: (1) he is likely to succeed on the merits, (2) he is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in his favor, and (4) an injunction is in the public interest. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary and drastic remedy" that should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (describing the "substantial proof" requirement to grant a preliminary injunction as much higher than the burden of proof for a summary judgment).

The Ninth Circuit has adopted a "sliding scale" test for preliminary injunctions. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011). Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another. Id. For example, "serious questions" as to the

merits of a case, combined with a showing that the hardships tip sharply in the plaintiff's favor, can support the issuance of an injunction, assuming the other two elements of the Winter test are also met. Winter, 555 U.S. at 24 ("Courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief, and should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.") Id.

A preliminary injunction can take two forms: either a prohibitory injunction or a mandatory injunction. Chalk v. U.S. Dist. Court Cent. Dist. of California, 840 F.2d 701, 704 (9th Cir. 1988). A prohibitory injunction prevents a party from taking action pending a resolution on the merits, Heckler v. Lopez, 463 U.S. 1328, 1333 (1983) (stating that a prohibitory injunction "freezes the positions of the parties until the court can hear the case on the merits"), while a mandatory injunction "orders a responsible party to take action." Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996). Since the "basic function" of a preliminary injunction is to preserve the status quo pending resolution on the merits, mandatory injunctions are "particularly disfavored." Id. Indeed, mandatory injunctions will not be issued unless failure to do so will result in "extreme or very serious damage." Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009).

B. Likelihood of Success on the Merits

Defendants argue "[t]he President and Secretary Mattis' decision that the complex issues presented by the policy on military service by transgender individuals warrant additional study before changes are made to longstanding policies passes muster under any standard." (MTD at 25.) However, this is not what happened in this case. In July of 2017, President Trump announced transgender people are barred from military service, and nothing in the Presidential Memorandum or Interim Guidance alters the fact that the decision has already been made. Defendants, in their briefing and at oral argument, attempt to focus on the constitutionality of the Interim Guidance and not the policy that takes place once it expires.[2] Even the title of the current operative policy, the "*Interim* Guidance," (emphasis added) attests to its temporary nature.

Defendants additionally contend military personnel decisions should be accorded a highly deferential level of review. However, this deferential review is most appropriate when the military acts with measure, and not "unthinkingly or reflexively." Rostker v. Goldberg, 453 U.S. 57, 72 (1981). Here, the only serious study and evaluation concerning the effect of transgender people in the armed forces led the military leaders to resoundingly conclude there was no justification for the ban. (Supra, "Military Transgender Policy Before July 2017," at 3–5.) The Court agrees with the Doe 1 court, which noted "the record at this stage of the case shows that the reasons offered for categorically excluding transgender individuals were not supported and

[2] The Doe 1 court's analysis of the interaction between the Presidential Memorandum and the Interim Guidance is sound and adopted by the Court. 2017 WL 4873042, at *17–18. Portions of that analysis have been reproduced in this Opinion. (See supra 9–10.)

were in fact contradicted by the only military judgment available at the time." 2017 WL 4873042, at *31. "[T]he Court's analysis in this Opinion has not been based on an independent evaluation of evidence or faulting the President for choosing between two alternatives based on competing evidence." Id.

The Ninth Circuit has strongly suggested that discrimination on the basis of one's transgender status is equivalent to sex-based discrimination. See Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("both [the Gender Motivated Violence Act and Title VII] prohibit discrimination based on gender as well as sex. Indeed, for the purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable." Additionally, sex-based discrimination can include discrimination based on someone failing "to conform to socially-constructed gender expectations.") Several district courts in this circuit have plainly held discrimination on the basis of one's transgender status is subject to intermediate scrutiny. See Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015); Olive v. Harrington, No. 115CV01276BAMPC, 2016 WL 4899177, at *5 (E.D. Cal. Sept. 14, 2016). Moreover, the courts which have examined the constitutionality of the transgender ban have also applied intermediate scrutiny. See Stone, 2017 WL 5589122, at *15; Doe 1, 2017 WL 4873042, at *27–29. The Court is persuaded by the analysis contained in these opinions.

Plaintiffs are "protected by the Fifth Amendment's Due Process Clause[, which] contains within it the prohibition against denying to any person the equal protection of the laws." U.S. v. Windsor, 133 S. Ct. 2675, 2695, 186 L. Ed. 2d 808 (2013). Consequently, the government must proffer a justification which is "exceedingly persuasive," "genuine," "not hypothesized," not "invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations." United States v. Virginia, 518 U.S. 515, 531 (1996). Defendants' justifications do not pass muster. Their reliance on cost is unavailing, as precedent shows the ease of cost and administration not survive intermediate scrutiny even if it is significant. Frontiero v. Richardson, 411 U.S. 677, 688–91 (1973). Moreover, all the evidence in the record suggests the ban's cost savings to the government is miniscule. (RAND Report at 22–23.) Furthermore, Defendants' unsupported allegation that allowing transgender individuals to be in the military would adversely affect unit cohesion is similarly unsupported by the proffered evidence. (Compare MTD at 30–31 with RAND Report at 24.) These justifications fall far short of exceedingly persuasive. Accordingly, the Court finds Plaintiffs have demonstrated their Equal Protection claim will likely succeed on the merits and further analysis of their other claims is unnecessary at this stage of the proceedings.

C. Irreparable Harm

Defendants first argue, "for much the same reasons they lack standing, Plaintiffs cannot show that they are likely to be injured if the Court does not enter an injunction." (MTD at 24.) Considering the Court has already found Plaintiffs have standing, this argument is easily dismissed. Second, Defendants contend Plaintiffs' injuries would not be beyond remediation. (Id.) For example, they argue separation from the military would not constitute irreparable harm

because it is within the Court's equitable powers to remedy the injury. (Id.) However, these arguments fail to address the negative stigma the ban forces upon Plaintiffs.

Plaintiffs allege, and the Court agrees, the ban sends a damaging public message that transgender people are not fit to serve in the military. (MPI Reply at 19.) There is nothing any court can do to remedy a government-sent message that some citizens are not worthy of the military uniform simply because of their gender. A few strokes of the legal quill may easily alter the law, but the stigma of being seen as less-than is not so easily erased. See Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter"); Lawrence v. Texas, 539 U.S. 558, 573 (2003) ("If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.") Additionally, "the deprivation of constitutional rights unquestionably constitutes irreparable injury." Hernandez v. Sessions, 872 F.3d 976, 994 (9th Cir. 2017) (internal quotations omitted) (citing Elrod v. Burns, 427 U.S. 347, 373 (1976)). This ban singles out transgender individuals for unequal treatment solely because of their transgender status. Plaintiffs have appropriately demonstrated irreparable injury. See Stone, 2017 WL 5589122, at *16; Doe 1, 2017 WL 4873042, at *32.

D. Balance of Equities and Public Interest

The Court finds Plaintiffs have shown the balance of equities and public interest weighs in favor of granting injunctive relief. Plaintiffs already feel the stigma attached to the Directives. (See Tate Declaration ¶ 23; John Doe 1 Declaration ¶¶ 23–25; John Doe 2 Declaration ¶¶ 30–33, 38–39.) Defendants again attempt to make the preliminary injunction about the Interim Guidance and not the policies which will supersede the Interim Guidance. (MTD at 40.) As noted above, this argument is misplaced. Additionally, as in Stone and Doe 1, Defendants make a perfunctory argument regarding the import of a strong national defense. (MTD at 40.) However:

> A bare invocation of "national defense" simply cannot defeat every motion for preliminary injunction that touches on the military. On the record before the Court, there is absolutely no support for the claim that the ongoing service of transgender people would have any negative effective on the military at all. In fact, there is considerable evidence that it is the discharge and banning of such individuals that would have such effects.... Moreover, the injunction that will be issued will in no way prevent the government from conducting studies or gathering advice or recommendations on transgender service.

Stone, 2017 WL 5589122, at *16 (quoting Doe 1, 2017 4873042, at *33.) The record stands much the same here as it did in Stone and Doe 1, thus the Court has no reason to deviate from the above analysis. In sum, considering all the Winter factors weigh in favor of granting a preliminary injunction, the Court preliminarily enjoins the Accession, Retention, and Sex Reassignment Surgery Directives pending the final resolution of this lawsuit.

IV. CONCLUSION

Finding the Plaintiffs have established injury-in-fact as it pertains to the Accession, Retention, and Sex Reassignment Surgery Directives, and finding this case ripe for adjudication, the Court DENIES Defendants' Motion to Dismiss. Additionally, finding the Winter factors weigh in favor of granting a preliminary injunction, the Court GRANTS Plaintiffs' Motion for Preliminary Injunction. Therefore, until this litigation is resolved, the Court ORDERS:

1. Defendants, and their agents, employees, assigns, and all those acting in concert with them are enjoined from categorically excluding individuals, including Plaintiffs Aiden Stockman, Nicolas Talbot, Tamasyn Reeves, from military service on the basis that they are transgender; and

2. No current service member, including Plaintiffs Jaquice Tate, John Doe 1, John Doe 2, and Jane Doe, may be separated, denied reenlistment, demoted, denied promotion, denied medically necessary treatment on a timely basis, or otherwise subjected to adverse treatment or differential terms of service on the basis that they are transgender.

IT IS SO ORDERED.

THE WHITE HOUSE

WASHINGTON

March 23, 2018

MEMORANDUM FOR THE SECRETARY OF DEFENSE
THE SECRETARY OF HOMELAND SECURITY

SUBJECT: Military Service by Transgender Individuals

Pursuant to my memorandum of August 25, 2017, "Military Service by Transgender Individuals," the Secretary of Defense, in consultation with the Secretary of Homeland Security, submitted to me a memorandum and report concerning military service by transgender individuals.

These documents set forth the policies on this issue that the Secretary of Defense, in the exercise of his independent judgment, has concluded should be adopted by the Department of Defense. The Secretary of Homeland Security concurs with these policies with respect to the U.S. Coast Guard.

Among other things, the policies set forth by the Secretary of Defense state that transgender persons with a history or diagnosis of gender dysphoria -- individuals who the policies state may require substantial medical treatment, including medications and surgery -- are disqualified from military service except under certain limited circumstances.

By the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby order as follows:

Section 1. I hereby revoke my memorandum of August 25, 2017, "Military Service by Transgender Individuals," and any other directive I may have made with respect to military service by transgender individuals.

Sec. 2. The Secretary of Defense, and the Secretary of Homeland Security, with respect to the U.S. Coast Guard, may exercise their authority to implement any appropriate policies concerning military service by transgender individuals.

Sec. 3. (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

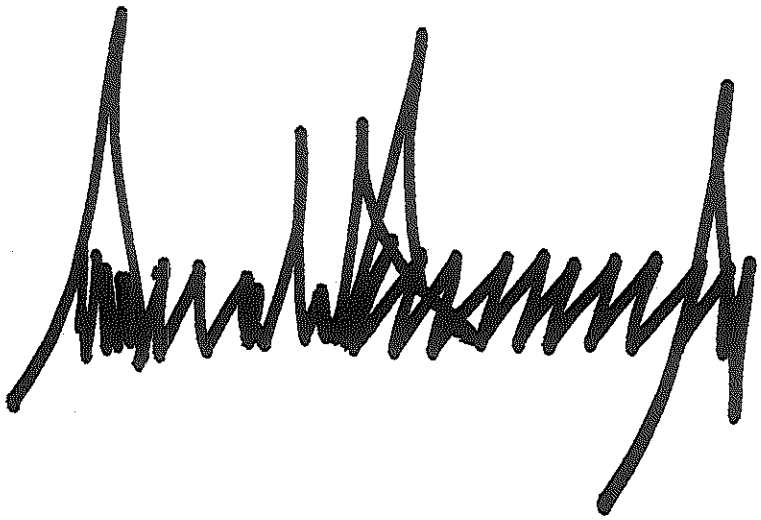
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.



UNCLASSIFIED//FOR OFFICIAL USE ONLY

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

FEB 22 2018

MEMORANDUM FOR THE PRESIDENT

SUBJECT: Military Service by Transgender Individuals

"Transgender" is a term describing those persons whose gender identity differs from their biological sex. A subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis.

Prior to your election, the previous administration adopted a policy that allowed for the accession and retention in the Armed Forces of transgender persons who had a history or diagnosis of gender dysphoria. The policy also created a procedure by which such Service members could change their gender. This policy was a departure from decades-long military personnel policy. On June 30, 2017, before the new accession standards were set to take effect, I approved the recommendation of the Services to delay for an additional six months the implementation of these standards to evaluate more carefully their impact on readiness and lethality. To that end, I established a study group that included the representatives of the Service Secretaries and senior military officers, many with combat experience, to conduct the review.

While this review was ongoing, on August 25, 2017, you sent me and the Secretary of Homeland Security a memorandum expressing your concern that the previous administration's new policy "failed to identify a sufficient basis" for changing longstanding policy and that "further study is needed to ensure that continued implementation of last year's policy change would not have ... negative effects." You then directed the Department of Defense and the Department of Homeland Security to reinstate the preexisting policy concerning accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources." You made clear that we could advise you "at any time, in writing, that a change to this policy is warranted."

I created a Panel of Experts comprised of senior uniformed and civilian Defense Department and U.S. Coast Guard leaders and directed them to consider this issue and develop policy proposals based on data, as well as their professional military judgment, that would enhance the readiness, lethality, and effectiveness of our military. This Panel included combat veterans to ensure that our military purpose remained the foremost consideration. I charged the Panel to provide its best military advice, based on increasing the lethality and readiness of America's armed forces, without regard to any external factors.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical

professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed available information on gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike previous reviews on military service by transgender individuals, the Panel's analysis was informed by the Department's own data obtained since the new policy began to take effect last year.

Based on the work of the Panel and the Department's best military judgment, the Department of Defense concludes that there are substantial risks associated with allowing the accession and retention of individuals with a history or diagnosis of gender dysphoria and require, or have already undertaken, a course of treatment to change their gender. Furthermore, the Department also finds that exempting such persons from well-established mental health, physical health, and sex-based standards, which apply to all Service members, including transgender Service members without gender dysphoria, could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality.

The prior administration largely based its policy on a study prepared by the RAND National Defense Research Institute; however, that study contained significant shortcomings. It referred to limited and heavily caveated data to support its conclusions, glossed over the impacts of healthcare costs, readiness, and unit cohesion, and erroneously relied on the selective experiences of foreign militaries with different operational requirements than our own. In short, this policy issue has proven more complex than the prior administration or RAND assumed.

I firmly believe that compelling behavioral health reasons require the Department to proceed with caution before compounding the significant challenges inherent in treating gender dysphoria with the unique, highly stressful circumstances of military training and combat operations. Preservation of unit cohesion, absolutely essential to military effectiveness and lethality, also reaffirms this conclusion.

Therefore, in light of the Panel's professional military judgment and my own professional judgment, the Department should adopt the following policies:

- Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances: (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.

- Transgender persons who require or have undergone gender transition are disqualified from military service.

- Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

I have consulted with the Secretary of Homeland Security, and she agrees with these proposed policies.

By its very nature, military service requires sacrifice. The men and women who serve voluntarily accept limitations on their personal liberties – freedom of speech, political activity, freedom of movement - in order to provide the military lethality and readiness necessary to ensure American citizens enjoy their personal freedoms to the fullest extent. Further, personal characteristics, including age, mental acuity, and physical fitness – among others – matter to field a lethal and ready force.

In my professional judgment, these policies will place the Department of Defense in the strongest position to protect the American people, to fight and win America's wars, and to ensure the survival and success of our Service members around the world. The attached report provided by the Under Secretary of Defense for Personnel and Readiness includes a detailed analysis of the factors and considerations forming the basis of the Department's policy proposals.

I therefore respectfully recommend you revoke your memorandum of August 25, 2017, regarding Military Service by Transgender Individuals, thus allowing me and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to implement appropriate policies concerning military service by transgender persons.

Attachment:
As stated

cc:
Secretary of Homeland Security

DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS

FEBRUARY 2018

Table of Contents

Executive Summary

It is a bedrock principle of the Department of Defense that any eligible individual[1] who can meet the high standards for military service without special accommodations should be permitted to serve. This is no less true for transgender persons than for any other eligible individual. This report, and the recommendations contained herein, proceed from this fundamental premise.

The starting point for determining a person's qualifications for military duty is whether the person can meet the standards that govern the Armed Forces. Federal law requires that anyone entering into military service be "qualified, effective, and able-bodied."[2] Military standards are designed not only to ensure that this statutory requirement is satisfied but to ensure the overall military effectiveness and lethality of the Armed Forces.

The purpose of the Armed Forces is to fight and win the Nation's wars. No human endeavor is more physically, mentally, and emotionally demanding than the life and death struggle of battle. Because the stakes in war can be so high—both for the success and survival of individual units in the field and for the success and survival of the Nation—it is imperative that all Service members are physically and mentally able to execute their duties and responsibilities without fail, even while exposed to extreme danger, emotional stress, and harsh environments.

Although not all Service members will experience direct combat, standards that are applied universally across the Armed Forces must nevertheless account for the possibility that any Service member could be thrust into the crucible of battle at any time. As the Department has made clear to Congress, "[c]ore to maintaining a ready and capable military force is the understanding that each Service member is required to be available and qualified to perform assigned missions, including roles and functions outside of their occupation, in any setting."[3] Indeed, there are no occupations in the military that are exempt from deployment.[4] Moreover, while non-combat positions are vital to success in war, the physical and mental requirements for those positions should not be the barometer by which the physical and mental requirements for all positions, especially combat positions, are defined. Fitness for combat must be the metric against which all standards and requirements are judged. To give all Service members the best chance of success and survival in war, the Department must maintain the highest possible standards of physical and mental health and readiness across the force.

While individual health and readiness are critical to success in war, they are not the only measures of military effectiveness and lethality. A fighting unit is not a mere collection of individuals; it is a unique social organism that, when forged properly, can be far more powerful than the sum of its parts. Human experience over millennia—from the Spartans at Thermopylae to the band of brothers of the 101st Airborne Division in World War II, to Marine squads fighting building-to-building in Fallujah—teaches us this. Military effectiveness requires

[1] 10 U.S.C. §§ 504, 505(a), 12102(b).
[2] 10 U.S.C. § 505(a).
[3] Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," pp. 8-9 (Apr. 2016).
[4] Id.

transforming a collection of individuals into a single fighting organism—merging multiple individual identities into one. This transformation requires many ingredients, including strong leadership, training, good order and discipline, and that most intangible, but vital, of ingredients—unit cohesion or, put another way, human bonding.

Because unit cohesion cannot be easily quantified, it is too often dismissed, especially by those who do not know what Justice Oliver Wendell Holmes called the "incommunicable experience of war."[5] But the experience of those who, as Holmes described, have been "touched with fire" in battle and the experience of those who have spent their lives studying it attest to the enduring, if indescribable, importance of this intangible ingredient. As Dr. Jonathan Shay articulated it in his study of combat trauma in Vietnam, "[s]urvival and success in combat often require soldiers to virtually read one another's minds, reflexively covering each other with as much care as they cover themselves, and going to one another's aid with little thought for safety."[6] Not only is unit cohesion essential to the health of the unit, Dr. Shay found that it was essential to the health of the individual soldier as well. "Destruction of unit cohesion," Dr. Shay concluded, "cannot be overemphasized as a reason why so many psychological injuries that might have healed spontaneously instead became chronic."[7]

Properly understood, therefore, military effectiveness and lethality are achieved through a combination of inputs that include individual health and readiness, strong leadership, effective training, good order and discipline, and unit cohesion. To achieve military effectiveness and lethality, properly designed military standards must foster these inputs. And, for the sake of efficiency, they should do so at the least possible cost to the taxpayer.

To the greatest extent possible, military standards—especially those relating to mental and physical health—should be based on scientifically valid and reliable evidence. Given the life-and-death consequences of warfare, the Department has historically taken a conservative and cautious approach in setting the mental and pbysical standards for the accession and retention of Service members.

Not all standards, however, are capable of scientific validation or quantification. Instead, they are the product of professional military judgment acquired from hard-earned experience leading Service members in peace and war or otherwise arising from expertise in military affairs. Although necessarily subjective, this judgment is the best, if not only, way to assess the impact of any given military standard on the intangible ingredients of military effectiveness mentioned above—leadership, training, good order and discipline, and unit cohesion.

For decades, military standards relating to mental health, physical health, and the physiological differences between men and women operated to preclude from military service transgender persons who desired to live and work as the opposite gender.

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[5] *The Essential Holmes: Selections from the Letters, Speeches, Judicial Opinions, and Other Writings of Oliver Wendell Holmes, Jr.*, p. 93 (Richard Posner, ed., University of Chicago Press 1992).
[6] Jonathan Shay, *Achilles in Vietnam*, p. 61 (Atheneum 1994).
[7] Id. at 198.

Relying on a report by an outside consultant, the RAND National Defense Research Institute, the Department, at the direction of Secretary Ashton Carter, reversed that longstanding policy in 2016. Although the new policy—the "Carter policy"—did not permit all transgender Service members to change their gender to align with their preferred gender identity, it did establish a process to do so for transgender Service members who were diagnosed with gender dysphoria—that is, the distress or impairment of functioning that is associated with incongruity between one's biological sex and gender identity. It also set in motion a new accession policy that would allow applicants who had a history of gender dysphoria, including those who had already transitioned genders, to enter into military service, provided that certain conditions were met. Once a change of gender is authorized, the person must be treated in all respects in accordance with the person's preferred gender, whether or not the person undergoes any hormone therapy or surgery, so long as a treatment plan has been approved by a military physician.

The new accession policy had not taken effect when the current administration came into office. Secretary James Mattis exercised his discretion and approved the recommendation of the Services to delay the Carter accession policy for an additional six months so that the Department could assess its impact on military effectiveness and lethality. While that review was ongoing, President Trump issued a memorandum to the Secretary of Defense and the Secretary of Homeland Security with respect to the U.S. Coast Guard expressing that further study was needed to examine the effects of the prior administration's policy change. The memorandum directed the Secretaries to reinstate the longstanding preexisting accession policy until such time that enough evidence existed to conclude that the Carter policy would not have negative effects on military effectiveness, lethality, unit cohesion, and military resources. The President also authorized the Secretary of Defense, in consultation with the Secretary of Homeland Security, to address the disposition of transgender individuals who were already serving in the military.

Secretary Mattis established a Panel of Experts that included senior uniformed and civilian leaders of the Department and U.S. Coast Guard, many with experience leading Service members in peace and war. The Panel made recommendations based on each Panel member's independent military judgment. Consistent with those recommendations, the Department, in consultation with the Department of Homeland Security, recommends the following policy to the President:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex. Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are qualified for service, provided that they, like all other persons, satisfy all standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which transgender persons without a history or diagnosis of gender dysphoria must serve, like everyone else, in their biological sex.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified. Except for those who are exempt under this policy, as described below, and except where waivers or exceptions to policy are otherwise authorized, transgender persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be ineligible for service. For reasons discussed at length in this report, the Department concludes that accommodating gender transition could impair unit readiness; undermine unit cohesion, as well as good order and discipline, by blurring the clear lines that demarcate male and female standards and policies where they exist; and lead to disproportionate costs. Underlying these conclusions is the considerable scientific uncertainty and overall lack of high quality scientific evidence demonstrating the extent to which transition-related treatments, such as cross-sex hormone therapy and sex reassignment surgery—interventions which are unique in psychiatry and medicine—remedy the multifaceted mental health problems associated with gender dysphoria.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances. Transgender persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver or exception to policy as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability (i.e., absence of gender dysphoria) immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Consistent with the Department's general approach of applying less stringent standards to retention than to accession in order to preserve the Department's substantial investment in trained personnel, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).[8]

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* Transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary care,

[8] Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

to change their gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the Carter policy procedures and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its solemn promise to these Service members, and the investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption is and should be deemed severable from the rest of the policy.

Although the precise number is unknown, the Department recognizes that many transgender persons who desire to serve in the military experience gender dysphoria and, as a result, could be disqualified under the recommended policy set forth in this report. Many transgender persons may also be unwilling to adhere to the standards associated with their biological sex as required by longstanding military policy. But others have served, and are serving, with distinction under the standards for their biological sex, like all other Service members. Nothing in this policy precludes service by transgender persons who do not have a history or diagnosis of gender dysphoria and are willing and able to meet all standards that apply to their biological sex.

Moreover, nothing in this policy should be viewed as reflecting poorly on transgender persons who suffer from gender dysphoria, or have had a history of gender dysphoria, and are accordingly disqualified from service. The vast majority of Americans from ages 17 to 24—that is, 71%—are ineligible to join the military without a waiver for mental, medical, or behavioral reasons.[9] Transgender persons with gender dysphoria are no less valued members of our Nation than all other categories of persons who are disqualified from military service. The Department honors all citizens who wish to dedicate, and perhaps even lay down, their lives in defense of the Nation, even when the Department, in the best interests of the military, must decline to grant their wish.

Military standards are high for a reason—the trauma of war, which all Service members must be prepared to face, demands physical, mental, and moral standards that will give all Service members the greatest chance to survive the ordeal with their bodies, minds, and moral character intact. The Department would be negligent to sacrifice those standards for any cause. There are serious differences of opinion on this issue, even among military professionals, but in the final analysis, given the uncertainty associated with the study and treatment of gender dysphoria, the competing interests involved, and the vital interests at stake—our Nation's defense and the success and survival of our Service members in war—the Department must proceed with caution.

[9] The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report," p. 26 (Sept. 2016).

History of Policies Concerning Transgender Persons

For decades, military standards have precluded the accession and retention of certain transgender persons.[10] Accession standards—i.e., standards that govern induction into the Armed Forces—have historically disqualified persons with a history of "transsexualism." Also disqualified were persons who had undergone genital surgery or who had a history of major abnormalities or defects of the genitalia. These standards prevented transgender persons, especially those who had undergone a medical or surgical gender transition, from accessing into the military, unless a waiver was granted.

Although retention standards—i.e., standards that govern the retention and separation of persons already serving in the Armed Forces—did not require the mandatory processing for separation of transgender persons, it was a permissible basis for separation processing as a physical or mental condition not amounting to a disability. More typically, however, such Service members were processed for separation because they suffered from other associated medical conditions or comorbidities, such as depression, which were also a basis for separation processing.

At the direction of Secretary Carter, the Department made significant changes to these standards. These changes—i.e., the "Carter policy"—prohibit the separation of Service members on the basis of their gender identity and allow Service members who are diagnosed with gender dysphoria to transition to their preferred gender.

Transition-related treatment is highly individualized and could involve what is known as a "medical transition," which includes cross-sex hormone therapy, or a "surgical transition,"

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[10] For purposes of this report, the Department uses the broad definition of "transgender" adopted by the RAND National Defense Institute in its study of transgender service: "an umbrella term used for individuals who have sexual identity or gender expression that differs from their assigned sex at birth." RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, p.75 (RAND Corporation 2016), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf ("RAND Study"). According to the Human Rights Campaign, "[t]he transgender community is incredibly diverse. Some transgender people identify as male or female, and some identify as genderqueer, nonbinary, agender, or somewhere else on or outside of the spectrum of what we understand gender to be." Human Rights Campaign, "Understanding the Transgender Community," https://www.hrc.org/resources/understanding-the-transgender-community (last visited Feb. 14, 2018). A subset of transgender persons are those who have been diagnosed with gender dysphoria. According to the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association, "gender dysphoria" is a "marked incongruence between one's experienced/expressed gender and assigned gender" that "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 452-53 (5th ed. 2013). Based on these definitions, a person can be transgender without necessarily having gender dysphoria (i.e., the transgender person does not suffer "clinically significant distress or impairment" on account of gender incongruity). A 2016 survey of active duty Service members estimated that approximately 1% of the force—8,980 Service members—identify as transgender. Office of People Analytics, Department of Defense, "2016 Workplace and Gender Relations Survey of Active Duty Members, Transgender Service Members," pp. 1-2. Currently, there are 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016. In addition, when using the term "biological sex" or "sex," this report is referring to the definition of "sex" in the RAND study: "a person's biological status as male or female based on chromosomes, gonads, hormones, and genitals (intersex is a rare exception)." RAND Study at 75.

which includes sex reassignment surgery. Service members could also forego medical transition treatment altogether, retain all of their biological anatomy, and live as the opposite gender—this is called a "social transition."

Once the Service member's transition is complete, as determined by the member's military physician and commander in accordance with his or her individualized treatment plan, and the Service member provides legal documentation of gender change, the Carter policy allows for the Service member's gender marker to be changed in the DEERS. Thereafter, the Service member must be treated in every respect—including with respect to physical fitness standards; berthing, bathroom, and shower facilities; and uniform and grooming standards—in accordance with the Service member's preferred gender. The Carter policy, however, still requires transgender Service members who have not changed their gender marker in DEERS, including persons who identify as other than male or female, to meet the standards associated with their biological sex.

The Carter policy also allows accession of persons with gender dysphoria who can demonstrate stability in their preferred gender for at least 18 months. The accession policy did not take effect until required by court order, effective January 1, 2018.

The following discussion describes in greater detail the evolution of accession and retention standards pertaining to transgender persons.

Transgender Policy Prior to the Carter Policy

A. Accession Medical Standards

DoD Instruction (DoDI) 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services*, establishes baseline accession medical standards used to determine an applicant's medical qualifications to enter military service. This instruction is reviewed every three to four years by the Accession Medical Standards Working Group (AMSWG), which includes medical and personnel subject matter experts from across the Department, its Military Services, and the U.S. Coast Guard. The AMSWG thoroughly reviews over 30 bodily systems and medical focus areas while carefully considering evidence-based clinical information, peer-reviewed scientific studies, scientific expert consensus, and the performance of existing standards in light of empirical data on attrition, deployment readiness, waivers, and disability rates. The AMSWG also considers inputs from non-government sources and evaluates the applicability of those inputs against the military's mission and operational environment, so that the Department and the Military Services can formally coordinate updates to these standards.

Accession medical standards are based on the operational needs of the Department and are designed to ensure that individuals are physically and psychologically "qualified, effective, and able-bodied persons"[1] capable of performing military duties. Military effectiveness requires that the Armed Forces manage an integrated set of unique medical standards and qualifications because all military personnel must be available for worldwide duty 24 hours a day without

[1] 10 U.S.C. § 505(a).

restriction or delay. Such duty may involve a wide range of demands, including exposure to danger or harsh environments, emotional stress, and the operation of dangerous, sensitive, or classified equipment. These duties are often in remote areas lacking immediate and comprehensive medical support. Such demands are not normally found in civilian occupations, and the military would be negligent in its responsibility if its military standards permitted admission of applicants with physical or emotional impairments that could cause harm to themselves or others, compromise the military mission, or aggravate any current physical or mental health conditions that they may have.

In sum, these standards exist to ensure that persons who are under consideration for induction into military service are:

- free of contagious diseases that probably will endanger the health of other personnel;
- free of medical conditions or physical defects that may require excessive time lost from duty for necessary treatment or hospitalization, or probably will result in separation from service for medical unfitness;
- medically capable of satisfactorily completing required training;
- medically adaptable to the military environment without the necessity of geographical area limitations; and
- medically capable of performing duties without aggravation of existing physical defects or medical conditions.[12]

Establishing or modifying an accession standard is a risk management process by which a health condition is evaluated in terms of the probability and effect on the five listed outcomes above. These standards protect the applicant from harm that could result from the rigors of military duty and help ensure unit readiness by minimizing the risk that an applicant, once inducted into military service, will be unavailable for duty because of illness, injury, disease, or bad health.

Unless otherwise expressly provided, a current diagnosis or verified past medical history of a condition listed in DoDI 6130.03 is presumptively disqualifying.[13] Accession standards reflect the considered opinion of the Department's medical and personnel experts that an applicant with an identified condition should only be able to serve if they can qualify for a waiver. Waivers are generally only granted when the condition will not impact the individual's assigned specialty or when the skills of the individual are unique enough to warrant the additional risk. Waivers are not generally granted when the conditions of military service may aggravate the existing condition. For some conditions, applicants with a past medical history may nevertheless be eligible for accession if they meet the requirements for a certain period of "stability"—that is, they can demonstrate that the condition has been absent for a defined period

[12] Department of Defense Instruction 6130.03, *Medical Standards for Appointment, Enlistment, or Induction in the Military Services* (Apr. 28, 2010), incorporating Change 1, p. 2 (Sept. 13, 2011) ("DoDI 6130.03").
[13] Id. at 10.

of time prior to accession.[14] With one exception,[15] each accession standard may be waived in the discretion of the accessing Service based on that Service's policies and practices, which are driven by the unique requirements of different Service missions, different Service occupations, different Service cultures, and at times, different Service recruiting missions.

Historically, mental health conditions have been a great concern because of the unique mental and emotional stresses of military service. Mental health conditions frequently result in attrition during initial entry training and the first term of service and are routinely considered by in-service medical boards as a basis for separation. Department mental health accession standards have typically aligned with the conditions identified in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), which is published by the American Psychiatric Association (APA). The DSM sets forth the descriptions, symptoms, and other criteria for diagnosing mental disorders. Health care professionals in the United States and much of the world use the DSM as the authoritative guide to the diagnosis of mental disorders.

Prior to implementation of the Carter policy, the Department's accession standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."[16] These standards were consistent with DSM-III, which in 1980, introduced the diagnosis of transsexualism.[17] In 1987, DSM-III-R added gender identity disorder, non-transsexual type.[18] DSM-IV, which was published in 1994, combined these two diagnoses and called the resulting condition "gender identity disorder."[19] Due to challenges associated with updating and publishing a new iteration of DoDI 6130.03, the DoDI's terminology has not changed to reflect the changes in the DSM, including further changes that will be discussed later.

DoDI 6130.03 also contains other disqualifying conditions that are associated with, but not unique to, transgender persons, especially those who have undertaken a medical or surgical transition to the opposite gender. These include:

- a history of chest surgery, including but not limited to the surgical removal of the breasts,[20] and genital surgery, including but not limited to the surgical removal of the testicles;[21]

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[14] See, e.g., id. at 47.
[15] The accession standards for applicants with HIV are not waivable absent a waiver from both the accessing Service and the Under Secretary of Defense for Personnel and Readiness. See Department of Defense Instruction 6485.01, *Human Immunodeficiency Virus (HIV) in Military Service Members* (Jun. 7, 2013).
[16] DoDI 6130.03 at 48.
[17] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, pp. 261-264 (3rd ed. 1980).
[18] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R)*, pp. 76-77 (3rd ed. revised 1987).
[19] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)*, pp. 532-538 (4th ed. 1994).
[20] DoDI 6130.03 at 18.
[21] Id. at 25-27.

- a history of major abnormalities or defects of the genitalia, including but not limited to change of sex, hermaphroditism, penis amputation, and pseudohermaphroditism;[22]
- mental health conditions such as suicidal ideation, depression, and anxiety disorder;[23] and
- the use of certain medications, or conditions requiring the use of medications, such as hormone therapies and anti-depressants.[24]

Together with a diagnosis of transsexualism, these conditions, which were repeatedly validated by the AMSWG, provided multiple grounds for the disqualification of transgender persons.

B. Retention Standards

The standards that govern the retention of Service members who are already serving in the military are generally less restrictive than the corresponding accession standards due to the investment the Department has made in the individual and their increased capability to contribute to mission accomplishment.

Also unlike the Department's accession standards, each Service develops and applies its own retention standards. With respect to the retention of transgender Service members, these Service-specific standards may have led to inconsistent outcomes across the Services, but as a practical matter, before the Carter policy, the Services generally separated Service members who desired to transition to another gender. During that time, there were no express policies allowing individuals to serve in their preferred gender rather than their biological sex.

Previous Department policy concerning the retention (administrative separation) of transgender persons was not clear or rigidly enforced. DoDI 1332.38, *Physical Disability Evaluation*, now cancelled, characterized "sexual gender and identity disorders" as a basis for allowing administrative separation for a condition not constituting a disability; it did not require mandatory processing for separation. A newer issuance, DoDI 1332.18, *Disability Evaluation System (DES)*, August 5, 2014, does not reference these disorders but instead reflects changes in how such medical conditions are characterized in contemporary medical practice.

Earlier versions of DoDI 1332.14, *Enlisted Administrative Separations*, contained a cross reference to the list of conditions not constituting a disability in former DoDI 1332.38. This was how "transsexualism," the older terminology, was used as a basis for administrative separation. Separation on this basis required formal counseling and an opportunity to address the issue, as well as a finding that the condition was interfering with the performance of duty. In practice, transgender persons were not usually processed for administrative separation on account of gender dysphoria or gender identity itself, but rather on account of medical comorbidities (e.g., depression or suicidal ideation) or misconduct due to cross dressing and related behavior.

[22] Id.
[23] Id. at 47-48.
[24] Id. at 48.

The Carter Policy

At the direction of Secretary Carter, the Department began formally reconsidering its accession and retention standards as they applied to transgender persons with gender dysphoria in 2015. This reevaluation, which culminated with the release of the Carter policy in 2016, was prompted in part by amendments to the DSM that appeared to change the diagnosis for gender identity disorder from a disorder to a treatable condition called gender dysphoria. Starting from the assumption that transgender persons are qualified for military service, the Department sought to identify and remove the obstacles to such service. This effort resulted in substantial changes to the Department's accession and retention standards to accommodate transgender persons with gender dysphoria who require treatment for transitioning to their preferred gender.

A. Changes to the DSM

When the APA published the fifth edition of the DSM in May 2013, it changed "gender identity disorder" to "gender dysphoria" and designated it as a "condition"—a new diagnostic class applicable only to gender dysphoria—rather than a "disorder."[25] This change was intended to reflect the APA's conclusion that gender nonconformity alone—without accompanying distress or impairment of functioning—was not a mental disorder.[26] DSM-5 also decoupled the diagnosis for gender dysphoria from diagnoses for "sexual dysfunction and parphilic disorders, recognizing fundamental differences between these diagnoses."[27]

According to DSM-5, gender dysphoria in adolescents and adults is "[a] marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months' duration, as manifested by at least two of the following":

- A marked incongruence between one's experienced/expressed gender and primary and/or secondary sex characteristics (or in young adolescents, the anticipated secondary sex characteristics).
- A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experienced/expressed gender (or in young adolescents, a desire to prevent the development of the anticipated secondary sex characteristics).

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[25] See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, pp. 451-459 (5th ed. 2013) ("DSM-5").
[26] RAND Study at 77; see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (May 15, 2014), p. 1 ("This change was intended to reflect a consensus that gender nonconformity is not a psychiatric disorder, as it was previously categorized. However, since the condition may cause clinically significant distress and since a diagnosis is necessary for access to medical treatment, the new term was proposed."); Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, pp. 1182-83 (2016) ("In the DSM-5, [gender dysphoria] has replaced the diagnosis of 'gender identity disorder' in order to place the focus on the dysphoria and to diminish the pathology associated with identity incongruence.").
[27] Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1183 (2016).

- A strong desire for the primary and/or secondary sex characteristics of the other gender.
- A strong desire to be of the other gender (or some alternative gender different from one's assigned gender).
- A strong desire to be treated as the other gender (or some alternative gender different from one's assigned gender).
- A strong conviction that one has the typical feelings and reactions of the other gender (or some alternative gender different from one's assigned gender).

Importantly, DSM-5 observed that gender dysphoria "is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[28]

B. The Department Begins Review of Transgender Policy

On July 28, 2015, then Secretary Carter issued a memorandum announcing that no Service members would be involuntarily separated or denied reenlistment or continuation of service based on gender identity or a diagnosis of gender dysphoria without the personal approval of the Under Secretary of Defense for Personnel and Readiness.[29] The memorandum also created the Transgender Service Review Working Group (TSRWG) "to study the policy and readiness implications of welcoming transgender persons to serve openly."[30] The memorandum specifically directed the working group to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified."[31]

As part of this review, the Department commissioned the RAND National Defense Research Institute to conduct a study to "(1) identify the health care needs of the transgender population, transgender Service members' potential health care utilization rates, and the costs associated with extending health care coverage for transition-related treatments; (2) assess the potential readiness impacts of allowing transgender Service members to serve openly; and (3) review the experiences of foreign militaries that permit transgender Service members to serve openly."[32] The resulting report, entitled *Assessing the Implications of Allowing Transgender Personnel to Serve Openly*, reached several conclusions. First, the report estimated that there are between 1,320 and 6,630 transgender Service members already serving in the active component of the Armed Forces and 830 to 4,160 in the Selected Reserve.[33] Second, the report predicted "annual gender transition-related health care to be an extremely small part of the overall health care provided to the [active component] population."[34] Third, the report estimated that active component "health care costs will increase by between $2.4 million and $8.4 million annually—an amount that will have little impact on and represents an exceedingly small proportion of

[28] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*, p. 453 (5th ed. 2013).
[29] Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015).
[30] Id.
[31] Id.
[32] RAND Study at 1.
[33] Id. at x-xi.
[34] Id. at xi.

[active component] health care expenditures (approximately $6 billion in FY 2014)."[35] Fourth, the report "found that less than 0.0015 percent of the total available labor-years would be affected, based on estimated gender transition-related health care utilization rates."[36] Finally, the report concluded that "[e]xisting data suggest a minimal impact on unit cohesion as a result of allowing transgender personnel to serve openly."[37] "Overall," according to RAND, "our study found that the number of U.S. transgender Service members who are likely to seek transition-related care is so small that a change in policy will likely have a marginal impact on health care costs and the readiness of the force."[38]

The RAND report thus acknowledged that there will be an adverse impact on health care utilization and costs, readiness, and unit cohesion, but concluded nonetheless that the impact will be "negligible" and "marginal" because of the small estimated number of transgender Service members relative to the size of the active component of the Armed Forces. Because of the RAND report's macro focus, however, it failed to analyze the impact at the micro level of allowing gender transition by individuals with gender dysphoria. For example, as discussed in more detail later, the report did not examine the potential impact on unit readiness, perceptions of fairness and equity, personnel safety, and reasonable expectations of privacy at the unit and sub-unit levels, all of which are critical to unit cohesion. Nor did the report meaningfully address the significant mental health problems that accompany gender dysphoria—from high rates of comorbidities and psychiatric hospitalizations to high rates of suicide ideation and suicidality—and the scope of the scientific uncertainty regarding whether gender transition treatment fully remedies those problems.

C. New Standards for Transgender Persons

Based on the RAND report, the work of the TSRWG, and the advice of the Service Secretaries, Secretary Carter approved the publication of DoDI 1300.28, *In-service Transition for Service Members Identifying as Transgender*, and Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members," on June 30, 2016. Although the new retention standards were effective immediately upon publication of the above memoranda, the accession standards were delayed until July 1, 2017, to allow time for training all Service members across the Armed Forces, including recruiters, Military Entrance Processing Station (MEPS) personnel, and basic training cadre, and to allow time for modifying facilities as necessary.

1. *Retention Standards*. DoDI 1300.28 establishes the procedures by which Service members who are diagnosed with gender dysphoria may administratively change their gender. Once a Service member receives a gender dysphoria diagnosis from a military physician, the physician, in consultation with the Service member, must establish a treatment plan. The treatment plan is highly individualized and may include cross-sex hormone therapy (i.e., medical transition), sex reassignment surgery (i.e., surgical transition), or simply living as the opposite gender but without any cross-sex hormone or surgical treatment (i.e., social

[35] Id. at xi-xii.
[36] Id. at xii.
[37] Id.
[38] Id. at 69.

transition). The nature of the treatment is left to the professional medical judgment of the treating physician and the individual situation of the transgender Service member. The Department does not require a Service member with gender dysphoria to undergo cross-sex hormone therapy, sex reassignment surgery, or any other physical changes to effectuate an administrative change of gender. During the course of treatment, commanders are authorized to grant exceptions from physical fitness, uniform and grooming, and other standards, as necessary and appropriate, to transitioning Service members. Once the treating physician determines that the treatment plan is complete, the Service member's commander approves, and the Service member produces legal documentation indicating change of gender (e.g., certified birth certificate, court order, or U.S. passport), the Service member may request a change of gender marker in DEERS. Once the DEERS gender marker is changed, the Service member is held to all standards associated with the member's transitioned gender, including uniform and grooming standards, body composition assessment, physical readiness testing, Military Personnel Drug Abuse Testing Program participation, and other military standards congruent to the member's gender. Indeed, the Service member must be treated in all respects in accordance with the member's transitioned gender, including with respect to berthing, bathroom, and shower facilities. Transgender Service members who do not meet the clinical criteria for gender dysphoria, by contrast, remain subject to the standards and requirements applicable to their biological sex.

2. *Accession Standards*. DTM 16-005 directed that the following medical standards for accession into the Military Services take effect on July 1, 2017:

(1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:

(a) the applicant has completed all medical treatment associated with the applicant's gender transition; and
(b) the applicant has been stable in the preferred gender for 18 months; and
(c) if the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:

(a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) no functional limitations or complications persist, nor is any additional surgery required.[39]

[39] Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members,'" Attachment, pp. 1-2 (June 30, 2016).

Panel of Experts Recommendation

The Carter policy's accession standards for persons with a history of gender dysphoria were set to take effect on July 1, 2017, but on June 30, after consultation with the Secretaries and Chiefs of Staff of each Service, Secretary Mattis postponed the new standards for an additional six months "to evaluate more carefully the impact of such accessions on readiness and lethality."[40] Secretary Mattis specifically directed that the review would "include all relevant considerations" and would last for five months, with a due date of December 1, 2017.[41] The Secretary also expressed his desire to have "the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department."[42]

While Secretary Mattis's review was ongoing, President Trump issued a memorandum, on August 25, 2017, directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to reinstate longstanding policy generally barring the accession of transgender individuals "until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice" would not "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources."[43] The President found that "further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects."[44] Accordingly, the President directed both Secretaries to maintain the prohibition on accession of transgender individuals "until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary" that is convincing.[45] The President made clear that the Secretaries may advise him "at any time, in writing, that a change to this policy is warranted."[46] In addition, the President gave both Secretaries discretion to "determine how to address transgender individuals currently serving" in the military and made clear that no action be taken against them until a determination was made.[47]

On September 14, 2017, Secretary Mattis established a Panel of Experts to study, in a "comprehensive, holistic, and objective" manner, "military service by transgender individuals, focusing on military readiness, lethality, and unit cohesion, with due regard for budgetary constraints and consistent with applicable law."[48] He directed the Panel to "conduct an independent multi-disciplinary review and study of relevant data and information pertaining to transgender Service members."[49]

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[40] Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017).
[41] Id.
[42] Id.
[43] Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017).
[44] Id. at 1.
[45] Id. at 2.
[46] Id.
[47] Id.
[48] Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals," pp. 1-2 (Sept. 14, 2017).
[49] Id. at 2.

The Panel consisted of the Under Secretaries of the Military Departments (or officials performing their duties), the Armed Services' Vice Chiefs (including the Vice Commandant of the U.S. Coast Guard), and the Senior Enlisted Advisors, and was chaired by the Under Secretary of Defense for Personnel and Readiness or an official performing those duties. The Secretary of Defense selected these senior leaders because of their experience leading warfighters in war and peace or their expertise in military operational effectiveness. These senior leaders also have the statutory responsibility to organize, train, and equip military forces and are uniquely qualified to evaluate the impact of policy changes on the combat effectiveness and lethality of the force. The Panel met 13 times over a span of 90 days.

The Panel received support from medical and personnel experts from across the Departments of Defense and Homeland Security. The Transgender Service Policy Working Group, comprised of medical and personnel experts from across the Department, developed policy recommendations and a proposed implementation plan for the Panel's consideration. The Medical and Personnel Executive Steering Committee, a standing group of the Surgeons General and Service Personnel Chiefs, led by Personnel and Readiness, provided the Panel with an analysis of accession standards, a multi-disciplinary review of relevant data, and information about medical treatment for gender dysphoria and gender transition-related medical care. These groups reported regularly to the Panel and responded to numerous queries for additional information and analysis to support the Panel's review and deliberations. A separate working group tasked with enhancing the lethality of our Armed Forces also provided a briefing to the Panel on their work relating to retention standards.

The Panel met with and received input from transgender Service members, commanders of transgender Service members, military medical professionals, and civilian medical professionals with experience in the care and treatment of individuals with gender dysphoria. The Panel also reviewed information and analyses about gender dysphoria, the treatment of gender dysphoria, and the effects of currently serving individuals with gender dysphoria on military effectiveness, unit cohesion, and resources. Unlike past reviews, the Panel's analysis was informed by the Department's own data and experience obtained since the Carter policy took effect.

To fulfill its mandate, the Panel addressed three questions:

- Should the Department of Defense access transgender individuals?
- Should the Department allow transgender individuals to transition gender while serving, and if so, what treatment should be authorized?
- How should the Department address transgender individuals who are currently serving?

After extensive review and deliberation, which included evidence in support of and against the Panel's recommendations, the Panel exercised its professional military judgment and made recommendations. The Department considered those recommendations and the information underlying them, as well as additional information within the Department, and now proposes the following policy consistent with those recommendations.

Recommended Policy

To maximize military effectiveness and lethality, the Department, after consultation with and the concurrence of the Department of Homeland Security, recommends cancelling the Carter policy and, as explained below, adopting a new policy with respect to the accession and retention of transgender persons.

The Carter policy assumed that transgender persons were generally qualified for service and that their accession and retention would not negatively impact military effectiveness. As noted earlier, Secretary Carter directed the TSRWG, the group charged with evaluating, and making recommendations on, transgender service, to "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except where objective practical impediments are identified."[50] Where necessary, standards were adjusted or relaxed to accommodate service by transgender persons. The following analysis makes no assumptions but instead applies the relevant standards applicable to everyone to determine the extent to which transgender persons are qualified for military duty.

For the following reasons, the Department concludes that transgender persons should not be disqualified from service solely on account of their transgender status, provided that they, like all other Service members, are willing and able to adhere to all standards, including the standards associated with their biological sex. With respect to the subset of transgender persons who have been diagnosed with gender dysphoria, however, those persons are generally disqualified unless, depending on whether they are accessing or seeking retention, they can demonstrate stability for the prescribed period of time; they do not require, and have not undergone, a change of gender; and they are otherwise willing and able to meet all military standards, including those associated with their biological sex. In order to honor its commitment to current Service members diagnosed with gender dysphoria, those Service members who were diagnosed after the effective date of the Carter policy and before any new policy takes effect will not be subject to the policy recommended here.

Discussion of Standards

The standards most relevant to the issue of service by transgender persons fall into three categories: mental health standards, physical health standards, and sex-based standards. Based on these standards, the Department can assess the extent to which transgender persons are qualified for military service and, in light of that assessment, recommend appropriate policies.

A. Mental Health Standards

Given the extreme rigors of military service and combat, maintaining high standards of mental health is essential to military effectiveness and lethality. The immense toll that the burden and experience of combat can have on the human psyche cannot be overstated. Therefore, putting individuals into battle, who might be at increased risk of psychological injury, would be reckless, not only for those individuals, but for the Service members who serve beside them as well.

[50] Memorandum from Ashton Carter, Secretary of Defense, "Transgender Service Members" (July 28, 2015).

The Department's experience with the mental health issues arising from our wars in Afghanistan and Iraq, including post-traumatic stress disorder (PTSD), only underscores the importance of maintaining high levels of mental health across the force. PTSD has reached as high as 2.8% of all active duty Service members, and in 2016, the number of active duty Service members with PTSD stood at 1.5%.[51] Of all Service members in the active component, 7.5% have been diagnosed with a mental health condition of some type.[52] The Department is mindful of these existing challenges and must exercise caution when considering changes to its mental health standards.

Most mental health conditions and disorders are automatically disqualifying for accession absent a waiver. For example, persons with a history of bipolar disorder, personality disorder, obsessive-compulsive disorder, suicidal behavior, and even body dysmorphic disorder (to name a few) are barred from entering into military service, unless a waiver is granted.[53] For a few conditions, however, persons may enter into service without a waiver if they can demonstrate stability for 24 to 36 continuous months preceding accession. Historically, a person is deemed stable if they are without treatment, symptoms, or behavior of a repeated nature that impaired social, school, or work efficiency for an extended period of several months. Such conditions include depressive disorder (stable for 36 continuous months) and anxiety disorder (stable for 24 continuous months).[54] Requiring a period of stability reduces, but does not eliminate, the likelihood that the individual's depression or anxiety will return.

Historically, conditions associated with transgender individuals have been automatically disqualifying absent a waiver. Before the changes directed by Secretary Carter, military mental health standards barred persons with a "[h]istory of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias."[55] These standards, however, did not evolve with changing understanding of transgender mental health. Today, transsexualism is no longer considered by most mental health practitioners as a mental health condition. According to the APA, it is not a medical condition for persons to identify with a gender that is different from their biological sex.[56] Put simply, transgender status alone is not a condition.

Gender dysphoria, by contrast, is a mental health condition that can require substantial medical treatment. Many individuals who identify as transgender are diagnosed with gender dysphoria, but "[n]ot all transgender people suffer from gender dysphoria and that distinction," according to the APA, "is important to keep in mind."[57] The DSM-5 defines gender dysphoria as

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[51] Deployment Health Clinical Center, "Mental Health Disorder Prevalence among Active Duty Service Members in the Military Health System, Fiscal Years 2005-2016" (Jan. 2017).
[52] Id.
[53] DoDI 6130.03 at 47-48.
[54] Id.
[55] Id. at 48.
[56] DSM-5 at 452-53.
[57] American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018). Conversely, not all persons with gender dysphoria are transgender. "For example, some men who are disabled in combat, especially if their injury includes genital wounds, may feel that they are no longer men because their bodies do not conform to their concept of manliness. Similarly, a woman who opposes plastic surgery, but who must undergo mastectomy because of breast

a "marked incongruence between one's experience/expressed gender and assigned gender, of at least 6 months duration," that is manifested in various specified ways.[58] According to the APA, the "condition is associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[59]

Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders.[60] High rates of suicide ideation, attempts, and completion among people who are transgender are also well documented in the medical literature, with lifetime rates of suicide attempts reported to be as high as 41% (compared to 4.6% for the general population).[61] According to a 2015 survey, the rate skyrockets to 57% for transgender individuals without a supportive family.[62] The Department is concerned that the stresses of military life, including basic training, frequent moves, deployment to war zones and austere environments, and the relentless physical demands, will be additional contributors to suicide behavior in people with gender dysphoria. In fact, there is recent evidence that military service can be a contributor to suicidal thoughts.[63]

Preliminary data of Service members with gender dysphoria reflect similar trends. A review of the administrative data indicates that Service members with gender dysphoria are eight times more likely to attempt suicide than Service members as a whole (12% versus 1.5%).[64]

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cancer, may find that she requires reconstructive breast surgery in order to resolve gender dysphoria arising from the incongruence between her body without breasts and her sense of herself as a woman." M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas Kolditz & Alan Steinman, "Medical Aspects of Transgender Military Service," *Armed Forces & Society*, p. 5 n.22 (Mar. 2014).

[58] DSM-5 at 452.

[59] DSM-5 at 453.

[60] Cecilia Dhejne, Roy Van Vlerken, Gunter Heylens & Jon Arcelus, "Mental health and gender dysphoria: A review of the literature," *International Review of Psychiatry*, Vol. 28, pp. 44-57 (2016); George R. Brown & Kenneth T. Jones, "Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study," *LGBT Health*, Vol. 3, p. 128 (Apr. 2016).

[61] Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, p. 2 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf; H.G. Virupaksha, Daliboyina Muralidhar & Jayashree Ramakrishna, "Suicide and Suicide Behavior among Transgender Persons," *Indian Journal of Psychological Medicine*, Vol.38, pp. 505-09 (2016); Claire M. Peterson, Abigail Matthews, Emily Copps-Smith & Lee Ann Conard, "Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria," *Suicide and Life Threatening Behavior*, Vol. 47, pp. 475-482 (Aug. 2017).

[62] Ann P. Haas, Philip L. Rodgers & Jody L. Herman, *Suicide Attempts among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey*, pp. 2, 12 (American Foundation for Suicide Prevention and The Williams Institute, University of California, Los Angeles, School of Law 2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/AFSP-Williams-Suicide-Report-Final.pdf.

[63] Raymond P. Tucker, Rylan J. Testa, Mark A.Reger, Tracy L. Simpson, Jillian C. Shipherd, & Keren Lehavot, "Current and Military-Specific Gender Minority Stress Factors and Their Relationship with Suicide Ideation in Transgender Veterans," *Suicide and Life Threatening Behavior* DOI: 10.1111/sltb.12432 (epub ahead of print), pp. 1-10 (2018); Craig J. Bryan, AnnaBelle O. Bryan, Bobbie N. Ray-Sannerud, Neysa Etienne & Chad E. Morrow, "Suicide attempts before joining the military increase risk for suicide attempts and severity of suicidal ideation among military personnel and veterans," *Comprehensive Psychiatry*, Vol. 55, pp. 534-541 (2014).

[64] Data retrieved from Military Health System data repository (Oct. 2017).

Service members with gender dysphoria are also nine times more likely to have mental health encounters than the Service member population as a whole (28.1 average encounters per Service member versus 2.7 average encounters per Service member).[65] From October 1, 2015 to October 3, 2017, the 994 active duty Service members diagnosed with gender dysphoria accounted for 30,000 mental health visits.[66]

It is widely believed by mental health practitioners that gender dysphoria can be treated. Under commonly accepted standards of care, treatment for gender dysphoria can include: psychotherapy; social transition—also known as "real life experience"—to allow patients to live and work in their preferred gender without any hormone treatment or surgery; medical transition to align secondary sex characteristics with patients' preferred gender using cross-sex hormone therapy and hair removal; and surgical transition—also known as sex reassignment surgery—to make the physical body—both primary and secondary sex characteristics—resemble as closely as possible patients' preferred gender.[67] The purpose of these treatment options is to alleviate the distress and impairment of gender dysphoria by seeking to bring patients' physical characteristics into alignment with their gender identity—that is, one's inner sense of one's own gender.[68]

Cross-sex hormone therapy is a common medical treatment associated with gender transition that may be commenced following a diagnosis of gender dysphoria.[69] Treatment for women transitioning to men involves the administration of testosterone, whereas treatment for men transitioning to women requires the blocking of testosterone and the administration of estrogens.[70] The Endocrine Society's clinical guidelines recommend laboratory bloodwork every 90 days for the first year of treatment to monitor hormone levels.[71]

As a treatment for gender dysphoria, sex reassignment surgery is "a unique intervention not only in psychiatry but in all of medicine."[72] Under existing Department guidelines

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[65] Data retrieved from Military Health System data repository (Oct. 2017). Study period was Oct. 1, 2015 to July 26, 2017.

[66] Data retrieved from Military Health System data repository (Oct. 2017).

[67] RAND Study at 5-7, Appendices A & C; see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 1 (May 15, 2014) ("The full therapeutic approach to [gender dysphoria] consists of 3 elements or phases, typically in the following order: (1) hormones of the desired gender; (2) real-life experience for 12 months in the desired role; and (3) surgery to change the genitalia and other sex characteristics (e.g., breast reconstruction or mastectomy). However, not everyone with [gender dysphoria] needs or wants all elements of this triadic approach."); Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1183 (Oct. 2016) ("The Endocrine Society proposes a sequential approach in transsexual care to optimize mental health and physical outcomes. Generally, they recommend initiation of psychotherapy, followed by cross-sex hormone treatments, then [sex reassignment surgery].").

[68] RAND Study at 73.

[69] Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

[70] Id. at 3885-3888.

[71] Id.

[72] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011); see also Hayes Directory, "Sex Reassignment Surgery for the Treatment of

implementing the Carter policy, men transitioning to women may obtain an orchiectomy (surgical removal of the testicles), a penectomy (surgical removal of the penis), a vaginoplasty (surgical creation of a vagina), a clitoroplasty (surgical creation of a clitoris), and a labiaplasty (surgical creation of the labia). Women transitioning to men may obtain a hysterectomy (surgical removal of the uterus), a mastectomy (surgical removal of the breasts), a metoidioplasty (surgical enlargement of the clitoris), a phalloplasty (surgical creation of a penis), a scrotoplasty (surgical creation of a scrotum) and placement of testicular prostheses, a urethroplasty (surgical enlargement of the urethra), and a vaginectomy (surgical removal of the vagina). In addition, the following cosmetic procedures may be provided at military treatment facilities as well: abdominoplasty, breast augmentation, blepharoplasty (eyelid lift), hair removal, face lift, facial bone reduction, hair transplantation, liposuction, reduction thyroid chondroplasty, rhinoplasty, and voice modification surgery.[73]

The estimated recovery time for each of the surgical procedures, even assuming no complications, can be substantial. For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to eight weeks; an orchiectomy is up to six weeks; and a vaginoplasty is up to three months.[74] When combined with 12 continuous months of hormone therapy, which is required prior to genital surgery,[75] the total time necessary for surgical transition can exceed a year.

Although relatively few people who are transgender undergo genital reassignment surgeries (2% of transgender men and 10% of transgender women), we have to consider that the rate of complications for these surgeries is significant, which could increase a transitioning Service member's unavailability.[76] Even according to the RAND study, 6% to 20% of those receiving vaginoplasty surgery experience complications, meaning that "between three and 11 Service members per year would experience a long-term disability from gender reassignment

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Gender Dysphoria," p. 2 (May 15, 2014) (noting that gender dysphoria "does not readily fit traditional concepts of medical necessity since research to date has not established anatomical or physiological anomalies associated with [gender dysphoria]"); Hayes Annual Review, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria" (Apr. 18, 2017).

[73] Memorandum from Defense Health Agency, "Information Memorandum: Interim Defense Health Agency Procedures for Reviewing Requests for Waivers to Allow Supplemental Health Care Program Coverage of Sex Reassignment Surgical Procedures" (Nov. 13, 2017); see also RAND Study at Appendix C.

[74] University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018); Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

[75] RAND Study at 80; see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

[76] Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.

surgery."[77] The RAND study further notes that of those receiving phalloplasty surgery, as many as 25%—one in four—will have complications.[78]

The prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care described above. While there are numerous studies of varying quality showing that this treatment can improve health outcomes for individuals with gender dysphoria, the available scientific evidence on the extent to which such treatments fully remedy all of the issues associated with gender dysphoria is unclear. Nor do any of these studies account for the added stress of military life, deployments, and combat.

As recently as August 2016, the Centers for Medicare and Medicaid Services (CMS) conducted a comprehensive review of the relevant literature, over 500 articles, studies, and reports, to determine if there was "sufficient evidence to conclude that gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria."[79] After reviewing the universe of literature regarding sex reassignment surgery, CMS identified 33 studies sufficiently rigorous to merit further review, and of those, "some were positive; others were negative."[80] "Overall," according to CMS, "the quality and strength of evidence were low due to mostly observational study designs with no comparison groups, subjective endpoints, potential confounding . . . , small sample sizes, lack of validated assessment tools, and considerable [number of study subjects] lost to follow-up."[81] With respect to whether sex reassignment surgery was "reasonable and necessary" for the treatment of gender dysphoria, CMS concluded that there was "not enough high quality evidence to determine whether gender reassignment surgery improves health outcomes for Medicare beneficiaries with gender dysphoria and whether patients most likely to benefit from these types of surgical intervention can be identified prospectively."[82]

Importantly, CMS identified only six studies as potentially providing "useful information" on the effectiveness of sex reassignment surgery. According to CRS, "the four best designed and conducted studies that assessed the quality of life before and after surgery using validated (albeit, non-specific) psychometric studies did not demonstrate clinically significant changes or differences in psychometric test results after [sex reassignment surgery]."[83]

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[77] RAND Study at 40-41.
[78] Id. at 41.
[79] Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, "Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria," Centers for Medicare & Medicaid Services, p. 9 (Aug. 30, 2016) ("CMS Report").
[80] Id. at 62.
[81] Id.
[82] Id. at 65. CMS did not conclude that gender reassignment surgery can never be necessary and reasonable to treat gender dysphoria. To the contrary, it made clear that Medicare insurers could make their own "determination of whether or not to cover gender reassignment surgery based on whether gender reassignment surgery is reasonable and necessary for the individual beneficiary after considering the individual's specific circumstances." Id. at 66. Nevertheless, CMS did decline to require all Medicare insurers to cover sex reassignment surgeries because it found insufficient scientific evidence to conclude that such surgeries improve health outcomes for persons with gender dysphoria.
[83] Id. at 62.

Additional studies found that the "cumulative rates of requests for surgical reassignment reversal or change in legal status" were between 2.2% and 3.3%.[84]

A sixth study, which came out of Sweden, is one of the most robust because it is a "nationwide population-based, long-term follow-up of sex-reassigned transsexual persons."[85] The study found increased mortality and psychiatric hospitalization for patients who had undergone sex reassignment surgery as compared to a healthy control group.[86] As described by CMS: "The mortality was primarily due to completed suicides (19.1-fold greater than in [the control group]), but death due to neoplasm and cardiovascular disease was increased 2 to 2.5 times as well. We note, mortality from this patient population did not become apparent until after 10 years. The risk for psychiatric hospitalization was 2.8 times greater than in controls even after adjustment for prior psychiatric disease (18%). The risk for attempted suicide was greater in male-to-female patients regardless of the gender of the control."[87]

According to the Hayes Directory, which conducted a review of 19 peer-reviewed studies on sex reassignment surgery, the "evidence suggests positive benefits," including "decreased [gender dysphoria], depression and anxiety, and increased [quality of life]," but "because of serious limitations," these findings "permit only weak conclusions."[88] It rated the quality of evidence as "very low" due to the numerous limitations in the studies and concluded that there is

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[84] Id.

[85] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, p. 6 (Feb. 2011); see also id. ("Strengths of this study include nationwide representativity over more than 30 years, extensive follow-up time, and minimal loss to follow-up. . . . Finally, whereas previous studies either lack a control group or use standardised mortality rates or standarised incidence rates as comparisons, we selected random population controls matched by birth year, and either birth or final sex.").

[86] Id. at 7; see also at 6 ("Mortality from suicide was strikingly high among sex-reassigned persons, also after adjustment for prior psychiatric morbidity. In line with this, sex-reassigned persons were at increased risk for suicide attempts. Previous reports suggest that transsexualism is a strong risk factor for suicide, also after sex reassignment, and our long-term findings support the need for continued psychiatric follow-up for persons at risk to prevent this. Inpatient care for psychiatric disorders was significantly more common among sex-reassigned persons than among matched controls, both before and after sex reassignment. It is generally accepted that transsexuals have more psychiatric ill-health than the general population prior to the sex reassignment. It should therefore come as no surprise that studies have found high rates of depression, and low quality of life, also after sex reassignment. Notably, however, in this study the increased risk for psychiatric hospitalization persisted even after adjusting for psychiatric hospitalization prior to sex reassignment. This suggests that even though sex reassignment alleviates gender dysphoria, there is a need to identify and treat co-occurring psychiatric morbidity in transsexual persons not only before but also after sex reassignment.").

[87] CMS Report at 62. It bears noting that the outcomes for mortality and suicide attempts differed "depending on when sex reassignment was performed: during the period 1973-1988 or 1989-2003." Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, p. 5 (Feb. 2011). Even though both mortality and suicide attempts were greater for transsexual persons than the healthy control group across both time periods, this did not reach statistical significance during the 1989-2003 period. One possible explanation is that mortality rates for transsexual persons did not begin to diverge from the healthy control group until after 10 years of follow-up, in which case the expected increase in mortality would not have been observed for most of the persons receiving sex reassignment surgeries from 1989-2003. Another possible explanation is that treatment was of a higher quality from 1989-2003 than from 1973-1988.

[88] Hayes Directory, "Sex Reassignment Surgery for the Treatment of Gender Dysphoria," p. 4 (May 15, 2014).

not sufficient "evidence to establish patient selection criteria for [sex reassignment surgery] to treat [gender dysphoria]."[89]

With respect to hormone therapy, the Hayes Directory examined 10 peer-reviewed studies and concluded that a "substantial number of studies of cross-sex hormone therapy each show some positive findings suggesting improvement in well-being after cross-sex hormone therapy."[90] Yet again, it rated the quality of evidence as "very low" and found that the "evidence is insufficient to support patient selection criteria for hormone therapy to treat [gender dysphoria]."[91] Importantly, the Hayes Directory also found: "Hormone therapy and subsequent [sex reassignment surgery] failed to bring overall mortality, suicide rates, or death from illicit drug use in [male-to-female] patients close to rates observed in the general male population. It is possible that mortality is nevertheless reduced by these treatments, but tbat cannot be determined from the available evidence."[92]

In 2010, Mayo Clinic researchers conducted a comprehensive review of 28 studies on the use of cross-sex hormone therapy in sex reassignment and concluded that there was "very low quality evidence" showing that such therapy "likely improves gender dysphoria, psychological functioning and comorbidities, sexual function and overall quality of life."[93] Not all of the studies showed positive results, but overall, after pooling the data from all of the studies, the researchers showed that 80% of patients reported improvement in gender dysphoria, 78% reported improvement in psychological symptoms, and 80% reported improvement in quality of life, after receiving hormone therapy.[94] Importantly, however, "[s]uicide attempt rates decreased after sex reassignment but stayed higher than the normal population rate."[95]

The authors of the Swedish study discussed above reached similar conclusions: "This study found substantially higher rates of overall mortality, death from cardiovascular disease and suicide, suicide attempts, and psychiatric hospitali[z]ations in sex-reassigned transsexual individuals compared to a healthy control population. This highlights that post[-]surgical transsexuals are a risk group that need long-term psychiatric and somatic follow-up. Even though surgery and hormonal therapy alleviates gender dysphoria, it is apparently not sufficient to remedy the high rates of morbidity and mortality found among transsexual persons."[96]

Even the RAND study, which the Carter policy is based upon, confirmed that "[t]here have been no randomized controlled trials of the effectiveness of various forms of treatment, and

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[89] Id. at 3.
[90] Hayes Directory, "Hormone Therapy for the Treatment of Gender Dysphoria," pp. 2, 4 (May 19, 2014).
[91] Id. at 4.
[92] Id. at 3.
[93] Mohammad Hassan Murad, Mohamed B. Elamin, Magaly Zumaeta Garcia, Rebecca J. Mullan, Ayman Murad, Patricia J. Erwin & Victor M. Montori, "Hormonal therapy and sex reassignment: a systematic review and meta-analysis of qualify of life and psychosocial outcomes," *Clinical Endocrinology*, Vol. 72, p. 214 (2010).
[94] Id. at 216.
[95] Id.
[96] Cecilia Dhejne, Paul Lichtenstein, Marcus Boman, Anna L. Johansson, Niklas Långström & Mikael Landén, "Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden," *PLoS One*, Vol. 6, pp. 1-8 (Feb. 2011).

most evidence comes from retrospective studies."[97] Although noting that "[m]ultiple observational studies have suggested significant and sometimes dramatic reductions in suicidality, suicide attempts, and suicides among transgender patients after receiving transition-related treatment," RAND made clear that "none of these studies were randomized controlled trials (the gold standard for determining treatment efficacy)."[98] "In the absence of quality randomized trial evidence," RAND concluded, "it is difficult to fully assess the outcomes of treatment for [gender dysphoria]."[99]

Given the scientific uncertainty surrounding the efficacy of transition-related treatments for gender dysphoria, it is imperative that the Department proceed cautiously in setting accession and retention standards for persons with a diagnosis or history of gender dysphoria.

B. Physical Health Standards

Not only is maintaining high standards of mental health critical to military effectiveness and lethality, maintaining high standards of physical health is as well. Although technology has done much to ease the physical demands of combat in some military specialties, war very much remains a physically demanding endeavor. Service members must therefore be physically prepared to endure the rigors and hardships of military service, including potentially combat. They must be able to carry heavy equipment sometimes over long distances; they must be able to handle heavy machinery; they must be able to traverse harsh terrain or survive in ocean waters; they must be able to withstand oppressive heat, bitter cold, rain, sleet, and snow; they must be able to endure in unsanitary conditions, coupled with lack of privacy for basic bodily functions, sometimes with little sleep and sustenance; they must be able to carry their wounded comrades to safety; and they must be able to defend themselves against those who wisb to kill them.

Above all, whether they serve on the frontlines or in relative safety in non-combat positions, every Service member is important to mission accomplishment and must be available to perform their duties globally whenever called upon. The loss of personnel due to illness, disease, injury, or bad health diminishes military effectiveness and lethality. The Department's physical health standards are therefore designed to minimize the odds that any given Service member will be unable to perform his or her duties in the future because of illness, disease, or injury. As noted earlier, those who seek to enter military service must be free of contagious diseases; free of medical conditions or physical defects that could require treatment, hospitalization, or eventual separation from service for medical unfitness; medically capable of satisfactorily completing required training; medically adaptable to the military environment; and medically capable of performing duties without aggravation of existing physical defects or medical conditions.[100] To access recruits with higher rates of anticipated unavailability for deployment thrusts a heavier burden on those who would deploy more often.

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[97] RAND Study at 7.
[98] Id. at 10 (citing only to a California Department of Insurance report).
[99] Id.
[100] DoDI 6130.03 at 2.

Historically, absent a waiver, the Department has barred from accessing into the military anyone who had undergone chest or genital surgery (e.g., removal of the testicles or uterus) and anyone with a history of major abnormalities or defects of the chest or genitalia, including hermaphroditism and pseudohermaphroditism.[101] Persons with conditions requiring medications, such as anti-depressants and hormone treatment, were also disqualified from service, unless a waiver was granted.[102]

These standards have long applied uniformly to all persons, regardless of transgender status. The Carter policy, however, deviates from these uniform standards by exempting, under certain conditions, treatments associated with gender transition, such as sex reassignment surgery and cross-sex hormone therapy. For example, under the Carter policy, an applicant who has received genital reconstruction surgery may access without a waiver if a period of 18 months has elapsed since the date of the most recent surgery, no functional limitations or complications persist, and no additional surgery is required. In contrast, an applicant who received similar surgery following a traumatic injury is disqualified from military service without a waiver.[103] Similarly, under the Carter policy, an applicant who is presently receiving cross-sex hormone therapy post-gender transition may access without a waiver if the applicant has been stable on such hormones for 18 months. In contrast, an applicant taking synthetic hormones for the treatment of hypothyroidism is disqualified from military service without a waiver.[104]

C. Sex-Based Standards

Women have made invaluable contributions to the defense of the Nation throughout our history. These contributions have only grown more significant as the number of women in the Armed Forces has increased and as their roles have expanded. Today, women account for 17.6% of the force,[105] and now every position, including combat arms positions, is open to them.

The vast majority of military standards make no distinctions between men and women. Where biological differences between males and females are relevant, however, military standards do differentiate between them. The Supreme Court has acknowledged the lawfulness of sex-based standards that flow from legitimate biological differences between the sexes.[106] These sex-based standards ensure fairness, equity, and safety; satisfy reasonable expectations of privacy; reflect common practice in society; and promote core military values of dignity and respect between men and women—all of which promote good order, discipline, steady leadership, unit cohesion, and ultimately military effectiveness and lethality.

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[101] Id. at 25-27.
[102] Id. at 46-48.
[103] Id. at 26-27.
[104] Id. at 41.
[105] Defense Manpower Data Center, Active and Reserve Master Files (Dec. 2017).
[106] For example, in *United States v. Virginia*, the Court noted approvingly that "[a]dmitting women to [the Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements, and to adjust aspects of the physical training programs." 518 U.S. 515, 550-51 n.19 (1996) (citing the statute that requires the same standards for women admitted to the service academies as for the men, "except for those minimum essential adjustments in such standards required because of physiological differences between male and female individuals").

For example, anatomical differences between males and females, and the reasonable expectations of privacy that flow from those differences, at least partly account for the laws and regulations that require separate berthing, bathroom, and shower facilities and different drug testing procedures for males and females.[107] To maintain good order and discipline, Congress has even required by statute that the sleeping and latrine areas provided for "male" recruits be physically separated from the sleeping and latrine areas provided for "female" recruits during basic training and that access by drill sergeants and training personnel "after the end of the training day" be limited to persons of the "same sex as the recruits" to ensure "after-hours privacy for recruits during basic training."[108]

In addition, physiological differences between males and females account for the different physical fitness and body fat standards that apply to men and women.[109] This ensures equity and fairness. Likewise, those same physiological differences also account for the policies that regulate competition between men and women in military training and sports, such as boxing and combatives.[110] This ensures protection from injury.

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[107] See, e.g., Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration," p. 56 (Mar. 20, 2017); Department of the Air Force, Air Force Instruction 32-6005, "Unaccompanied Housing Management," p. 35 (Jan 29., 2016); Department of the Army, Human Resources Command, AR 600-85, "Substance Abuse Program" (Dec. 28, 2012) ("Observers must . . . [b]e the same gender as the Soldier being observed.").

[108] See 10 U.S.C. § 4319 (Army), 10 U.S.C. § 6931 (Navy), and 10 U.S.C. § 9319 (Air Force) (requiring the sleeping and latrine areas provided for "male" recruits to be physically separated from the sleeping and latrine areas provided for "female" recruits during basic training); 10 U.S.C. § 4320 (Army), 10 U.S.C. § 6932 (Navy), and 10 U.S.C. § 9320 (Air Force) (requiring that access by drill sergeants and training personnel "after the end of the training day" be limited to persons of the "same sex as the recruits").

[109] See, e.g., Department of the Army, Army Regulation 600-9, "The Army Body Composition Program," pp. 21-31 (June 28, 2013); Department of the Navy, Office of the Chief of Naval Operations Instruction 6110.1J, "Physical Readiness Program," p. 7 (July 11, 2011); Department of the Air Force, Air Force Instruction 36-2905, "Fitness Program," pp. 86-95, 106-146 (Aug. 27, 2015); Department of the Navy, Marine Corps Order 6100.13, "Marine Corps Physical Fitness Program," (Aug. 1, 2008); Department of the Navy, Marine Corps Order 6110.3A, "Marine Corps Body Composition and Military Appearance Program," (Dec. 15, 2016); see also United States Military Academy, Office of the Commandant of Cadets, "Physical Program Whitebook AY 16-17," p. 13 (specifying that, to graduate, cadets must meet the minimum performance standard of 3:30 for men and 5:29 for women on the Indoor Obstacle Course Test); Department of the Army, Training and Doctrine Command, TRADOC Regulation 350-6, "Enlisted Initial Entry Training Policies and Administration," p. 56 (Mar. 20, 2017) ("Performance requirement differences, such as [Army Physical Fitness Test] scoring are based on physiological differences, and apply to the entire Army.").

[110] See, e.g., Headquarters, Department of the Army, TC 3-25.150, "Combatives," p. A-15 (Feb. 2017) ("Due to the physiological difference between the sexes and in order to treat all Soldiers fairly and conduct gender-neutral competitions, female competitors will be given a 15 percent overage at weigh-in."); id. ("In championships at battalion-level and above, competitors are divided into eight weight class brackets. . . . These classes take into account weight and gender."); Major Alex Bedard, Major Robert Peterson & Ray Barone, "Punching Through Barriers: Female Cadets Integrated into Mandatory Boxing at West Point," *Association of the United States Army* (Nov. 16, 2017), https://www.ausa.org/articles/punching-through-barriers-female-cadets-boxing-west-point (noting that "[m]atching men and women according to weight may not adequately account for gender differences regarding striking force" and that "[w]hile conducting free sparring, cadets must box someone of the same gender"); RAND Study at 57 (noting that, under British military policy, transgender persons "can be excluded from sports that organize around gender to ensure the safety of the individual or other participants"); see also International Olympic Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_

Uniform and grooming standards, to a certain extent, are also based on anatomical differences between males and females. Even those uniform and grooming standards that are not, strictly speaking, based on physical biology nevertheless flow from longstanding societal expectations regarding differences in attire and grooming for men and women.[111]

Because these sex-based standards are based on legitimate biological differences between males and females, it follows that a person's physical biology should dictate which standards apply. Standards designed for biological males logically apply to biological males, not biological females, and vice versa. When relevant, military practice has long adhered to this straightforward and logical demarcation.

By contrast, the Carter policy deviates from this longstanding practice by making military sex-based standards contingent, not necessarily on the person's biological sex, but on the person's gender marker in DEERS, which can be changed to reflect the person's gender identity.[112] Thus, under the Carter policy, a biological male who identifies as a female (and changes his gender marker to reflect that gender) must be held to the standards and regulations for females, even though those standards and regulations are based on female physical biology, not female gender identity. The same goes for females who identify as males. Gender identity alone, however, is irrelevant to standards that are designed on the basis of biological differences.

Rather than apply only to those transgender individuals who have altered their external biological characteristics to fully match that of their preferred gender, under the Carter policy, persons need not undergo sex reassignment surgery, or even cross-sex hormone therapy, in order to be recognized as, and thus subject to the standards associated with, their preferred gender. A male who identifies as female could remain a biological male in every respect and still must be treated in all respects as a female, including with respect to physical fitness, facilities, and uniform and grooming. This scenario is not farfetched. According to the APA, not "all individuals with gender dysphoria desire a complete gender reassignment. . . . Some are satisfied with no medical or surgical treatment but prefer to dress as the felt gender in public."[113] Currently, of the 424 approved Service member treatment plans, at least 36 do not include cross-

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consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion; NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

[111] "The difference between men's and women's grooming policies recognizes the difference between the sexes; sideburns for men, different hairstyles and cosmetics for women. Establishing identical grooming and personal appearance standards for men and women would not be in the Navy's best interest and is not a factor in the assurance of equal opportunity." Department of the Navy, Navy Personnel Command, Navy Personnel Instruction 156651, "Uniform Regulations," Art. 2101.1 (July 7, 2017); see also Department of the Army, Army Regulation 670-1, "Wear and Appearance of Army Uniforms and Insignia," pp. 4-16 (Mar. 31, 2014); Department of the Air Force, Air Force Instruction 26-2903, "Dress and Personal Appearance of Air Force Personnel," pp. 17-27 (Feb. 9, 2017); Department of the Navy, Marine Corps Order P1020.34G, "Marine Corps Uniform Regulations," pp. 1-9 (Mar. 31, 2003).

[112] Department of Defense Instruction 1300.28, *In-service Transition for Service Members Identifying as Transgender*, pp. 3-4 (June 30, 2016).

[113] American Psychiatric Association, "Expert Q & A: Gender Dysphoria," available at https://www.psychiatry.org/patients-families/gender-dysphoria/expert-qa (last visited Feb. 14, 2018).

sex hormone therapy or sex reassignment surgery.[114] And it is questionable how many Service members will obtain any type of sex reassignment surgery. According to a survey of transgender persons, only 25% reported having had some form of transition-related surgery.[115]

The variability and fluidity of gender transition undermine the legitimate purposes that justify different biologically-based, male-female standards. For example, by allowing a biological male who retains male anatomy to use female berthing, bathroom, and shower facilities, it undermines the reasonable expectations of privacy and dignity of female Service members. By allowing a biological male to meet the female physical fitness and body fat standards and to compete against females in gender-specific physical training and athletic competition, it undermines fairness (or perceptions of fairness) because males competing as females will likely score higher on the female test than on the male test and possibly compromise safety. By allowing a biological male to adhere to female uniform and grooming standards, it creates unfairness for other males who would also like to be exempted from male uniform and grooming standards as a means of expressing their own sense of identity.

These problems could perhaps be alleviated if a person's preferred gender were recognized only after the person underwent a biological transition. The concept of gender transition is so nebulous, however, that drawing any line—except perhaps at a full sex reassignment surgery—would be arbitrary, not to mention at odds with current medical practice, which allows for a wide range of individualized treatment. In any event, rates for genital surgery are exceedingly low—2% of transgender men and 10% of transgender women.[116] Only up to 25% of surveyed transgender persons report having had some form of transition-related surgery.[117] The RAND study estimated that such rates "are typically only around 20 percent, with the exception of chest surgery among female-to-male transgender individuals."[118] Moreover, of the 424 approved Service member treatment plans available for study, 388 included cross-sex hormone treatment, but only 34 non-genital sex reassignment surgeries and one genital surgery have been completed thus far. Only 22 Service members have requested a waiver for a genital sex reassignment surgery.[119]

Low rates of full sex reassignment surgery and the otherwise wide variation of transition-related treatment, with all the challenges that entails for privacy, fairness, and safety, weigh in favor of maintaining a bright line based on biological sex—not gender identity or some variation thereof—in determining which sex-based standards apply to a given Service member. After all, a person's biological sex is generally ascertainable through objective means. Moreover, this approach will ensure that biologically-based standards will be applied uniformly to all Service members of the same biological sex. Standards that are clear, coherent, objective, consistent, predictable, and uniformly applied enhance good order, discipline, steady leadership, and unit cohesion, which in turn, ensure military effectiveness and lethality.

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[114] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).
[115] Id.
[116] Sandy E. James, Jody L. Herman, Susan Rankin, Mara Keisling, Lisa Mottet & Ma'ayan Anafi, *The Report of the 2015 U.S. Transgender Survey*, pp. 100-103 (National Center for Transgender Equality 2016) available at https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF.
[117] Id. at 100.
[118] RAND Study at 21.
[119] Defense Health Agency, Supplemental Health Care Program Data (Feb. 2018).

New Transgender Policy

In light of the forgoing standards, all of which are necessary for military effectiveness and lethality, as well as the recommendations of the Panel of Experts, the Department, in consultation with the Department of Homeland Security, recommends the following policy:

A. Transgender Persons Without a History or Diagnosis of Gender Dysphoria, Who Are Otherwise Qualified for Service, May Serve, Like All Other Service Members, in Their Biological Sex.

Transgender persons who have not transitioned to another gender and do not have a history or current diagnosis of gender dysphoria—i.e., they identify as a gender other than their biological sex but do not currently experience distress or impairment of functioning in meeting the standards associated with their biological sex—are eligible for service, provided that they, like all other persons, satisfy all mental and physical health standards and are capable of adhering to the standards associated with their biological sex. This is consistent with the Carter policy, under which a transgender person's gender identity is recognized only if the person has a diagnosis or history of gender dysphoria.

Although the precise number is unknown, the Department recognizes that many transgender persons could be disqualified under this policy. And many transgender persons who would not be disqualified may nevertheless be unwilling to adhere to the standards associated with their biological sex. But many have served, and are serving, with great dedication under the standards for their biological sex. As noted earlier, 8,980 Service members reportedly identify as transgender, and yet there are currently only 937 active duty Service members who have been diagnosed with gender dysphoria since June 30, 2016.

B. Transgender Persons Who Require or Have Undergone Gender Transition Are Disqualified.

Except for those who are exempt under this policy, as described below in C.3, and except where waivers or exceptions to policy are otherwise authorized, persons who are diagnosed with gender dysphoria, either before or after entry into service, and require transition-related treatment, or have already transitioned to their preferred gender, should be disqualified from service. In the Department's military judgment, this is a necessary departure from the Carter policy for the following reasons:

1. *Undermines Readiness.* While transition-related treatments, including real life experience, cross-sex hormone therapy, and sex reassignment surgery, are widely accepted forms of treatment, there is considerable scientific uncertainty concerning whether these treatments fully remedy, even if they may reduce, the mental health problems associated with gender dysphoria. Despite whatever improvements in condition may result from these treatments, there is evidence that rates of psychiatric hospitalization and suicide behavior remain higher for persons with gender dysphoria, even after treatment, as compared to persons without gender dysphoria.[120] The persistence of these problems is a risk for readiness.

[120] See *supra* at pp. 24-26.

Another readiness risk is the time required for transition-related treatment and the impact on deployability. Although limited and incomplete because many transitioning Service members either began treatment before the Carter policy took effect or did not require sex reassignment surgery, currently available in-service data already show that, cumulatively, transitioning Service members in the Army and Air Force have averaged 167 and 159 days of limited duty, respectively, over a one-year period.[121]

Transition-related treatment that involves cross-sex hormone therapy or sex reassignment surgery could render Service members with gender dysphoria non-deployable for a significant period of time—perhaps even a year—if the theater of operations cannot support the treatment. For example, Endocrine Society guidelines for cross-sex hormone therapy recommend quarterly bloodwork and laboratory monitoring of hormone levels during the first year of treatment.[122] Of the 424 approved Service member treatment plans available for study, almost all of them—91.5%—include the prescription of cross-sex hormones.[123] The period of potential non-deployability increases for those who undergo sex reassignment surgery. As described earlier, the recovery time for the various sex reassignment procedures is substantial. For non-genital surgeries (assuming no complications), the range of recovery is between two and eight weeks depending on the type of surgery, and for genital surgeries (again assuming no complications), the range is between three and six months before the individual is able to return to full duty.[124] When combined with 12 continuous months of hormone therapy, which is recommended prior to genital surgery,[125] the total time necessary for sex reassignment surgery could exceed a year. If the operational environment does not permit access to a lab for monitoring hormones (and there is certainly debate over how common this would be), then the Service member must be prepared to forego treatment, monitoring, or the deployment. Either outcome carries risks for readiness.

Given the limited data, however, it is difficult to predict with any precision the impact on readiness of allowing gender transition. Moreover, the input received by the Panel of Experts varied considerably. On one hand, some commanders with transgender Service members

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[121] Data reported by the Departments of the Army and Air Force (Oct. 2017).

[122] Wylie C. Hembree, Peggy Cohen-Kettenis, Lous Gooren, Sabine Hannema, Walter Meyer, M. Hassan Murad, Stephen Rosenthal, Joshua Safer, Vin Tangpricha, & Guy T'Sjoen, "Endocrine Treatment of Gender-Dysphoric/Gender Incongruent Persons: An Endocrine Society Clinical Practice Guideline," *The Journal of Clinical Endocrinology & Metabolism*, Vol. 102, pp. 3869-3903 (Nov. 2017).

[123] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017). Although the RAND study observed that British troops who are undergoing hormone therapy are generally able to deploy if the "hormone dose is steady and there are no major side effects," it nevertheless acknowledged that "deployment to all areas may not be possible, depending on the needs associated with any medication (e.g., refrigeration)." RAND Study at 59.

[124] For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to 8 weeks; an orchiectomy is up to 6 weeks; and a vaginoplasty is up to three months. See University of California, San Francisco, Center of Excellence for Transgender Health, "Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People," available at http://transhealth.ucsf.edu/trans?page=guidelines-home (last visited Feb. 16, 2018); see also Discussion with Dr. Loren Schechter, Visiting Clinical Professor of Surgery, University of Illinois at Chicago (Nov. 9, 2017).

[125] RAND Study at 80; see also id. at 7; Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1184 (Oct. 2016) (noting that Endocrine Society criteria "require that the patient has been on continuous cross-sex hormones and has had continuous [real life experience] or psychotherapy for the past 12 months").

reported that, from the time of diagnosis to the completion of a transition plan, the transitioning Service members would be non-deployable for two to two-and-a-half years.[126] On the other band, some commanders, as well as transgender Service members themselves, reported that transition-related treatment is not a burden on unit readiness and could be managed to avoid interfering with deployments, with one commander even reporting that a transgender Service member with gender dysphoria under his command elected to postpone surgery in order to deploy.[127] This conclusion was echoed by some experts in endocrinology who found no harm in stopping or adjusting hormone therapy treatment to accommodate deployment during the first year of hormone use.[128] Of course, postponing treatment, especially during a combat deployment, has risks of its own insofar as the treatment is necessary to mitigate the clinically significant distress and impairment of functioning caused by gender dysphoria. After all, "when Service members deploy and then do not meet medical deployment fitness standards, there is risk for inadequate treatment within tbe operational theater, personal risk due to potential inability to perform combat required skills, and the potential to be sent home from the deployment and render the deployed unit with less manpower."[129] In short, the periods of transition-related non-availability and the risks of deploying untreated Service members with gender dysphoria are uncertain, and that alone merits caution.

Moreover, most mental health conditions, as well as the medication used to treat them, limit Service members' ability to deploy. Any DSM-5 psychiatric disorder witb residual symptoms, or medication side effects, which impair social or occupational performance, require a waiver for the Service member to deploy.[130] The same is true for mental health conditions that pose a substantial risk for deterioration or recurrence in the deployed environment.[131] In managing mental health conditions while deployed, providers must consider the risk of exacerbation if the individual were exposed to trauma or severe operational stress. These determinations are difficult to make in the absence of evidence on the impact of deployment on individuals with gender dysphoria.[132]

The RAND study acknowledges that the inclusion of individuals with gender dysphoria in the force will have a negative impact on readiness. According to RAND, foreign militaries that allow service by personnel with gender dysphoria have found that it is sometimes necessary to restrict the deployment of transitioning individuals, including those receiving hormone therapy and surgery, to austere environments where their healthcare needs cannot be met.[133] Nevertheless, RAND concluded that the impact on readiness would be minimal—e.g., 0.0015% of available deployable labor-years across the active and reserve components—because of the

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[126] Minutes, Transgender Review Panel (Oct. 13, 2017).
[127] Id.
[128] Minutes, Transgender Review Panel (Nov. 9, 2017).
[129] Institute for Defense Analyses, "Force Impact of Expanding the Recruitment of Individuals with Auditory Impairment," pp. 60-61 (Apr. 2016).
[130] Modification Thirteen to U.S. Central Command Individual Protection and Individual, Unit Deployment Policy, Tab A, p. 8 (Mar. 2017).
[131] Id.
[132] See generally Memorandum from the Assistant Secretary of Defense for Health Affairs, "Clinical Practice Guidance for Deployment-Limiting Mental Disorders and Psychotropic Medications," pp. 2-4 (Oct. 7, 2013).
[133] RAND Study at 40.

exceedingly small number of transgender Service members who would seek transition-related treatment.[134] Even then, RAND admitted that the information it cited "must be interpreted with caution" because "much of the current research on transgender prevalence and medical treatment rates relies on self-reported, nonrepresentative samples."[135] Nevertheless, by RAND's standard, the readiness impact of many medical conditions that the Department has determined to be disqualifying—from bipolar disorder to schizophrenia—would be minimal because they, too, exist only in relatively small numbers.[136] And yet that is no reason to allow persons with those conditions to serve.

The issue is not whether the military can absorb periods of non-deployability in a small population; rather, it is whether an individual with a particular condition can meet the standards for military duty and, if not, whether the condition can be remedied through treatment that renders the person non-deployable for as little time as possible. As the Department has noted before: "[W]here the operational requirements are growing faster than available resources," it is imperative that the force "be manned with Service members capable of meeting all mission demands. The Services require that every Service member contribute to full mission readiness, regardless of occupation. In other words, the Services require all Service members to be able to engage in core military tasks, including the ability to deploy rapidly, without impediment or encumbrance."[137] Moreover, the Department must be mindful that "an increase in the number of non-deployable military personnel places undue risk and personal burden on Service members qualified and eligible to deploy, and negatively impacts mission readiness."[138] Further, the Department must be attuned to the impact that high numbers of non-deployable military personnel places on families whose Service members deploy more often to backfill or compensate for non-deployable persons.

In sum, the available information indicates that there is inconclusive scientific evidence that the serious problems associated with gender dysphoria can be fully remedied through transition-related treatment and that, even if it could, most persons requiring transition-related treatment could be non-deployable for a potentially significant amount of time. By this metric, Service members with gender dysphoria who need transition-related care present a significant challenge for unit readiness.

2. *Incompatible with Sex-Based Standards.* As discussed in detail earlier, military personnel policy and practice has long maintained a clear line between men and women where their biological differences are relevant with respect to physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards. This line promotes good order and discipline, steady leadership, unit cohesion, and ultimately military

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[134] Id. at 42.
[135] Id. at 39.
[136] According to the National Institute of Mental Health, 2.8% of U.S. adults experienced bipolar disorder in the past year, and 4.4% have experienced the condition at some time in their lives. National Institute of Mental Health, "Bipolar Disorder" (Nov. 2017) https://www.nimh.nih.gov/health/statistics/bipolar-disorder.shtml. The prevalence of schizophrenia is less than 1%. National Institute of Mental Health, "Schizophrenia" (Nov. 2017) https://www.nimh.nih.gov/health/statistics/schizophrenia.shtml.
[137] Under Secretary of Defense for Personnel and Readiness, "Fiscal Year 2016 Report to Congress on the Review of Enlistment of Individuals with Disabilities in the Armed Forces," p. 9 (Apr. 2016).
[138] Id. at 10.

effectiveness and lethality because it ensures fairness, equity, and safety; satisfies reasonable expectations of privacy; reflects common practice in the society from which we recruit; and promotes core military values of dignity and respect between men and women. To exempt Service members from the uniform, biologically-based standards applicable to their biological sex on account of their gender identity would be incompatihle with this line and undermine the objectives such standards are designed to serve.

First, a policy that permits a change of gender without requiring any biological changes risks creating unfairness, or perceptions thereof, that could adversely affect unit cohesion and good order and discipline. It could be perceived as discriminatory to apply different biologically-based standards to persons of the same biological sex based on gender identity, which is irrelevant to standards grounded in physical biology. For example, it unfairly discriminates against biological males who identify as male and are held to male standards to allow biological males who identify as female to be held to female standards, especially where the transgender female retains many of the biological characteristics and capabilities of a male. It is important to note here that the Carter policy does not require a transgender person to undergo any biological transition in order to be treated in all respects in accordance with the person's preferred gender. Therefore, a biological male who identifies as female could remain a biological male in every respect and still be governed by female standards. Not only would this result in perceived unfairness by biological males who identify as male, it would also result in perceived unfairness by biological females who identify as female. Biological females who may be required to compete against such transgender females in training and athletic competition would potentially be disadvantaged.[139] Even more importantly, in physically violent training and competition, such as boxing and combatives, pitting biological females against biological males who identify as female, and vice versa, could present a serious safety risk as well.[140]

This concern may seem trivial to those unfamiliar with military culture. But vigorous competition, especially physical competition, is central to the military life and is indispensable to the training and preparation of warriors. Nothing encapsulates this more poignantly than the words of General Douglas MacArthur when he was superintendent of the U.S. Military Academy and which are now engraved above the gymnasium at West Point: "Upon the fields of friendly

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[139] See *supra* note 109. Both the International Olympic Committee (IOC) and the National Collegiate Athletic Association (NCAA) have attempted to mitigate this problem in their policies regarding transgender athletes. For example, the IOC requires athletes who transition from male to female to demonstrate certain suppressed levels of testosterone to minimize any advantage in women's competition. Similarly, the NCAA prohibits an athlete who has transitioned from male to female from competing on a women's team without changing the team status to a mixed gender team. While similar policies could be employed by the Department, it is unrealistic to expect the Department to subject transgender Service members to routine hormone testing prior to biannual fitness testing, athletic competition, or training simply to mitigate real and perceived unfairness or potential safety concerns. See, e.g., International Olympie Committee Consensus Meeting on Sex Reassignment and Hyperandrogensim (Nov. 2015), https://stillmed.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf; NCAA Office of Inclusion, NCAA Inclusion of Transgender Student-Athletes (Aug. 2011), https://www.ncaa.org/sites/default/files/Transgender_Handbook_2011_Final.pdf.

[140] See *supra* note 109.

strife are sown the seeds that, upon other fields, on other days will bear the fruits of victory."[141] Especially in combat units and in training, including the Service academies, ROTC, and other commissioning sources, Service members are graded and judged in significant measure based upon their physical aptitude, which is only fitting given that combat remains a physical endeavor.

Second, a policy that accommodates gender transition without requiring full sex reassignment surgery could also erode reasonable expectations of privacy that are important in maintaining unit cohesion, as well as good order and discipline. Given the unique nature of military service, Service members of the same biological sex are often required to live in extremely close proximity to one another when sleeping, undressing, showering, and using the bathroom. Because of reasonable expectations of privacy, the military has long maintained separate berthing, bathroom, and shower facilities for men and women while in garrison. In the context of recruit training, this separation is even mandated by Congress.[142]

Allowing transgender persons who have not undergone a full sex reassignment, and thus retain at least some of the anatomy of their biological sex, to use the facilities of their identified gender would invade the expectations of privacy that the strict male-female demarcation in berthing, bathroom, and shower facilities is meant to serve. At the same time, requiring transgender persons who have developed, even if only partially, the anatomy of their identified gender to use the facilities of their biological sex could invade the privacy of the transgender person. Without separate facilities for transgender persons or other mitigating accommodations, which may be unpalatable to transgender individuals and logistically impracticable for the Department, the privacy interests of biological males and females and transgender persons could be anticipated to result in irreconcilable situations. Lieutenants, Sergeants, and Petty Officers charged with carrying out their units' assigned combat missions should not be burdened by a change in eligibility requirements disconnected from military life under austere conditions.

The best illustration of this irreconcilability is the report of one commander who was confronted with dueling equal opportunity complaints—one from a transgender female (i.e., a biological male with male genitalia who identified as female) and the other from biological females. The transgender female Service member was granted an exception to policy that allowed the Service member to live as a female, which included giving the Service member access to female shower facilities. This led to an equal opportunity complaint from biological females in the unit who believed that granting a biological male, even one who identified as a female, access to their showers violated their privacy. The transgender Service member responded with an equal opportunity complaint claiming that the command was not sufficiently supportive of the rights of transgender persons.[143]

The collision of interests discussed above are a direct threat to unit cohesion and will inevitably result in greater leadership challenges without clear solutions. Leaders at all levels

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[141] Douglas MacArthur, *Respectfully Quoted: A Dictionary of Quotations* (1989), available at http://www.bartleby.com/73/1874.html.

[142] See *supra* note 108.

[143] Minutes, Transgender Review Panel (Oct. 13, 2017). Limited data exists regarding the performance of transgender Service members due to policy restrictions in Department of Defense 1300.28, *In-Service Transition for Transgender Service Members* (Oct. 1, 2016), that prevent the Department from tracking individuals who may identify as transgender as a potentially unwarranted invasion of personal privacy.

already face immense challenges in building cohesive military units. Blurring the line that differentiates the standards and policies applicable to men and women will only exacerbate those challenges and divert valuable time and energy from military tasks.

The unique leadership challenges arising from gender transition are evident in the Department's handbook implementing the Carter policy. The handbook provides guidance on various scenarios that commanders may face. One such scenario concerns the use of shower facilities: "A transgender Service member has expressed privacy concerns regarding the open bay shower configuration. Similarly, several other non-transgender Service members have expressed discomfort when showering in these facilities with individuals who have different genitalia." As possible solutions, the handbook offers that the commander could modify the shower facility to provide privacy or, if that is not feasible, adjust the timing of showers. Another scenario involves proper attire during a swim test: "It is the semi-annual swim test and a female to male transgender Service member who has fully transitioned, but did not undergo surgical change, would like to wear a male swimsuit for the test with no shirt or other top coverage." The extent of the handbook's guidance is to advise commanders that "[i]t is within [their] discretion to take measures ensuring good order and discipline," that they should "counsel the individual and address the unit, if additional options (e.g., requiring all personnel to wear shirts) are being considered," and that they should consult the Service Central Coordination Cell, a help line for commanders in need of advice.

These vignettes illustrate the significant effort required of commanders to solve challenging problems posed by the implementation of the current transgender service policies. The potential for discord in the unit during the routine execution of daily activities is substantial and highlights the fundamental incompatibility of the Department's legitimate military interest in uniformity, the privacy interests of all Service members, and the interest of transgender individuals in an appropriate accommodation. Faced with these conflicting interests, commanders are often forced to devote time and resources to resolve issues not present outside of military service. A failure to act quickly can degrade an otherwise highly functioning team, as will failing to seek appropriate counsel and implementing a faulty solution. The appearance of unsteady or seemingly unresponsive leadership to Service member concerns erodes the trust that is essential to unit cohesion and good order and discipline.

The RAND study does not meaningfully address how accommodations for gender transition would impact perceptions of fairness and equity, expectations of privacy, and safety during training and athletic competition and how these factors in turn affect unit cohesion. Instead, the RAND study largely dismisses concerns about the impact on unit cohesion by pointing to the experience of four countries that allow transgender service—Australia, Canada, Israel, and the United Kingdom.[144] Although the vast majority of armed forces around the world do not permit or have policies on transgender service, RAND noted that 18 militaries do, but only four have well-developed and publicly available policies.[145] RAND concluded that "the available research revealed no significant effect on cohesion, operational effectiveness, or

[144] RAND Study at 45.
[145] Id. at 50.

readiness."[146] It reached this conclusion, however, despite noting reports of resistance in the ranks, which is a strong indication of an adverse effect on unit cohesion.[147] Nevertheless, RAND acknowledged that the available data was "limited" and that the small number of transgender personnel may account for "the limited effect on operational readiness and cohesion."[148]

Perhaps more importantly, however, the RAND study mischaracterizes or overstates the reports upon which it rests its conclusions. For example, the RAND study cites *Gays in Foreign Militaries 2010: A Global Primer* by Nathaniel Frank as support for the conclusions that there is no evidence that transgender service has had an adverse effect on cohesion, operational effectiveness, or readiness in the militaries of Australia and the United Kingdom and that diversity has actually led to increases in readiness and performance.[149] But that particular study has nothing to do with examining the service of transgender persons; rather, it is about the integration of homosexual persons into the military.[150]

With respect to transgender service in the Israeli military, the RAND study points to an unpublished paper by Anne Speckhard and Reuven Paz entitled *Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service*. The RAND study cites this paper for the proposition that "there has been no reported effect on cohesion or readiness" in the Israeli military and "there is no evidence of any impact on operational effectiveness."[151] These sweeping and categorical claims, however, are based only on "six in-depth interviews of experts on the subject both inside and outside the [Israeli Defense Forces (IDF)]: two in the IDF leadership—including the spokesman's office; two transgender individuals who served in the IDF, and two professionals who serve transgender clientele—before, during and after their IDF service."[152] As the RAND report observed, however: "There do appear to be some limitations on the assignment of transgender personnel, particularly in combat units. Because of the austere living conditions in these types of units, necessary accommodations may not be available for Service members in the midst of a gender transition. As a result, transitioning individuals are typically not assigned to combat units."[153] In addition, as the RAND study notes, under the Israeli policy at the time, "assignment of housing, restrooms, and showers is typically linked to the birth gender, which does not change in the military system until after gender reassignment surgery."[154] Therefore, insofar as a Service member's change of gender is not recognized until after sex reassignment

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[146] Id. at 45.
[147] Id.
[148] Id.
[149] Id.
[150] Nathaniel Frank, "Gays in Foreign Militaries 2010: A Global Primer," p. 6 *The Palm Center* (Feb. 2010), https://www.palmcenter.org/wpcontent/uploads/2017/12/FOREIGNMILITARIESPRIMER2010FINAL.pdf ("This study seeks to answer some of the questions that have been, and will continue to be, raised surrounding the instructive lessons from other nations that have lifted their bans on openly gay service.").
[151] Rand Study at 45.
[152] Anne Speckhard & Reuven Paz, "Transgender Service in the Israeli Defense Forces: A Polar Opposite Stance to the U.S. Military Policy of Barring Transgender Soldiers from Service," p. 3 (2014), http://www.researchgate.net/publication/280093066.
[153] RAND Study at 56.
[154] Id. at 55.

surgery, the Israeli policy—and whatever claims about its impact on cohesion, readiness, and operational effectiveness—are distinguishable from the Carter policy.

Finally, the RAND study cites to a journal article on the Canadian military experience entitled *Gender Identity in the Canadian Forces: A Review of Possible Impacts on Operational Effectiveness* by Alan Okros and Denise Scott. According to RAND, the authors of this article "found no evidence of any effect on unit or overall cohesion."[155] But the article not only fails to support the RAND study's conclusions (not to mention the article's own conclusions), but it confirms the concerns that animate the Department's recommendations. The article acknowledges, for example, the difficulty commanders face in managing the competing interests at play:

> Commanders told us that the new policy fails to provide sufficient guidance as to how to weigh priorities among competing objectives during their subordinates' transition processes. Although they endorsed the need to consult transitioning Service members, they recognized that as commanding officers, they would be called on to balance competing requirements. They saw the primary challenge to involve meeting trans individual's expectations for reasonable accommodation and individual privacy while avoiding creating conditions that place extra burdens on others or undermined the overall team effectiveness. To do so, they said that they require additional guidance on a range of issues including clothing, communal showers, and shipboard bunking and messing arrangements.[156]

Notwithstanding its optimistic conclusions, the article also documents serious problems with unit cohesion. The authors observe, for instance, that the chain of command "has not fully earned the trust of the transgender personnel," and that even though some transgender Service members do trust the chain of command, others "expressed little confidence in the system," including one who said, "I just don't think it works that well."[157]

In sum, although the foregoing considerations are not susceptible to quantification, undermining the clear sex-differentiated lines with respect to physical fitness; berthing, bathroom, and shower facilities; and uniform and grooming standards, which have served all branches of Service well to date, risks unnecessarily adding to the challenges faced by leaders at all levels, potentially fraying unit cohesion, and threatening good order and discipline. The Department acknowledges that there are serious differences of opinion on this subject, even among military professionals, including among some who provided input to the Panel of Experts,[158] but given the vital interests at stake—the survivability of Service members, including

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[155] Id. at 45.
[156] Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," *Armed Forces and Society* Vol. 41, p. 8 (2014).
[157] Id. at 9.
[158] While differences of opinion do exist, it bears noting that, according to a Military Times/Syracuse University's Institute for Veterans and Military Families poll, 41% of active duty Service members polled thought that allowing gender transition would hurt their unit's readiness, and only 12% thought it would be beneficial. Overall, 57% had a negative opinion of the Carter policy. Leo Shane III, "Poll: Active-duty troops worry about military's transgender

transgender persons, in combat and the military effectiveness and lethality of our forces—it is prudent to proceed with caution, especially in light of the inconclusive scientific evidence that transition-related treatment restores persons with gender dysphoria to full mental health.

3. *Imposes Disproportionate Costs.* Transition-related treatment is also proving to be disproportionately costly on a per capita basis, especially in light of the absence of solid scientific support for the efficacy of such treatment. Since implementation of the Carter policy, the medical costs for Service members with gender dysphoria have increased nearly three times—or 300%—compared to Service members without gender dysphoria.[159] And this increase is despite the low number of costly sex reassignment surgeries that have been performed so far.[160] As noted earlier, only 34 non-genital sex reassignment surgeries and one genital surgery have been completed,[161] with an additional 22 Service members requesting a waiver for genital surgery.[162] We can expect the cost disparity to grow as more Service members diagnosed with gender dysphoria avail themselves of surgical treatment. As many as 77% of the 424 Service member treatment plans available for review include requests for transition-related surgery, although it remains to be seen how many will ultimately obtain surgeries.[163] In addition, several commanders reported to the Panel of Experts that transition-related treatment for Service members with gender dysphoria in their units had a negative budgetary impact because they had to use operations and maintenance funds to pay for the Service members' extensive travel throughout the United States to obtain specialized medical care.[164]

Taken together, the foregoing concerns demonstrate why recognizing and making accommodations for gender transition are not conducive to, and would likely undermine, the inputs—readiness, good order and discipline, sound leadership, and unit cohesion—that are essential to military effectiveness and lethality. Therefore, it is the Department's professional military judgment that persons who have been diagnosed with, or have a history of, gender dysphoria and require, or have already undergone, a gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver.

C. Transgender Persons With a History or Diagnosis of Gender Dysphoria Are Disqualified, Except Under Certain Limited Circumstances.

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policies," *Military Times* (July 27, 2017) available at https://www.militarytimes.com/news/pentagon-congress/2017/07/27/poll-active-duty-troops-worry-about-militarys-transgender-policies/.

[159] Minutes, Transgender Review Panel (Nov. 21, 2017).

[160] Minutes, Transgender Review Panel (Nov. 2, 2017).

[161] Data retrieved from Military Health System Data Repository (Nov. 2017).

[162] Defense Health Agency Data (as of Feb. 2018).

[163] Data reported by the Departments of the Army, Navy, and Air Force (Oct. 2017).

[164] Minutes, Transgender Review Panel (Oct. 13, 2017); see also Irene Folaron & Monica Lovasz, "Military Considerations in Transsexual Care of the Active Duty Member," *Military Medicine*, Vol. 181, p. 1185 (Oct. 2016) ("As previously discussed, a new diagnosis of gender dysphoria and the decision to proceed with gender transition requires frequent evaluations by the [mental health professional] and endocrinologist. However, most [military treatment facilities] lack one or both of these specialty services. Members who are not in proximity to [military treatment facilities] may have significant commutes to reach their required specialty care. Members stationed in more remote locations face even greater challenges of gaining access to military or civilian specialists within a reasonable distance from their duty stations.").

As explained earlier in greater detail, persons with gender dysphoria experience significant distress and impairment in social, occupational, or other important areas of functioning. Gender dysphoria is also accompanied by extremely high rates of suicidal ideation and other comorbidities. Therefore, to ensure unit safety and mission readiness, which is essential to military effectiveness and lethality, persons who are diagnosed with, or have a history of, gender dysphoria are generally disqualified from accession or retention in the Armed Forces. The standards recommended here are subject to the same procedures for waiver as any other standards. This is consistent with the Department's handling of other mental conditions that require treatment. As a general matter, only in the limited circumstances described below should persons with a history or diagnosis of gender dysphoria be accessed or retained.

1. *Accession of Individuals Diagnosed with Gender Dysphoria.* Given the documented fluctuations in gender identity among children, a history of gender dysphoria should not alone disqualify an applicant seeking to access into the Armed Forces. According to the DSM-5, the persistence of gender dysphoria in biological male children "has ranged from 2.2% to 30%," and the persistence of gender dysphoria in biological female children "has ranged from 12% to 50%."[165] Accordingly, persons with a history of gender dysphoria may access into the Armed Forces, provided that they can demonstrate 36 consecutive months of stability—i.e., absence of gender dysphoria—immediately preceding their application; they have not transitioned to the opposite gender; and they are willing and able to adhere to all standards associated with their biological sex. The 36-month stability period is the same standard the Department currently applies to persons with a history of depressive disorder. The Carter policy's 18-month stability period for gender dysphoria, by contrast, has no analog with respect to any other mental condition listed in DoDI 6130.03.

2. *Retention of Service Members Diagnosed with Gender Dysphoria.* Retention standards are typically less stringent than accession standards due to training provided and on-the-job performance data. While accession standards endeavor to predict whether a given applicant will require treatment, hospitalization, or eventual separation from service for medical unfitness, and thus tend to be more cautious, retention standards focus squarely on whether the Service member, despite his or her condition, can continue to do the job. This reflects the Department's desire to retain, as far as possible, the Service members in which it has made substantial investments and to avoid the cost of finding and training a replacement. To use an example outside of the mental health context, high blood pressure does not meet accession standards, even if it can be managed with medication, but it can meet retention standards so long as it can be managed with medication. Regardless, however, once they have completed treatment, Service members must continue to meet the standards that apply to them in order to be retained. Therefore, Service members who are diagnosed with gender dysphoria after entering military service may be retained without waiver, provided that they are willing and able to adhere to all standards associated with their biological sex, the Service member does not require gender transition, and the Service member is not otherwise non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months).[166]

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[165] DSM-5 at 455.

[166] Under Secretary of Defense for Personnel and Readiness, "DoD Retention Policy for Non-Deployable Service Members" (Feb. 14, 2018).

3. *Exempting Current Service Members Who Have Already Received a Diagnosis of Gender Dysphoria.* The Department is mindful of the transgender Service members who were diagnosed with gender dysphoria and either entered or remained in service following the announcement of the Carter policy and the court orders requiring transgender accession and retention. The reasonable expectation of these Service members that the Department would honor their service on the terms that then existed cannot be dismissed. Therefore, transgender Service members who were diagnosed with gender dysphoria by a military medical provider after the effective date of the Carter policy, but before the effective date of any new policy, may continue to receive all medically necessary treatment, to change their gender marker in DEERS, and to serve in their preferred gender, even after the new policy commences. This includes transgender Service members who entered into military service after January 1, 2018, when the Carter accession policy took effect by court order. The Service member must, however, adhere to the procedures set forth in DoDI 1300.28, and may not be deemed to be non-deployable for more than 12 months or for a period of time in excess of that established by Service policy (which may be less than 12 months). While the Department believes that its commitment to these Service members, including the substantial investment it has made in them, outweigh the risks identified in this report, should its decision to exempt these Service members be used by a court as a basis for invalidating the entire policy, this exemption instead is and should be deemed severable from the rest of the policy.

Conclusion

In making these recommendations, the Department is well aware that military leadership from the prior administration, along with RAND, reached a different judgment on these issues. But as the forgoing analysis demonstrates, the realities associated with service by transgender individuals are more complicated than the prior administration or RAND had assumed. In fact, the RAND study itself repeatedly emphasized the lack of quality data on these issues and qualified its conclusions accordingly. In addition, that study concluded that allowing gender transition would impede readiness, limit deployability, and burden the military with additional costs. In its view, however, such harms were negligible in light of the small size of the transgender population. But especially in light of the various sources of uncertainty in this area, and informed by the data collected since the Carter policy took effect, the Department is not convinced that these risks could be responsibly dismissed or that even negligible harms should be incurred given the Department's grave responsibility to fight and win the Nation's wars in a manner that maximizes the effectiveness, lethality, and survivability of our most precious assets—our Soldiers, Sailors, Airmen, Marines, and Coast Guardsmen.

Accordingly, the Department weighed the risks associated with maintaining the Carter policy against the costs of adopting a new policy that was less risk-favoring in developing these recommendations. It is the Department's view that the various balances struck by the recommendations above provide the best solution currently available, especially in light of the significant uncertainty in this area. Although military leadership from the prior administration reached a different conclusion, the Department's professional military judgment is that the risks associated with maintaining the Carter policy—risks that are continuing to be better understood as new data become available—counsel in favor of the recommended approach.

Presidential Documents

Memorandum of August 25, 2017

Military Service by Transgender Individuals

Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security

Section 1. *Policy.* (a) Until June 2016, the Department of Defense (DoD) and the Department of Homeland Security (DHS) (collectively, the Departments) generally prohibited openly transgender individuals from accession into the United States military and authorized the discharge of such individuals. Shortly before President Obama left office, however, his Administration dismantled the Departments' established framework by permitting transgender individuals to serve openly in the military, authorizing the use of the Departments' resources to fund sex-reassignment surgical procedures, and permitting accession of such individuals after July 1, 2017. The Secretary of Defense and the Secretary of Homeland Security have since extended the deadline to alter the currently effective accession policy to January 1, 2018, while the Departments continue to study the issue.

In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments' longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year's policy change would not have those negative effects.

(b) Accordingly, by the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016 until such time as a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above. The Secretary of Defense, after consulting with the Secretary of Homeland Security, may advise me at any time, in writing, that a change to this policy is warranted.

Sec. 2. *Directives.* The Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, shall:

(a) maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that I find convincing; and

(b) halt all use of DoD or DHS resources to fund sex-reassignment surgical procedures for military personnel, except 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.

Sec. 3. *Effective Dates and Implementation.* Section 2(a) of this memorandum shall take effect on January 1, 2018. Sections 1(b) and 2(b) of this memorandum shall take effect on March 23, 2018. By February 21, 2018, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall submit to me a plan for implementing both the general policy set forth in section 1(b) of this memorandum and the specific directives

set forth in section 2 of this memorandum. The implementation plan shall adhere to the determinations of the Secretary of Defense, made in consultation with the Secretary of Homeland Security, as to what steps are appropriate and consistent with military effectiveness and lethality, budgetary constraints, and applicable law. As part of the implementation plan, the Secretary of Defense, in consultation with the Secretary of Homeland Security, shall determine how to address transgender individuals currently serving in the United States military. Until the Secretary has made that determination, no action may be taken against such individuals under the policy set forth in section 1(b) of this memorandum.

Sec. 4. *Severability.* If any provision of this memorandum, or the application of any provision of this memorandum, is held to be invalid, the remainder of this memorandum and other dissimilar applications of the provision shall not be affected.

Sec. 5. *General Provisions.* (a) Nothing in this memorandum shall be construed to impair or otherwise affect:

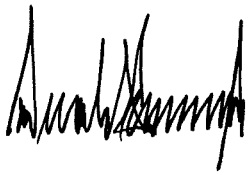
(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This memorandum shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) The Secretary of Defense is authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, August 25, 2017

[FR Doc. 2017–18544
Filed 8–29–17; 11:15 am]
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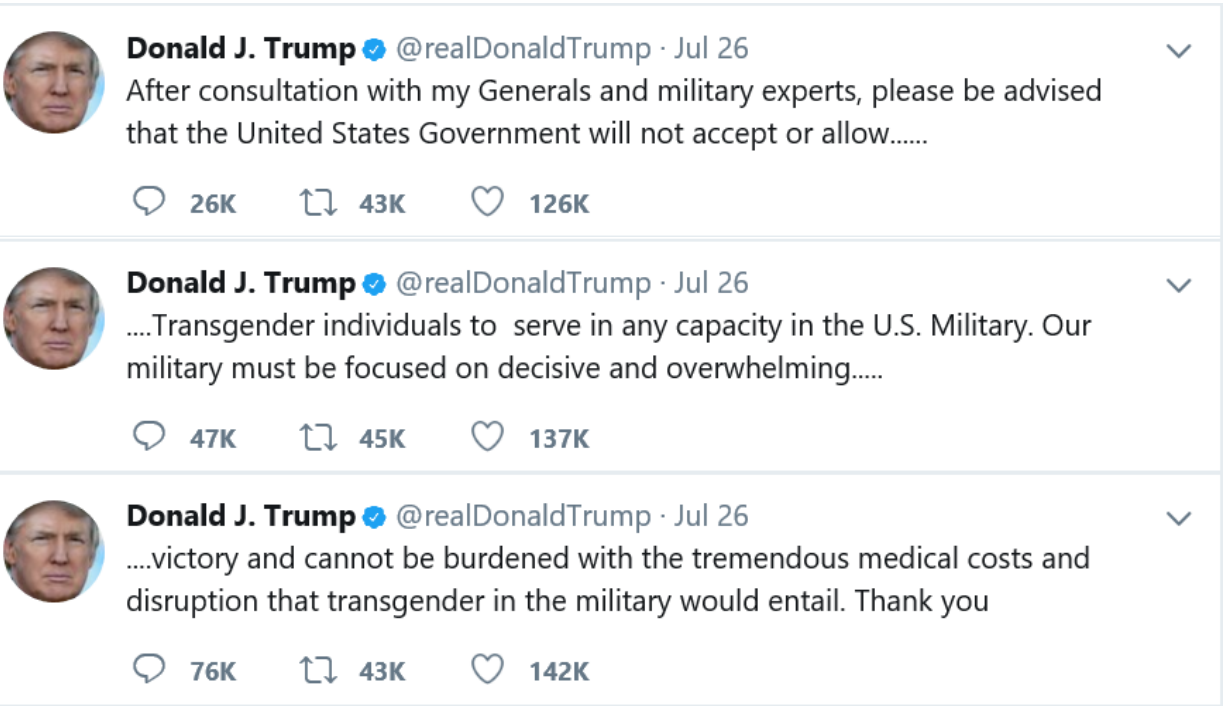

Donald J. Trump @realDonaldTrump · Jul 26

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

26K 43K 126K

Donald J. Trump @realDonaldTrump · Jul 26

....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming.....

47K 45K 137K

Donald J. Trump @realDonaldTrump · Jul 26

....victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you

76K 43K 142K

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUN 30 2017

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Accession of Transgender Individuals into the Military Services

Since becoming the Secretary of Defense, I have emphasized that the Department of Defense must measure each policy decision against one critical standard: will the decision affect the readiness and lethality of our armed forces? Put another way, how will the decision affect the ability of America's military forces to defend the Nation? It is against this standard that I provide the following guidance on the way forward in accessing transgender individuals into the military Services.

Under existing DoD policy, such accessions were anticipated to begin on July 1, 2017. The Deputy Secretary directed the Services to assess their readiness to begin accessions. Building upon that work and after consulting with the Service Chiefs and Secretaries, I have determined that it is necessary to defer the start of accessions for six months. We will use this additional time to evaluate more carefully the impact of such accessions on readiness and lethality. This review will include all relevant considerations.

My intent is to ensure that I personally have the benefit of the views of the military leadership and of the senior civilian officials who are now arriving in the Department. This action in no way presupposes the outcome of the review, nor does it change policies and procedures currently in effect under DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members." I am confident we will continue to treat all Service members with dignity and respect.

The Under Secretary of Defense for Personnel and Readiness will lead this review and will report the results to me not later than December 1, 2017.

DoD INSTRUCTION 1300.28

IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS

Originating Component:	Office of the Under Secretary of Defense for Personnel and Readiness
Effective:	October 1, 2016
Releasability:	Cleared for public release. Available on the DoD Issuances Website at http://www.dtic.mil/whs/directives.
Cancels:	Secretary of Defense Memorandum, "Transgender Service Members," July 28, 2015
Approved by:	Ashton Carter, Secretary of Defense

Purpose: This issuance:

- Establishes a construct by which transgender Service members may transition gender while serving.
- Enumerates prerequisites and prescribes procedures for changing a Service member's gender marker in the Defense Enrollment Eligibility Reporting System (DEERS).
- Specifies medical treatment provisions for Active Component (AC) and Reserve Component (RC) transgender Service members.
- Implements the policies and procedures in Directive-type Memorandum 16-005.

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SECTION 1: GENERAL ISSUANCE INFORMATION

1.1. APPLICABILITY. This issuance applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security, by agreement with that Department, and in all regards, except as to the requirement to submit issuances implementing this issuance to the Office of the Under Secretary of Defense for Personnel and Readiness 30 days in advance of publication in accordance with Paragraphs 2.1c and 2.2e), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

1.2. POLICY.

a. DoD and the Military Departments will institute policies to provide Service members a process by which, while serving, they may transition gender. These policies are premised on the conclusion that open service by transgender persons who are subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming standards, deployability, and retention, is consistent with military service and readiness.

b. The Military Departments and Services recognize a Service member's gender by the member's gender marker in the DEERS. Coincident with that gender marker, the Services apply, and the member is responsible to meet, all standards for uniforms and grooming; body composition assessment (BCA); physical readiness testing (PRT); Military Personnel Drug Abuse Testing Program (MPDATP) participation; and other military standards applied with consideration of the member's gender. As to facilities subject to regulation by the military, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

c. Service members with a diagnosis from a military medical provider indicating that gender transition is medically necessary, will be provided medical care and treatment for the diagnosed medical condition. Recommendations of a military medical provider will address the severity of the Service member's medical condition and the urgency of any proposed medical treatment. Medical advice to commanders will be provided in a manner consistent with processes used for other medical conditions that may limit the Service member's performance of official duties.

d. Any medical care and treatment provided to an individual Service member in the process of gender transition will be provided in the same manner as other medical care and treatment. Nothing in this issuance will be construed to authorize a commander to deny medically necessary treatment to a Service member.

e. Any determination that a transgender Service member is non-deployable at any time will be consistent with established Military Department and Service standards, as applied to other Service members whose deployability is similarly affected in comparable circumstances unrelated to gender transition.

f. Commanders will assess expected impacts on mission and readiness after consideration of the advice of military medical providers and will address such impacts in accordance with this issuance. In applying the tools described in this issuance, a commander will not accommodate biases against transgender individuals. If a Service member is unable to meet standards or requires an exception to policy (ETP) during a period of gender transition, all applicable tools, including the tools described in this issuance, will be available to commanders to minimize impacts to the mission and unit readiness.

g. When the military medical provider determines that a Service member's gender transition is complete, and at a time approved by the commander in consultation with the transgender Service member, the member's gender marker will be changed in DEERS and the Service member will be recognized in the preferred gender.

SECTION 2: RESPONSIBILITIES

2.1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R):

a. Updates existing DoD issuances, or promulgate new issuances, as appropriate, in accordance with the provisions of this issuance.

b. Expeditiously develops and promulgates education and training materials to provide relevant, useful information for transgender Service members, commanders, military medical providers, and the force.

c. Ensures that the text of proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new Military Department and Service issuance, is consistent with this issuance.

d. Issues guidance to the Military Departments, establishing the prerequisites and procedures for changing a Service member's gender marker in DEERS.

2.2. SECRETARIES OF THE MILITARY DEPARTMENTS AND COMMANDANT, UNITED STATES COAST GUARD (USCG). The Secretaries of the Military Departments and the Commandant, USCG:

a. Adhere to all provisions of this issuance.

b. Administer their respective programs, and update existing Military Department regulations, policies, and guidance, or promulgate new issuances, as appropriate, in accordance with the provisions of this issuance.

c. Establish a Service Central Coordination Cell (SCCC) to provide multi-disciplinary (e.g., medical, legal, military personnel management) expert advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military and to assist commanders in the execution of DoD, Military Department, and Service policies and procedures.

d. Educate their AC and RC forces to ensure appropriate understanding of the policies and procedures pertaining to gender transition in the military.

e. Submit to the USD(P&R) the text of any proposed revision to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, not later than 30 days in advance of the proposed publication date.

f. Ensure the protection of personally identifiable information (PII) and personal privacy considerations in the implementation of this issuance and Military Department and Service regulations, policies, and guidance.

g. Implement processes for the assessment and oversight of compliance with DoD, Military Department, and Service policies and procedures applicable to service by transgender persons, in accordance with Paragraph 3.8 of this issuance.

SECTION 3: GENDER TRANSITION

3.1. SPECIAL MILITARY CONSIDERATIONS. Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness. Where possible, gender transition should be conducted such that a Service member would meet all applicable standards and be available for duty in the birth gender prior to a change in the member's gender marker in DEERS and would meet all applicable standards and be available for duty in the preferred gender after the change in gender marker. Recognizing, however, that every transition is unique, the policies and procedures set forth herein provide flexibility to the Military Departments, Services, and commanders, in addressing transitions that may or may not follow this construct. These policies and procedures are applicable, in whole or in relevant part, to those Service members who intend to begin transition, are beginning transition, who already may have started transition, and who have completed gender transition and are stable in their preferred gender.

a. Medical.

(1) In accordance with DoD Instructions (DoDIs) 6025.19 and 1215.13, all Service members have a responsibility to maintain their health and fitness, meet individual medical readiness requirements, and report to their chains of command any medical (including mental health) and health issue that may affect their readiness to deploy or fitness to continue serving in an active status.

(2) Each Service member in the AC or in the Selected Reserve will, as a condition of continued participation in military service, report significant health information to their chain of command. Service members who have or have had a medical condition that may limit their performance of official duties, must consult with a military medical provider concerning their diagnosis and proposed treatment, and must notify their commanders.

(3) As in the case of other health issues, when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary, the member's notification to the commander must identify all medically necessary care and treatment that is part of the Service member's medical treatment plan and a projected schedule for such treatment, including an estimated date for a change in the member's gender marker in DEERS.

b. Gender Transition in the Military. Gender transition begins when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender. At that point, the Service member will be responsible for meeting all applicable military standards in the preferred gender, and as to facilities subject to regulation by the military, will use those berthing, bathroom, and shower facilities associated with the preferred gender.

c. Continuity of Medical Care. A military medical provider may determine certain medical care and treatment to be medically necessary, even after a Service member's gender marker is

changed in DEERS (e.g., cross-sex hormone therapy). A gender marker change does not preclude such care and treatment.

d. Living in Preferred Gender. Real Life Experience (RLE) is the phase in the gender transition process during which the individual commences living socially in the gender role consistent with their preferred gender. Although in civilian life this phase is generally categorized by living and working full-time in the preferred gender, consistent application of military standards will normally require that RLE occur in an off-duty status and away from the Service member's place of duty, prior to the change of a gender marker in DEERS.

e. DEERS. The Military Departments and Services recognize a Service member's gender by the member's gender marker in DEERS. Coincident with that gender marker, the Services apply, and the member is responsible to meet, all standards for uniforms and grooming; BCA; PRT; MPDATP participation; and other military standards applied with consideration of the member's gender. As to facilities subject to regulation by the military, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

f. Military Readiness. Unique to military service, the commander is responsible and accountable for the overall readiness of his or her command. The commander is also responsible for the collective morale and welfare and good order and discipline of the unit, the command climate, and for ensuring that all members of the command are treated with dignity and respect. When a commander receives any request from a Service member that entails a period of non-availability for duty (e.g., necessary medical treatment, ordinary leave, emergency leave, temporary duty, other approved absence), the commander must consider the individual need associated with the request and the needs of the command, in making a decision on that request.

3.2. ROLES AND RESPONSIBILITIES. The individual Service member, the military medical provider, the commander, and each of the Military Departments have crucial roles and responsibilities in the process of gender transition in the military.

a. Service Member's Role.

(1) Secure a medical diagnosis from a military medical provider.

(2) Notify the commander of a diagnosis indicating that gender transition is medically necessary, and identify all medically necessary treatment that is part of the member's medical treatment plan and a projected schedule for such treatment, including an estimated date for a change in the member's gender marker in DEERS, as set forth in Paragraph 3.1.a.

(3) Notify the commander of any change to the medical treatment plan, the projected schedule for such treatment, or the estimated date on which the member's gender marker would be changed in DEERS.

b. Military Medical Provider's Role.

(1) Establish the member's medical diagnosis, recommend medically necessary care and treatment, and, in consultation with the Service member, develop a medical treatment plan associated with the Service member's gender transition, as set forth in Paragraph 3.1.a, for submission to the commander.

(2) In accordance with established military medical practices, advise the commander on the medical diagnosis applicable to the Service member, including the provider's assessment of the medically necessary care and treatment, the urgency of the proposed care and treatment, the likely impact of the care and treatment on the individual's readiness and deployability, and the scope of the human and functional support network needed to support the individual.

(3) In consultation with the Service member, formally advise the commander when the Service member's gender transition is complete, and recommend to the commander a time at which the member's gender marker may be changed in DEERS.

(4) Provide the Service member with medically necessary care and treatment after the member's gender marker has been changed in DEERS.

c. Commander's Role.

(1) Review a Service member's request to transition gender. Ensure, as appropriate, a transition process that:

(a) Complies with DoD, Military Department, and Service regulations, policies, and guidance.

(b) Considers the individual facts and circumstances presented by the Service member.

(c) Ensures military readiness by minimizing impacts to the mission (including deployment, operational, training, and exercise schedules, and critical skills availability), as well as to the morale and welfare, and good order and discipline of the unit.

(d) Is consistent with the medical treatment plan.

(e) Incorporates consideration of other factors, as appropriate.

(2) Coordinate with the military medical provider regarding any medical care or treatment provided to the Service member, and any medical issues that arise in the course of a Service member's gender transition.

(3) Consult with the SCCC with regard to service by transgender Service members and gender transition in the military, the execution of DoD, Military Department, and Service policies and procedures, and assessment of the means and timing of any proposed medical care or treatment.

d. Role of the Military Department and the USCG.

(1) Establish policies and procedures in accordance with this issuance, outlining the actions a commander may take to minimize impacts to the mission and ensure continued unit readiness in the event that a transitioning individual is unable to meet standards or requires an ETP during a period of gender transition. Such policies and procedures may address the means and timing of transition, procedures for responding to a request for an ETP prior to the change of a Service member's gender marker in DEERS, appropriate duty statuses, and tools for addressing any inability to serve throughout the gender transition process. Any such actions available to the commander will consider and balance the needs of the individual and the needs of the command in a manner comparable to the actions available to the commander in addressing comparable Service member circumstances unrelated to gender transition. Such actions may include:

(a) Adjustments to the date on which the Service member's gender transition, or any component of the transition process, will commence.

(b) Advising the Service member of the availability of options for extended leave status or participation in other voluntary absence programs during the transition process.

(c) Arrangements for the transfer of the Service member to another organization, command, location, or duty status (e.g., Individual Ready Reserve), as appropriate, during the transition process.

(d) ETPs associated with changes in the member's physical appearance and body composition during gender transition, such as accommodations in the application of standards for uniforms and grooming, BCA, PRT, and MPDATP participation.

(e) Establishment of, or adjustment to, local policies on the use of berthing, bathroom, and shower facilities subject to regulation by the military, during the transition process.

(f) Referral for a determination of fitness in the disability evaluation system in accordance with DoDI 1332.18.

(g) Other actions, including the initiation of administrative or other proceedings, comparable to actions that could be initiated with regard to others whose ability to serve is similarly affected for reasons unrelated to gender transition.

(2) Establish policies and procedures, consistent with this issuance, whereby a Service member's gender marker will be changed in DEERS based on a determination by the military medical provider that the Service member's gender transition is complete; receipt of written approval from the commander, issued in consultation with the Service member; and production by the Service member of documentation indicating gender change. Such documentation is limited to:

(a) A certified true copy of a State birth certificate reflecting the Service member's preferred gender;

(b) A certified true copy of a court order reflecting the Service member's preferred gender; or

(c) A United States passport reflecting the member's preferred gender.

(3) When the Service member's gender marker in DEERS is changed:

(a) Apply uniform standards, grooming standards, BCA standards, PRT standards, MPDATP standards, and other standards applied with consideration of the member's gender, applicable to the Service member's gender as reflected in DEERS.

(b) As to facilities that are subject to regulation by the military, direct the use of berthing, bathroom, and shower facilities according to the Service member's gender marker as reflected in DEERS.

3.3. GENDER TRANSITION APPROVAL PROCESS.

a. A Service member on active duty, who receives a diagnosis from a military medical provider for which gender transition is medically necessary may, in consultation with the military medical provider and at the appropriate time, request that the commander approve:

(1) The timing of medical treatment associated with gender transition;

(2) An ETP associated with gender transition, consistent with Paragraph 3.2.d, and/or

(3) A change to the Service member's gender marker in DEERS.

b. The commander, informed by the recommendations of the military medical provider, the SCCC, and others, as appropriate, will respond to the request within a framework that ensures readiness by minimizing impacts to the mission (including deployment, operational, training, exercise schedules, and critical skills availability), as well as to the morale and welfare and good order and discipline of the command.

c. Consistent with applicable law, regulation, and policy, the commander will:

(1) Comply with the provisions of this issuance, and with Military Department and Service regulations, policies, and guidance, and consult with the SCCC.

(2) Promptly respond to any request for medical care, as identified by the military medical provider, and ensure that such care is provided consistent with applicable regulations.

(3) Respond to any request for medical treatment or an ETP associated with gender transition, as soon as practicable, but not later than, 90 days after receiving a request determined to be complete in accordance with the provisions of this issuance and Military Department and Service regulations, policies, and guidance. The response will be in writing; include notice of any actions taken by the commander in accordance with applicable regulations, policies, and guidance and the provisions of this issuance; and will be provided to both the Service member

and their military medical provider. A request that, upon review by the commander, is determined to be incomplete, will be returned to the Service member, with written notice of the deficiencies identified, as soon as practicable, but not later than 30 days after receipt.

(4) At any time prior to the change of the Service member's gender marker in DEERS, the commander may modify a previously approved approach to, or an ETP associated with, gender transition. A determination that modification is necessary and appropriate will be made in accordance with the procedures, and upon review and consideration of the factors set forth in Paragraph 3.2.c of this issuance. Notice of such modification will be provided to the Service member under procedures established by the Secretary of the Military Department concerned, and may include options as set forth in Paragraph 3.2.d.

(5) The commander will approve, in writing, the change of a Service member's gender marker in DEERS, subsequent to receipt of the recommendation of the military medical provider that the member's gender marker be changed and receipt of the requisite documentation from the Service member. Upon submission of the commander's written approval to the appropriate personnel servicing activity, the change in the Service member's gender marker will be entered in the database and transmitted to and updated in DEERS, under the authority, direction, and control of the Defense Manpower Data Center.

d. As authorized by Military Department and Service regulations, policies, and guidance implementing this issuance, a Service member may request review by a senior officer in the chain of command, of a subordinate commander's decision with regard to any request under this issuance and any subsequent modifications to that decision.

3.4. ADDITIONAL RC CONSIDERATIONS.

a. General. Excepting only those special considerations set forth below, RC personnel are subject to all policies and procedures applicable to AC Service members as set forth in this issuance and in Military Department and Service regulations, policies, and guidance implementing this issuance.

b. Gender transition approach. All RC Service members (except Selected Reserve full-time support personnel) identifying as transgender individuals, will submit to, and coordinate with their chain of command, evidence of a medical evaluation that includes a medical treatment plan. Selected Reserve full-time support personnel will follow the gender transition approval process set forth in Paragraph 3.3.

c. Medical treatment plans. A medical treatment plan established by a civilian medical provider will be subject to review and approval by a military medical provider.

d. Selected Reserve Drilling Member Participation. To the greatest extent possible, commanders and Service members will address periods of non-availability for any period of military duty, paid or unpaid, during the member's gender transition with a view to mitigating unsatisfactory participation. In accordance with DoDI 1215.13, such mitigation strategies may include:

(1) Rescheduled training.

(2) Authorized absences.

(3) Alternate training.

e. Delayed Training Program. Delayed Training Program personnel must be advised by recruiters and commanders of limitations resulting from being non-duty qualified. As appropriate, Service members in the Delayed Training Program may be subject to the provisions of Paragraph 3.5 of this issuance.

f. Split Option Training. When authorized by the Military Department concerned, Service members who elect to complete basic and specialty training over two non-consecutive periods may be subject to the provisions of Paragraph 3.5 of this issuance.

3.5. INITIAL ENTRY TRAINING AND CONSIDERATIONS ASSOCIATED WITH THE FIRST TERM OF SERVICE.

a. A blanket prohibition on gender transition during a Service member's first term of service is not permissible. However, the Department recognizes that the All-Volunteer Force readiness model is largely based on those newly accessed into the military being ready and available for multiple training and deployment cycles during their first term of service. This readiness model may be taken into consideration by a commander in evaluating a request for medical care or treatment or an ETP associated with gender transition during a Service member's first term of service. Any other facts and circumstances related to an individual Service member that impact that model will be considered by the commander as set forth in this issuance and implementing Military Department and Service regulations, policies, and guidance.

b. The following policies and procedures apply to Service members during the first term of service and will be applied to Service members with a diagnosis indicating that gender transition is medically necessary in the same manner, and to the same extent, as to Service members with other medical conditions that have a comparable impact on the member's ability to serve:

(1) A Service member is subject to separation in an entry-level status during the period of initial training (defined as 180 days per DoDI 1332.14) based on a medical condition that impairs the Service member's ability to complete such training.

(2) An individual participant is subject to separation from the Reserve Officers' Training Corps in accordance with DoDI 1215.08, or from a Service Academy in accordance with DoDI 1322.22, based on a medical condition that impairs the individual's ability to complete such training or to access into the Armed Forces, under the same terms and conditions applicable to participants in comparable circumstances not related to transgender persons or gender transition. As with all cadets or midshipmen who experience a medical condition while in the Reserve Officers' Training Corps Program or at a Service Academy, each situation is unique and will be evaluated based on its individual circumstances; however, the individual will be required

to meet medical accession standards as a prerequisite to graduation and appointment in the Armed Forces.

(3) A Service member is subject to administrative separation for a fraudulent or erroneous enlistment or induction when warranted and in accordance with DoDI 1332.14, based on any deliberate material misrepresentation, omission, or concealment of a fact, including a medical condition, that if known at the time of enlistment, induction, or entry into a period of military service, might have resulted in rejection.

(4) If a Service member requests non-urgent medical treatment or an ETP associated with gender transition during the first term of service, including during periods of initial entry training in excess of 180 days, the commander may give the factors set forth in Paragraph 3.5.a significant weight in considering and balancing the individual need associated with the request and the needs of the command, in determining when such treatment, or whether such ETP may commence in accordance with Paragraph 3.2.d.

3.6. PROTECTION OF PII AND PROTECTED HEALTH INFORMATION.

a. In accordance with DoDD 5400.11, in cases in which there is a need to collect, use, maintain, or disseminate PII in furtherance of this issuance or Military Department and Service regulations, policies, or guidance, the Military Departments and the USCG will protect against unwarranted invasions of personal privacy and the unauthorized disclosure of such PII. The Military Departments and the USCG will maintain such PII so as to protect individual's rights, consistent with federal law, regulation, and policy.

b. Disclosure of protected health information will be consistent with DoD 6025.18-R.

3.7. PERSONAL PRIVACY CONSIDERATIONS. A commander may employ reasonable accommodations to respect the privacy interests of Service members.

3.8. ASSESSMENT AND OVERSIGHT OF COMPLIANCE.

a. The Secretaries of the Military Departments and the Commandant, USCG, will implement processes for the assessment and oversight of compliance with DoD, Military Department, and Service policies and procedures applicable to service by transgender persons.

b. Beginning in 2018 and no less frequently than triennially thereafter, Secretaries of the Military Departments and the Commandant, USCG, will direct an Inspector General Special Inspection of compliance with this issuance and implementing Military Department or USCG regulations, policies, and guidance. The directing official will review the Report of Inspection for purposes of assessing and overseeing compliance; identifying compliance deficiencies, if any; timely initiating corrective action, as appropriate; and deriving best practices and lessons learned.

GLOSSARY

G.1. ACRONYMS.

AC	Active Component
BCA	body composition assessment
DEERS	Defense Enrollment Eligibility Reporting System
DoDI	DoD instruction
ETP	exception to policy
MPDATP	military personnel drug abuse testing program
PII	personally identifiable information
PRT	physical readiness testing
RLE	real life experience
RC	Reserve Component
SCCC	Service Central Coordination Cell
USCG	United States Coast Guard
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

G.2. DEFINITIONS. Unless otherwise noted, these terms and their definitions are for the purpose of this issuance.

cross-sex hormone therapy. The use of feminizing hormones in an individual assigned male at birth based on traditional biological indicators or the use of masculinizing hormones in an individual assigned female at birth. A common medical treatment associated with gender transition.

gender marker. Data element in DEERS that identifies a Service member's gender. A Service member is expected to adhere to all military standards associated with the member's gender marker in DEERS and use military berthing, bathroom, and shower facilities in accordance with the DEERS gender marker.

gender transition is complete. A Service member has completed the medical care identified or approved by a military medical provider in a documented medical treatment plan as necessary to achieve stability in the preferred gender.

gender transition process. Gender transition in the military begins when a Service member receives a diagnosis from a military medical provider indicating that the member's gender transition is medically necessary, and concludes when the Service member's gender marker in DEERS is changed and the member is recognized in the preferred gender.

human and functional support network. Support network for a Service member that may be informal (e.g., friends, family, co-workers, social media.) or formal (e.g., medical professionals, counselors, clergy).

medically necessary. Those health-care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms, and that meet accepted standards of medicine.

non-urgent medical care. The care required to diagnose and treat problems that are not life or limb threatening or that do not require immediate attention.

preferred gender. The gender in which a transgender Service member will be recognized when that member's gender transition is complete and the member's gender marker in DEERS is changed.

RLE. The phase in the gender transition process during which the individual commences living socially in the gender role consistent with their preferred gender. RLE may or may not be preceded by the commencement of cross-sex hormone therapy, depending on the medical treatment associated with the individual Service member's gender transition. The RLE phase is also a necessary precursor to certain medical procedures, including gender transition surgery. RLE generally encompasses dressing in the new gender, as well as using preferred gender berthing, bathroom, and shower facilities.

SCCC. Service-level cell of experts created to provide multi-disciplinary (e.g., medical, legal) advice and assistance to commanders with regard to service by transgender Service members and gender transition in the military.

stable in the preferred gender. Medical care identified or approved by a military medical provider in a documented medical treatment plan is complete, no functional limitations or complications persist, and the individual is not experiencing clinically significant distress or impairment in social, occupational, or other important areas of functioning. Continuing medical care, including but not limited to cross-sex hormone therapy, may be required to maintain a state of stability.

transgender Service member. A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any Service member who intends to begin transition, is undergoing transition, or has completed transition and is stable in the preferred gender.

transition. Period of time when individuals change from the gender role associated with their sex assigned at birth to a different gender role. For many people, this involves learning how to live socially in another gender role; for others this means finding a gender role and expression that are most comfortable for them. Transition may or may not include feminization or masculinization of the body through cross-sex hormone therapy or other medical procedures. The nature and duration of transition are variable and individualized.

urgent medical care. The care needed to diagnose and treat serious or acute medical conditions that pose no immediate threat to life and health, but require medical attention within 24 hours.

REFERENCES

Directive-type Memorandum 16-005, "Military Service of Transgender Service Members," July 1, 2016

DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003

DoD Directive 5400.11, "DoD Privacy Program," October 29, 2014

DoD Instruction 1215.08, "Senior Reserve Officers' Training Corps (ROTC) Programs," June 26, 2006

DoD Instruction 1215.13, "Ready Reserve Member Participation Policy," May 5, 2015

DoD Instruction 1322.22, "Service Academies," September 24, 2015

DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended

DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014

DoD Instruction 6025.19, "Individual Medical Readiness (IMR)," June 9. 2014

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301-1000

JUN 30 2016

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
DEPUTY CHIEF MANAGEMENT OFFICER
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR, OPERATIONAL TEST AND EVALUATION
DEPARTMENT OF DEFENSE CHIEF INFORMATION OFFICER
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members"

References: DoD Directive 1020.02E, "Diversity Management and Equal Opportunity in the DoD," June 8, 2015
DoD Directive 1350.2, "Department of Defense Military Equal Opportunity (MEO) Program," August 18, 1995
DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," April 28, 2010, as amended

Purpose. This DTM:

- Establishes policy, assigns responsibilities, and prescribes procedures for the standards for retention, accession, separation, in-service transition, and medical coverage for transgender personnel serving in the Military Services.

- Except as otherwise noted, this DTM will take effect immediately. It will be converted to a new DoDI. This DTM will expire effective June 30, 2017.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the

Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Policy.

- The defense of the Nation requires a well-trained, all-volunteer force comprised of Active and Reserve Component Service members ready to deploy worldwide on combat and operational missions.

- The policy of the Department of Defense is that service in the United States military should be open to all who can meet the rigorous standards for military service and readiness. Consistent with the policies and procedures set forth in this memorandum, transgender individuals shall be allowed to serve in the military.

- These policies and procedures are premised on my conclusion that open service by transgender Service members while being subject to the same standards and procedures as other members with regard to their medical fitness for duty, physical fitness, uniform and grooming, deployability, and retention, is consistent with military readiness and with strength through diversity.

Responsibilities

- The Secretaries of the Military Departments will:

  - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.

  - Draft revisions to the issuances identified, and, as necessary and appropriate, draft new issuances, consistent with the policies and procedures in this memorandum.

  - Submit to the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) the text of any proposed revisions to existing Military Department and Service regulations, policies, and guidance, and of any proposed new issuance, no later than 30 days in advance of the proposed publication date of each.

- The USD(P&R) will:

  - Take immediate action to identify all DoD, Military Department, and Service issuances, the content of which relate to, or may be affected by, the open service of transgender Service members.

- Draft revisions to the issuances identified in this memorandum and, as necessary and appropriate, draft new issuances consistent with the policies and procedures in this memorandum.

Procedures. See Attachment.

Releasability. **Cleared for public release**. This DTM is available on the DoD Issuances Website at http://www.dtic.mil/whs/directives.

Ash Carter

Attachment:
As stated

cc:
Secretary of Homeland Security
Commandant, United States Coast Guard

ATTACHMENT

PROCEDURES

1. SEPARATION AND RETENTION

a. Effective immediately, 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.

b. Transgender Service members will be subject to the same standards as any other Service member of the same gender; they may be separated, discharged, or denied reenlistment or continuation of service under existing processes and basis, but not due solely to their gender identity or an expressed intent to transition genders.

c. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

2. ACCESSIONS

a. Medical standards for accession into the Military Services help to ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty. Not later than July 1, 2017, the USD(P&R) will update DoD Instruction 6130.03 to reflect the following policies and procedures:

(1) A history of gender dysphoria is disqualifying, **unless**, as certified by a licensed medical provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, **unless**, as certified by a licensed medical provider:

(a) the applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) the applicant has been stable in the preferred gender for 18 months; and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, **unless**, as certified by a licensed medical provider:

(a) a period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) no functional limitations or complications persist, nor is any additional surgery required.

b. The Secretaries of the Military Departments and the Commandant, United States Coast Guard, may waive or reduce the 18-month periods, in whole or in part, in individual cases for applicable reasons.

c. The standards for accession described in this memorandum will be reviewed no later than 24 months from the effective date of this memorandum and may be maintained or changed, as appropriate, to reflect applicable medical standards and clinical practice guidelines, ensure consistency with military readiness, and promote effectiveness in the recruiting and retention policies and procedures of the Armed Forces.

3. IN-SERVICE TRANSITION

a. Effective October 1, 2016, DoD will implement a construct by which transgender Service members may transition gender while serving, in accordance with DoDI 1300.28, which I signed today.

b. Gender transition while serving in the military presents unique challenges associated with addressing the needs of the Service member in a manner consistent with military mission and readiness needs.

4. MEDICAL POLICY. Not later than October 1, 2016, the USD(P&R) will issue further guidance on the provision of necessary medical care and treatment to transgender Service members. Until the issuance of such guidance, the Military Departments and Services will handle requests from transgender Service members for particular medical care or to transition on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

5. EQUAL OPPORTUNITY

a. All Service members are entitled to equal opportunity in an environment free from sexual harassment and unlawful discrimination on the basis of race, color, national origin, religion, sex, or sexual orientation. It is the Department's position, consistent with the U.S. Attorney General's opinion, that discrimination based on gender identity is a form of sex discrimination.

b. The USD(P&R) will revise DoD Directives (DoDDs) 1020.02E," Diversity Management and Equal Opportunity in the DoD," and 1350.2,"Department of Defense Military Equal Opportunity (MEO) Program," to prohibit discrimination on the basis of gender identity and to incorporate such prohibitions in all aspects of the DoD MEO program. The USD(P&R) will prescribe the period of time within which Military Department and Service issuances implementing the MEO program must be conformed accordingly.

6. EDUCATION AND TRAINING

a. The USD(P&R) will expeditiously develop and promulgate education and training materials to provide relevant, useful information for transgender Service members, commanders, the force, and medical professionals regarding DoD policies and procedures on transgender service. The USD(P&R) will disseminate these training materials to all Military Departments and the Coast Guard not later than October 1, 2016.

b. Not later than November 1, 2016, each Military Department will issue implementing guidance and a written force training and education plan. Such plan will detail the Military Department's plan and program for training and educating its assigned force (to include medical professionals), including the standards to which such education and training will be conducted, and the period of time within which it will be completed.

7. IMPLEMENTATION AND TIMELINE

a. Not later than October 1, 2016, the USD(P&R) will issue a Commander's Training Handbook, medical guidance, and guidance establishing procedures for changing a Service member's gender marker in DEERS.

b. In the period between the date of this memorandum and October 1, 2016, the Military Departments and Services will address requests for gender transition from serving transgender Service members on a case-by-case basis, following the spirit and intent of this memorandum and DoDI 1300.28.

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2018, I filed the foregoing addendum with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Tara S. Morrissey
Tara S. Morrissey