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Prepared Statement

of

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REGARDING

Transgender Policy

BEFORE THE HOUSE ARMED SERVICES COMMITTEE

SUBCOMMITTEE ON MILITARY PERSONNEL

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Opening Remarks

Chairwoman Speier, Ranking Member Kelly, and Members of the Subcommittee, I appreciate the opportunity to discuss the very important issue of military service by transgender persons. In my remarks today, I will provide a brief overview of the history of this issue; I will examine the differences between the current court-imposed policy and the proposed new policy approved by then-Secretary Mattis; and I will address some common criticisms of the proposed policy. Before I begin, however, it is important to bear in mind that the Department of Defense is currently under a court order that effectively requires the Department to maintain the current policy. The proposed new policy has not been implemented due to injunctions issued by federal courts in four lawsuits.[1] The D.C. Circuit Court of Appeals recently vacated one of the injunctions,[2] and the Supreme Court stayed two others.[3] The Department is currently seeking relief from the sole remaining injunction so that it may move forward with the new policy.[4]

History of Policies Concerning Transgender Persons

Until recently, Department policy had long generally excluded transgender persons from military service. For decades, military accessions standards disqualified persons with a history of "transsexualism," including those who had undergone a medical or surgical gender transition, from joining the military, unless a waiver was granted. Those who were diagnosed with "transsexualism" while in service would generally be discharged, although typically because

[1] *Doe v. Shanahan*, No. 17-cv-1597 (D.D.C.), ECF No. 60 (Oct. 30, 2017); *Stone v. Trump*, No. 17-cv-02459 (D. Md.), ECF No. 84 (Nov. 21, 2017); *Karnoski v. Trump*, No. 17-cv-1297 (W.D. Wash.), ECF No. 103 (Dec. 11, 2017); *Stockman* v. *Trump*, No. 17-cv-1799 (C.D. Cal.), ECF No. 79 (Dec. 22, 2017).

[2] *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019).

[3] *See Trump v. Karnoski*, No. 18A625 (Jan. 22, 2019); *Trump v. Stockman*, 18A625 (Jan. 22, 2019).

[4] *Stone v. Trump*, No. 17-cv-02459 (D. Md.), ECF No. 234 (Jan. 24, 2019) (Defendants' Motion to Stay the Preliminary Injunction and Request for Expedited Ruling).

they suffered from associated medical conditions, such as depression or anxiety, that were also a basis for separation.[5]

In 2016, the Department announced significant changes to longstanding policy on military service by transgender persons.[6] First, the Department made clear that no one could be discharged or denied enlistment solely on the basis of gender identity. In so doing, the Department ended what had long been regarded as a general prohibition or "ban" on military service by transgender persons. This change of policy allowed transgender persons without a diagnosis or history of gender dysphoria or history of gender transition—a medical treatment for gender dysphoria—to serve if they could meet and adhere to the accession, retention, and sex-based standards associated with their biological sex, including medical fitness, physical fitness, body fat, uniform and grooming, and berthing, bathroom, and shower standards. Gender dysphoria is a medical condition arising from an incongruence between a person's gender identity and biological sex and can be treated through psychotherapy and/or gender transition, which can include living socially in one's preferred gender (but without any biological changes), cross-sex hormone therapy, or sex-reassignment surgery. Second, the Department determined that persons with a diagnosis or history of gender dysphoria or a history of gender transition were presumptively disqualified from joining the military because gender dysphoria is associated with clinically significant distress or impairment of functioning. The Department nevertheless provided certain accommodations to those with a history or diagnosis of gender dysphoria so that, under certain conditions, they could serve according to the standards associated with their preferred gender. For example, persons with a history of gender dysphoria who had transitioned genders could join the military in their preferred gender without a waiver so long as they had been stable for at least 18 months. Similarly, Service members who were diagnosed with gender dysphoria while in the military could obtain medical treatment to transition genders. Once their transition was complete, they would be permitted to adhere to the sex-based standards associated

[5] *See* Department of Defense Report and Recommendations on Military Service by Transgender Persons, February 2018 ("DoD Report"), pp. 7-11.

[6] *See* Memorandum from Ashton Carter, Secretary of Defense, "Directive-type Memorandum (DTM) 16-005, 'Military Service of Transgender Service Members,'" June 30, 2016 ("DTM 16-005").

with their preferred gender, rather than with their biological sex.[7] Under this policy, persons who have been diagnosed and treated for gender dysphoria need not undergo cross-sex hormone therapy, sex-reassignment surgery, or any other physical changes to be recognized and treated in accordance with their preferred gender. In general, most transitioning persons receive cross-sex hormone therapy, while a small number obtain sex-reassignment surgeries or prefer to transition socially without any physical changes.

In 2017, after consultation with the Service Secretaries and Service Chiefs of Staff, then-Secretary Mattis delayed implementation of the 2016 policy's accession standards in order to conduct a review of their impact on readiness and lethality.[8] It is a common misconception that then-Secretary Mattis directed this review only after the President announced his desire to return to the Department's longstanding pre-2016 policy.[9] That is not correct. Secretary Mattis delayed implementation of the 2016 policy's accession standards and ordered a review of this issue nearly a month prior to any public statement from the President. After the President directed the Department to reinstate the pre-2016 policy, Secretary Mattis then established a Panel of Experts comprised of senior officers and enlisted Service members, as well as civilian leaders, from across the Defense Department and United States Coast Guard to undertake a "comprehensive, holistic, and objective" study of the issue of military service by transgender persons.[10] The panel reviewed information gleaned from implementation of the 2016 policy – data which was not previously available to earlier working groups – and met with transgender Service members, commanding officers of transgender Service members, and military and civilian medical experts.[11]

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[7] *See* DTM 16-005; *see also* DoD Report, pp. 12-16.

[8] Memorandum from James N. Mattis, Secretary of Defense, "Accession of Transgender Individuals into the Military Services" (June 30, 2017).

[9] Memorandum from Donald J. Trump, President of the United States, "Military Service by Transgender Individuals" (Aug. 25, 2017).

[10] Memorandum from James N. Mattis, Secretary of Defense, "Terms of Reference—Implementation of Presidential Memorandum on Military Service by Transgender Individuals" (Sep. 14, 2017).

[11] *See* DoD Report, p. 18.

At the conclusion of its review, the Panel recommended, and Secretary Mattis adopted, a proposed new policy that, once implemented, would do the following: First, it would continue the policy of allowing transgender persons without a diagnosis or history of gender dysphoria to serve if they meet and adhere to all accession, retention, medical, and sex-based standards associated with their biological sex. In doing so, the 2018 policy, like the 2016 policy, would continue to provide that no one could be discharged or denied enlistment solely on the basis of gender identity. Second, it would end the policy of categorically providing special accommodations for individuals with a diagnosis or history of gender dysphoria. The only categorical exemption is for Service members who either accessed under the medical standards of the 2016 policy, or are currently serving and were diagnosed with gender dysphoria by a military medical provider, or had that diagnosis confirmed by a military medical provider, before the effective date of the 2018 policy. These exempted Service members may continue serving under the terms of the 2016 policy, including serving in their preferred gender, pursuing gender transition, and obtaining a gender marker change for official records and recognition, even after the new policy takes effect. The 2018 policy's standards will not apply to them.[12]

Comparison of the 2016 and 2018 Policies

Another common misconception is that the proposed policy is a dramatic departure from the 2016 policy. In reality, the two policies share much in common. For example, the 2016 policy and the proposed policy both presumptively disqualify individuals who have a diagnosis or history of gender dysphoria or who have a history of medical treatment for gender transition, such as cross-sex hormone therapy or sex-change surgery.[13] According to the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders, gender dysphoria is a condition "associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning."[14] Persons with gender dysphoria suffer from disproportionately

[12] *See* Memorandum for the President from James N. Mattis, Secretary of Defense, "Military Service by Transgender Individuals" (Feb. 22, 2018); *see also* DoD Report, pp. 17-19.

[13] *See* DTM 16-005, Attachment pp. 1-2 (2016 Policy) and DoD Report, pp. 4-5 (2018 Policy).

[14] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* ("DSM-5"), p. 453 (5th ed. 2013).

high rates of mental health conditions, such as anxiety, depression, and substance abuse disorders.[15] Sadly, they also suffer from alarmingly high rates of suicide, suicide attempts, and suicide ideation. Lifetime rates of suicide attempts, for example, are reported to be as high as 41%, compared to 4.6% for the general population.[16] Available data from Service members reflect similar trends. For instance, Service members with gender dysphoria are eight times more likely to report suicidal ideation than Service members as a whole (12% versus 1.5%)[17] and are nine times more likely to have mental health encounters than Service members as a whole (28.1 per Service member on average versus 2.7 per Service members).[18] In light of these facts, the Department determined gender dysphoria to be a presumptively disqualifying condition under both the 2016 and 2018 policies.[19] In this respect, both policies turn on a medical condition (gender dysphoria) or treatment for a medical condition (gender transition), not on gender identity.

Another important similarity between the 2016 and 2018 policies is their treatment of transgender persons who have no diagnosis or history of gender dysphoria. Both policies require transgender individuals without gender dysphoria, like all Service members, to meet the standards associated with their biological sex. By requiring all Service members without gender dysphoria to adhere to the sex-based standards associated with their biological sex (as opposed to their gender identity), both policies avoid discriminating on the basis of gender identity.[20] Again, Department policy prohibits discrimination based on gender identity and will continue to do so.[21]

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[15] *See* DoD Report, p. 21 and n.60 and studies cited therein.

[16] *See* DoD Report, p. 21 and n.61 and studies cited therein.

[17] *See* DoD Report, p. 21 and n.64.

[18] *See* DoD Report, p. 22 and n.65.

[19] *See* DTM 16-005, Attachment pp. 1-2 (2016 Policy) and DoD Report, pp. 4-5 (2018 Policy).

[20] *See* DTM 16-005, Attachment p. 1 (2016 Policy) and DoD Report, p. 19.

[21] DoD Directive 1020.02E, June 8, 2015, and Change 1, Nov. 29, 2016, Enclosure 2 at pp. 6-7.

The fundamental difference between the 2016 and 2018 policies is that the 2016 policy provides special accommodations to certain persons with a diagnosis or history of gender dysphoria or with a history of medical treatment for gender dysphoria. It does so primarily in two respects: First, under the 2016 policy, persons who have received cross-sex hormone therapy or sex-reassignment surgery to treat gender dysphoria may enter the military without a waiver (provided they can demonstrate a period of stability), but persons who received similar treatment for conditions unrelated to gender dysphoria may not enter the military without a waiver. For example, a person taking synthetic hormones for treatment of hypogonadism (the body's low production of sex hormones, such as testosterone or estrogen) is automatically disqualified without a waiver; whereas, a person taking cross-sex hormones for treatment of gender dysphoria is not. Second, persons with a diagnosis or history of gender dysphoria who have completed transition to another gender may opt out of the sex-based standards associated with their biological sex (even if they undergo no biological changes) and may instead adhere to the sex-based standards associated with their gender identity.[22] No other class of Service members is exempted from the sex-based standards associated with their biological sex.

Once implemented, the 2018 policy will end these special accommodations for persons with gender dysphoria and will ensure equal application of military standards to all persons regardless of gender identity. The proposed policy will allow persons with a history of gender dysphoria who do not have a history of cross-sex hormone therapy or sex-reassignment surgery to join the military if they can demonstrate a period of stability, and persons who are diagnosed with gender dysphoria while serving may remain in the military, but in all cases, persons with a diagnosis or history of gender dysphoria must be willing and able, like all Service members, to adhere to the sex-based standards associated with their biological sex. As with all Service members who have a medical condition that renders them unable to adhere to military standards without special accommodations, the need to seek gender transition for the treatment of gender dysphoria, which would require accommodations to meet military standards, is a basis for honorable separation from the military unless a waiver is granted.[23]

[22] *See* DTM 16-005, Attachment pp. 1-2.

[23] *See* DoD Report, pp. 4-6, 28-31.

As the Department's report explained,[24] categorical accommodations or exemptions from military standards undermine the Department's efforts to maintain military readiness, discipline, and unit cohesion. Such accommodations, for instance, can lead to real or perceived issues of unfairness, preferential treatment, or resentment. This is why uniformity and strict conformance to standards are so highly valued in military organizations.

With respect to maintaining separate berthing, bathroom, and shower facilities for males and females, creating exceptions for Service members to use the facilities of their preferred gender, rather than their biological sex, can undermine reasonable expectations of privacy and lead to unnecessary and debilitating leadership challenges. One illustration of this problem is the report of one commander who was confronted with dueling equal opportunity complaints. According to this commander, a transgender Service member with male anatomy was permitted to adhere to standards and requirements for female Service members, including access to shower facilities. This led to an equal opportunity complaint from biological females in the unit who believed granting a biological male, even one who identified as female, access to their showers violated their rights to 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.[25] This is consistent with the experience of the Canadian military where commanders reported that it was challenging to meet "trans individual's expectations for reasonable accommodation and individual privacy while avoiding creating conditions that place extra burdens on others or undermined overall team effectiveness."[26] Adherence to the requirement that all Service members must meet the standards associated with their biological sex will restore consistency in the application of those standards and will alleviate the burden on commanders of adjudicating competing interests at the unit level so that they can focus instead on military training and warfighting.

[24] *See* DoD Report, pp. 35-41.

[25] *See* DoD Report, p. 37 and n.143.

[26] *See* DoD Report, p. 40 and n.156 (*citing* Alan Okros & Denise Scott, "Gender Identity in the Canadian Forces," *Armed Forces and Society* Vol. 41, p. 8 (2014).

Finally, there is a significant risk that categorical accommodations for gender transition will impair unit readiness. As the Department's report explained at length,[27] gender transition can lead to substantial periods of unavailability for deployment or combat duty depending upon the nature and scope of the treatment. For example, the Department follows Endocrine Society guidelines recommending quarterly bloodwork and laboratory monitoring of hormone levels during the first year of cross-sex hormone therapy. Generally, this renders Service members non-deployable for up to a year without a waiver. As of October 2017, 91.5% of all approved treatment plans available for study included cross-sex hormone therapy. The period of non-deployability is potentially even greater for those undergoing sex reassignment surgery. It is estimated that non-genital sex reassignment surgeries could require up to eight weeks of convalescence, and genital sex reassignment surgeries could require between three and six months.[28] Given that 12 continuous months of cross-sex hormone therapy is recommended prior to genital sex reassignment surgery, the total time necessary for gender transition could well exceed a year. In addition, according to the RAND study, foreign militaries that allow service by personnel with gender dysphoria have found that it is sometimes necessary to restrict the deployment of personnel who are undergoing gender transition, including those receiving hormone therapy or surgery, to austere environments where their healthcare needs cannot be met.[29] For example, the Israeli military reportedly does not assign transitioning individuals to combat units because they require accommodations that may not be available in austere environments.[30] Long periods of unavailability for deployment or combat not only undermine readiness, they place unfair burdens on those who are ready to deploy and must backfill to compensate for non-deployable Service members.

No single reason alone necessarily accounts for the Department's decision to no longer provide special accommodations for gender transition; it is the combination of all the reasons set

[27] *See* DoD Report, pp. 32-35.

[28] *See* DoD Report, p. 33 and n.124.

[29] RAND National Defense Research Institute, *Assessing the Implications of Allowing Transgender Personnel to Serve Openly* (RAND Corporation 2016) ("RAND Study"), p. 40.

[30] RAND Study, p. 56.

forth in the Department's detailed 44-page report that we believe justifies the Department's course correction. That said, I should pause here to note that the Department is committed to providing all care necessary to protect the health of Service members diagnosed with gender dysphoria, including those who may ultimately need to be separated because they are no longer able to adhere to the standards associated with their biological sex.

Response to Criticisms of the 2018 Policy

Several criticisms have been leveled against the proposed policy that I would like to address before I conclude. First, many have described the proposed policy as a "ban" on military service by transgender persons. This characterization is not accurate. To the contrary, the 2018 policy, like the 2016 policy, prohibits the denial of accession or involuntary separation solely on the basis of gender identity. So long as transgender persons, even those with a diagnosis or history of gender dysphoria, are willing and able to adhere to all military standards, including the sex-based standards associated with their biological sex, and have met any applicable stability requirements and have not had disqualifying medical treatments, they may serve, and we welcome them.[31] According to the American Psychiatric Association, "[n]ot all transgender people suffer from gender dysphoria and that distinction is important to keep in mind."[32] The Department's data appears to bear this out. For example, an estimated 8,980 active duty service members identify as transgender according to a DoD survey, yet as of February 2018, only 937 had been diagnosed with gender dysphoria.[33]

Some have also argued that the proposed policy's insistence on all Service members adhering to the sex-based standards associated with their biological sex effectively bars transgender persons from military service. But this criticism presupposes that all transgender persons wish to permanently transition genders or are otherwise incapable of adhering to the military's sex-based standards without special accommodations. That, too, is inaccurate.

[31] *See* DoD Report, p. 19.

[32] *See* DoD Report, p. 20 and n.57 (*citing* American Psychiatric Association, "Expert Q&A: Gender Dysphoria," available at https://w2ww.psychiatgry.org/patients-families/gender-dysphoria/expert-qa.

[33] *See* DoD Report, p. 32.

According to a survey cited in the RAND study, 18 percent of transgender individuals plan to never transition.[34] In addition, as the variance between the estimated number of active duty transgender Service members and the number of Service members diagnosed with gender dysphoria suggests, there are many transgender Service members who are serving today with honor and distinction while adhering to all military standards, including the standards associated with their biological sex. As a result, a panel of the D.C. Circuit Court of Appeals recently held that it was factually incorrect to say that that the proposed policy amounted to a blanket ban on military service by transgender persons.[35]

Second, some have described the proposed policy as akin to "Don't Ask, Don't Tell." This characterization is also inaccurate. Unlike the proposed policy regarding gender dysphoria, "Don't Ask, Don't Tell" was not based on a medical condition. It barred people from military service solely because of their same-sex conduct, which is no longer associated with a medical condition and does not require medical treatment or special accommodations to meet military standards. In addition, under "Don't Ask, Don't Tell," Service members would not be asked about their sexual orientation, but if they were discovered at any time to have engaged in same-sex conduct (even off duty), they could be discharged from the military. By contrast, under the proposed policy, like the 2016 policy, no person can be removed or excluded from the military solely on account of his or her gender identity.[36] .

Third, some have claimed that the proposed policy disregards current medical understanding and practice relating to gender dysphoria. But that accusation, too, is inaccurate. The Department's report explaining the proposed policy acknowledges the American Psychiatric Association's judgment that it is not a disorder for persons to identify as a gender other than their

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[34] *See* RAND Study, p. 20 and n.2 (*citing* Jaime M. Grant, Lisa A. Mottet, and Justin Tanis, with Jack Harrison, Jody L. Herman, and Mara Keisling, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Washington, D.C.: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at p. 26).

[35] *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019) ("[T]he District Court made an erroneous finding that the Mattis Plan was the equivalent of a blanket ban on transgender service.").

[36] *See* DoD Report, p. 19 ("[T]he Department concludes that transgender persons should not be disqualified from service solely on account of their transgender status…").

biological sex.[37] It also acknowledges that the "prevailing judgment of mental health practitioners is that gender dysphoria can be treated with transition-related care," including cross-sex hormone therapy and sex-reassignment surgery, and that such treatment can improve health outcomes for persons with gender dysphoria.[38] Citing a few meta-studies with ambiguous results, the report simply notes that there are limits to what we know about the extent to which gender transition treatment can fully address all issues relating to gender dysphoria.[39] The RAND study made a similar observation when it noted that "it is difficult to fully assess the outcomes of treatment" for gender dysphoria.[40] Even so, these studies did not address the unique case of persons with gender dysphoria in the military. For these reasons, the Department has taken a cautious approach in applying its standards to persons with a diagnosis or history of gender dysphoria.[41] This is the same cautious approach that it takes with respect to all medical conditions and accessions standards. Indeed, it is precisely because of this measured approach that the Department sets high standards to ensure a resilient and battle-ready fighting force. As a result, 71% of prime military-age Americans are not eligible for military service without a waiver.[42] I can assure you that persons who are disqualified from military service for having gender dysphoria are no less valued members of our nation than the many others who are disqualified from service for not meeting the military's stringent physical, mental, or behavioral standards.

Conclusion

In proposing a new policy, the Department is well aware that some former Defense Department officials and former senior military leaders have reached a different judgment on this

[37] *See* DoD Report, p. 12 and n.25.

[38] *See* DoD Report, p. 24.

[39] *See* DoD Report, pp. 24-27

[40] RAND Study, p. 10.

[41] *See* DoD Report, p. 27.

[42] *See* DoD Report, p. 6 and n.9 (*citing* The Lewin Group, Inc., "Qualified Military Available (QMA) and Interested Youth: Final Technical Report," p. 26 (Sep. 2016)).

issue. But, as we will discuss today, the realities associated with the medical condition of gender dysphoria and the accommodations required for gender transition treatments are far more complicated than many may assume. This has certainly been borne out in the Department's experience with the 2016 policy. As a consequence, the Department has concluded, based on its best military judgment, that sustaining the 2016 policy for the long term would degrade military effectiveness and that the adjustments proposed in the 2018 policy are necessary. As new data becomes available that better informs our assessment of the risks, the Department is committed to reviewing that data in depth – as it does with all similarly situated conditions – to inform future policy considerations.

Ms. Chairwoman, Ranking Member Kelly, this concludes my statement. I thank you and the members of this Subcommittee for your outstanding and continuing support for the men and women of the Department of Defense, and I look forward to your questions.