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Understanding the Department of Defense's Policy Regarding Transgender Servicemembers

First Lieutenant A. Benjamin Spencer*

I. Introduction

In June 2016, the Secretary of Defense (SECDEF) issued Directive-type Memorandum (DTM) 16-005, "Military Service of Transgender Service Members." This DTM announced that, based on the premise that the "military should be open to all who can meet the rigorous standards for military service and readiness," "transgender individuals shall be allowed to serve in the military."¹ The attachment to the memo declared that servicemembers could no longer be "involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity."² The core purpose of the new policy was to ensure that transgender persons would be permitted to serve their country in the armed forces to the same extent as all other persons. However, the integration of openly transgender personnel into the military presents many on-the-ground issues that subsequent guidance and policies have striven to address and that commanders and policymakers will need to confront.

Regarding accession into the military by transgender persons (which is to begin in the summer of 2017), DTM 16-005 states that "gender dysphoria"³ would remain a disqualifying condition unless the person is certified by a medical provider as having been "stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months."⁴ In the event the person has been receiving cross-sex hormone therapy or has a history of sex reassignment surgery, a medically-certified 18-month period of stability must also be demonstrated prior to accession.⁵ For those transgender persons within the military, the policy indicates that once a servicemember's gender marker is officially changed in the Defense Enrollment Eligibility Reporting System (DEERS), that servicemember "will use those berthing, bathroom, and

shower facilities associated with the member's gender marker in DEERS."⁶ Importantly, DTM 16-005 directed, "Transgender Service members will be subject to the same standards as any other Service member of the same gender . . ." ⁷ There is some indication that transgender servicemembers will be entitled to government-funded medical care and treatment associated with a gender transition, although requests for particular care from transgender servicemembers will be handled on a case-by-case basis until the Department of Defense (DoD) issues further policy guidance.⁸ Finally, DTM 16-005 announces that "discrimination based on gender identity is a form of sex discrimination,"⁹ which is prohibited under current equal opportunity policies and regulations throughout the military.¹⁰

In the wake of DTM 16-005 the Service Secretaries have been tasked with identifying all issuances, regulations, and policies that bear on or may be affected by the open service of transgender persons and developing revisions to the same as may be necessary to render them consistent with the new policy.¹¹ For example, at the time the DoD policy was announced, Army Regulation (AR) 40-501 identified "transsexualism" as a medically-disqualifying disorder preventing entry into the Army and could form the basis for separation from the Army,¹² consequences that would be out of step with the new policy.

In response to DTM 16-005, Secretary of the Army Eric Fanning issued Army Directive (Army Dir.) 2016-35, "Army Policy on Military Service of Transgender Soldiers."¹³ It echoes the admonitions of DTM 16-005 that transgender Soldiers may serve openly and may not be involuntarily separated or denied reenlistment or continuation of service solely on the basis of gender identity.¹⁴ Additionally, the Army directive affirms that once a Soldier's gender marker is

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¹ U.S. DEP'T OF DEF., DTM 16-005, MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS (30 June 2016) [hereinafter DTM 16-005].

² *Id.* at Attachment para. 1.a.

³ See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 5th ed., 453 (2014) [hereinafter DSM-V] ("Individuals with gender dysphoria have a marked incongruence between the gender they have been assigned to (usually at birth, referred to as *natal gender*) and their experienced/expressed gender. This discrepancy is the core component of the diagnosis.").

⁴ DTM 16-005, *supra* note 2, at Attachment para. 2.a.(1).

⁵ *Id.* at Attachment para. 2.a.(2), (3).

⁶ U.S. DEP'T OF DEF., INSTR. 1300.28, IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS, para. 1.2.b (1 Oct. 2016) [hereinafter DoDI 1300.28].

⁷ *Id.* at Attachment para. 1.b.

⁸ *Id.* at Attachment para. 4.

⁹ DTM 16-005, *supra* note 2, at Attachment para. 5.a.

¹⁰ See U.S. DEP'T OF DEF., DIR. 1020.02E, DIVERSITY MANAGEMENT AND EQUAL OPPORTUNITY IN THE DoD (8 June 2015); U.S. DEP'T OF DEF., DIR. 1350.2, DEPARTMENT OF DEFENSE MILITARY EQUAL OPPORTUNITY (MEO) PROGRAM (18 Aug. 1995). Interestingly, DTM 16-005 indicates that both of these directives will be revised to address discrimination based on gender identity specifically. DTM 16-005, *supra* note 2, at Attachment para. 5.b.

¹¹ DTM 16-005, *supra* note 2, at 2.

¹² U.S. DEP'T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, paras. 2-27, 3-35 (14 Dec. 2007) (RAR, 4 Aug. 2011).

¹³ U.S. DEP'T OF ARMY, DIR. 2016-35, ARMY POLICY ON MILITARY SERVICE OF TRANSGENDER SOLDIERS (7 Oct. 2016) [hereinafter ARMY DIR. 2016-35].

¹⁴ *Id.* para. 2.

changed in DEERS, “the Soldier will be expected to adhere to Army standards applicable to the preferred gender.”¹⁵ Exceptions to policy for transitioning Soldiers are discouraged, but permitted if a Soldier wishes to depart from the Army’s standards for their gender marker.¹⁶ The other Service Secretaries have also issued policy guidance for their respective branches, which largely tracks the guidance offered in the Army policy.¹⁷

One interesting aspect of Army Dir. 2016-35 is that it revises multiple Army regulations,¹⁸ although not to such a degree as one might have expected. In AR 40-501, mentioned above, revisions eliminate transsexualism, gender identity issues, and “abnormalities or defects of the genitalia such as change of sex” as disqualifying for service.¹⁹ Army Regulation 135-178²⁰ and AR 635-200,²¹ which address reserve component and active duty enlisted separations, are revised to eliminate gender dysphoria and “transsexualism/gender transformation” as grounds for separation.²² Interestingly, “transvestism”—which is a term that refers to cross-dressing—is retained as a condition that warrants separation under paragraph 6-7a of AR 135-178.²³ The Army Command Policy, AR 600-20, is revised to replace references to discrimination based on sex or gender with “sex (including gender identity).”²⁴ The Army Substance Abuse Program regulation, AR 600-85, is revised as well, now permitting all Soldiers to use wide-mouth collection cups for specimen collection during the urinalysis process rather than only females (as before).²⁵

There are many important questions that will arise for commanders and servicemembers who have to operate under this policy, as well as for military policymakers who will have to oversee and further refine the policy as the services proceed with its implementation. These questions include: Who counts as transgender under the policy and what must they do to come within its ambit? What exactly are the contours of the policy in terms of the rights it provides and the duties it imposes? How are on-the-ground conflicts between the rights and privileges recognized under the policy to be balanced

against or reconciled with the rights and privileges that non-transgender servicemembers may have?

For policymakers, the questions are larger: What impact does transgender accommodation have on interests served by the various gender-distinct policies and practices of the military? Are there any limits on transgender accommodation and recognition that are required in view of potential adverse impacts that the policy may have on the rights or interests of non-transgender servicemembers?

This article will address these questions with the aim of providing commanders, servicemembers, and policymakers with a solid understanding of the new policy and how to navigate the various issues each will face as it is implemented throughout the force.

II. Who Is “Transgender” Under the Policy?

The main components of the new policy are threefold: (1) Transgender individuals are allowed to serve in the military openly and may not be discriminated against on the basis of their gender identity; (2) transgender servicemembers will be subject to the standards and procedures applicable to the gender with which they identify; and (3) transgender servicemembers will use the berthing, bathroom, and shower facilities associated with their gender identity.²⁶ Although, on its face, this appears to be broad in its protections, one must understand how the DoD defines “transgender” to understand its true scope.

In DoD Instruction 1300.28, *In-Service Transition for Transgender Service Members*, the DoD defines a transgender servicemember as follows: “A Service member who has received a medical diagnosis indicating that gender transition is medically necessary, including any servicemember who intends to begin transition, is undergoing transition, or has completed transition and is stable in the

¹⁵ *Id.* paras. 2.c., 3.f.

¹⁶ *Id.* para. 5.

¹⁷ See U.S. DEP’T OF AIR FORCE, AFPM2016-36-01, AIR FORCE POLICY MEMORANDUM FOR IN-SERVICE TRANSITION FOR AIRMEN IDENTIFYING AS TRANSGENDER (6 Oct. 2016) [hereinafter APFM2016-36-01]; U.S. DEP’T OF NAVY, SECRETARY OF THE NAVY INSTR. 1000.11, SERVICE OF TRANSGENDER SAILORS AND MARINES (4 Nov. 2016) [hereinafter SECNAVINST 1000.11].

¹⁸ *Id.* para. 6 (“Effective immediately, the following regulations will be revised in accordance with the language in enclosure 6: AR 40-501, AR 135-178, AR 600-20, AR 600-85, AR 635-200, and AR 638-2.”).

¹⁹ ARMY DIR. 2016-35, *supra* note 14, encl. 6.

²⁰ U.S. DEP’T OF THE ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (12 Jan. 2017) [hereinafter AR 135-178].

²¹ U.S. DEP’T OF THE ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (19 Dec. 2016).

²² ARMY DIR. 2016-35, *supra* note 14, encl. 6.

²³ *Id.*; AR 135-178, *supra* note 22, para. 6-7a.

²⁴ ARMY DIR. 2016-35, *supra* note 14, encl. 6; U.S. DEP’T OF THE ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014).

²⁵ ARMY DIR. 2016-35, *supra* note 14, encl. 6; U.S. DEP’T OF THE ARMY, REG. 600-85, THE ARMY SUBSTANCE ABUSE PROGRAM (28 Dec. 2012) [hereinafter AR 600-85]. The mortuary affairs regulation, AR 638-2, is revised in a minor way to strike “and transgenders” from paragraph 2-9b(1), which formerly read, “No uniform is authorized; dark suit only or equivalent for females and transgenders.” ARMY DIR. 2016-35, *supra* note 14, encl. 6.

²⁶ There are other aspects of the policy, such as the granting of access to medical services for the treatment of transgender persons interested in medical care, which presumably would include gender reassignment surgery. DTM 16-005, *supra* note 2, at Attachment, para. 4.

preferred gender.”²⁷ Two components of this definition are worth highlighting: *medical diagnosis* and *gender transition*. We will return to those terms in a moment. But as will be seen upon taking a closer look at the policy, the DoD makes these two concepts the foundation for whether and how it will recognize the preferred gender identity of transgender individuals.

In the military—as affirmed by the DoD in the documents announcing its new policy on transgender servicemembers—a servicemember’s gender is recognized based on his or her gender marker in DEERS.²⁸ A person’s gender marker in DEERS, in turn, determines what uniform and grooming standards, body composition assessment (BCA) standards, and physical readiness testing (PRT) standards apply to that person.²⁹ Similarly, the DEERS gender marker determines how a servicemember participates in the Military Personnel Drug Abuse Testing Program (MPDATP)³⁰ and which berthing, bathroom, and shower facilities the servicemember may use.³¹ Thus, one’s gender marker in DEERS is the key to how the military treats servicemembers with respect to gender.

Under the new policy, to be recognized as one’s preferred gender in the military, one must have the gender marker in DEERS changed.³² The question then becomes how does a servicemember do that under the new policy? One could imagine that members could present themselves to their commanders and simply declare or affirm what their gender identity is; then, the commander or some higher authority

could approve a switch in DEERS. But that is not the approach taken in the new policy. Instead, under the new policy, a servicemember’s gender marker in DEERS will only be changed from that assigned at birth “[w]hen the military medical provider determines that a Service member’s gender transition is complete,” the commander has given his or her written approval, and the servicemember provides civilian documentation³³ indicating a gender change.³⁴ Thus, a person must undergo a gender transition to obtain recognition of their status as transgender. How does the military define “gender transition”?

According to the policy, “Gender transition begins when a Service member receives a diagnosis from a military medical provider indicating that gender transition is medically necessary”³⁵ The policy further defines the completion of a gender transition as follows: “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.”³⁶ “Medically necessary” is defined as “health-care services or supplies necessary to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms”³⁷

As can be seen, in referring to a “diagnosis” and to “medical care,” the DoD’s new policy regards being transgender as a type of medical condition in need of treatment before it can be recognized. Although neither DTM 16-005, DoDI 1300.28, nor Army Dir. 2016-35 delve into what this condition is, the DoD does seem to identify it in a

²⁷ DoDI 1300.28, *supra* note 7, at 16 (Glossary).

²⁸ ARMY DIR. 2016-35, *supra* note 14, at para. 2.c.

²⁹ DoDI 1300.28, *supra* note 7, para. 1.2.b.

³⁰ AR 600-85, *supra* note 26, para. 4-9c(2) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

³¹ ARMY DIR. 2016-35, *supra* note 14, para. 2.c.

³² U.S. DEPT. OF DEF. HANDBOOK, TRANSGENDER SERVICE IN THE U.S. MILITARY: AN IMPLEMENTATION HANDBOOK, 43-44, 47 (2016) [hereinafter DOD IMPLEMENTATION HANDBOOK] (indicating that the standards and facilities restrictions for one’s preferred gender apply after the DEERS gender marker is changed).

³³ Such documentation includes a certified birth certificate, court order, or U.S. passport reflecting a person’s preferred gender. *Id.* The U.S. State Department requires physician certification of “clinical treatment” before it will permit a gender change on a U.S. Passport. *Gender Designation Change*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://travel.state.gov/content/passports/en/passports/information/gender.html> (last visited Jan. 13, 2017) (“Description of specific treatments is not required. The certification from your physician is based on his or her judgment of your treatment needs.”). States have their own rules regarding changing one’s gender on birth certificates and driver’s licenses, which vary in terms of what procedures and documentation are required. Some states require documentation of a surgical transition, and a few prohibit changing gender on birth certificates, but the trend appears to be toward requiring either evidence of “gender transition treatment” or certification by a physician or psychologist that the change accurately reflects the applicant’s sex or gender identity. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 103426 (Deering Supp. 2016) (“The State Registrar shall issue a new birth certificate reflecting a

change of sex without a court order for any person born in this state who has undergone clinically appropriate treatment for the purpose of gender transition”); VA. CODE ANN. § 32.1-269(E) (2015) (“Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure and upon request of such person, the State Registrar shall amend such person’s certificate of birth to show the change of sex”). The National Center for Transgender Equality has a regularly updated website summarizing state laws on name change, driver’s licenses, and birth certificate policies, with links to forms and other local resources. *ID Documents Center*, NAT’L CENTER FOR TRANSGENDER EQUALITY, <http://www.transequality.org/documents> (last updated Jan. 2017). See the Appendix, *infra*, for a description of the regulations governing gender changes in the five states with the highest number of active-duty personnel—California, Florida, North Carolina, Texas, and Virginia.

³⁴ DoDI 1300.28, *supra* note 7, para. 3.2.d(2). Army Dir. 2016-35 indicates that the applicable approval authority will approve a change to a Soldier’s gender marker in DEERS within 30 days after receiving a request for a change from the Soldier and all required documentation. ARMY DIR. 2016-35, *supra* note 14, para. 3.d. This period is 60 days for reserve component Soldiers. *See id.* The Soldier’s gender marker will be changed once the approval is submitted to the Commander, U.S. Army Human Resources Command (HRC). *Id.* para. 3.e.

³⁵ DoDI 1300.28, *supra* note 7, para. 3.1.b; *see also* ARMY DIR. 2016-35, *supra* note 14, at para. 3.

³⁶ DoDI 1300.28, *supra* note 7, at 16 (Glossary); *see also* ARMY DIR. 2016-35, *supra* note 14, para. 3.c.

³⁷ *Id.*

follow-up publication. In *Transgender Service in the U.S. Military: An Implementation Handbook*, the DoD refers to “gender dysphoria” and defines this as “a medical diagnosis that refers to distress that some transgender individuals experience due to a mismatch between their gender and their sex assigned at birth.”³⁸ This divergence is made possible by what the DoD indicates are the distinctions between “gender” and “sex”: “Sex and gender are different. Sex is whether a person is male or female through their biology. Gender is the socially defined roles and characteristics of being male and female associated with that sex. There are a number of people for whom these associations do not match.”³⁹ Indeed, the current version of the *Diagnostic and Statistical Manual of Mental Disorders*—DSM-V—concur in the DoD’s understanding of the difference between sex and gender as well as the condition of gender dysphoria. It defines gender dysphoria as “the distress that may accompany the incongruence between one’s experienced or expressed gender and one’s assigned gender.”⁴⁰

It is worth noting that defining a transgender person as one with a gender dysphoria diagnosis who has committed to a gender transition puts the DoD at variance with how the diagnostic and transgender communities define the term “transgender”—with the DoD’s definition being much narrower. As DSM-V recognizes, “Transgender refers to the broad spectrum of individuals who transiently or persistently identify with a gender different from their natal gender.”⁴¹ It is an “umbrella term” that embraces “anyone whose behavior, thoughts, or traits differ from the societal expectations for his or her biological sex.”⁴² The narrower concept of “transsexual”—defined as “[o]ne who lives full time in a gender role consistent with his or her inner gender identity whether such person has had sex reassignment surgery or not”⁴³—is more in line with what the DoD is referring to when it uses the term transgender.⁴⁴

Although the DoD policy conditions recognition of one’s gender identity upon undertaking and completing a “gender transition,” the DoD is careful not to dictate what that entails.

The policy recognizes that gender transition is a process that can vary from one individual to the next:

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.⁴⁵

The DoD’s handbook on implementation of the transgender policy affirms this view: “Gender transition care is individualized and can include psychotherapy, hormone therapy, RLE [real life experience], and sex reassignment surgery.”⁴⁶ *This is important*; the DoD policy does not require a *medical* transition, even though the starting point for a gender transition under the policy is a medical diagnosis of gender dysphoria. Rather, the policy simply requires a transition of some kind, which can include—but need not include—a medical transition.

This puts the DoD policy in line with the position on transitioning in the transgender community, which recognizes the possibility of *social/emotional and hormonal/medical* transitions. A social transition is one in which a person publicly identifies as their preferred gender and may choose to express that identity in ways that conform with societal expectations for that chosen gender.⁴⁷ The DoD policy refers to this aspect of transitioning as *real life experience* or RLE.⁴⁸ A medical transition can involve the use of cross-sex hormone therapy, defined by the DoD as “[t]he 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.”⁴⁹ A medical transition can also involve behavioral health care, psychotherapy, or gender reassignment surgery, which would bring one’s sex in line with their preferred gender identity.⁵⁰

³⁸ DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 9.

³⁹ *Id.*

⁴⁰ DSM-V, *supra* note 4, at 451.

⁴¹ *Id.* at 451.

⁴² ALLY WINDSOR HOWELL, *TRANSGENDER PERSONS AND THE LAW* 194 (2013). See also NICHOLAS M. TEICH, *TRANSGENDER* 101, at 2 (2012) (“Transgender is defined today as an umbrella term with many different identities existing under it.”).

⁴³ HOWELL, *supra* note 43, at 194.

⁴⁴ Various writings on transgender persons acknowledge that in public policy discussions, the term transgender tends to intend transsexualism as its meaning. *Id.* at 9–10 (“[F]or the purposes of this book, the word *transgender* will be used exclusively to refer to *transsexuals* . . .”) (emphasis in original);

TEICH, *supra* note 43, at 2 (“The type of transgenderism that we are concerned with in the bulk of this book is *transsexualism*.”) (emphasis in original).

⁴⁵ DoDI 1300.28, *supra* note 7, at 17.

⁴⁶ DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 13.

⁴⁷ See *TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY* 124–54 (Laura Erickson-Schroth ed., 2014) (discussing the various aspects of social transition for transgender persons) [hereinafter *TRANS BODIES*].

⁴⁸ DoDI 1300.28, *supra* note 7, at 16.

⁴⁹ *Id.* at 15.

⁵⁰ See DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 31 (“Medical treatment may include behavioral health care, use of hormones (which may

If at any point during the transition process the servicemember needs an accommodation for being unable to meet an applicable standard or to comply with a gender-specific regulation, DoD policy empowers commanders to grant exceptions to policy (ETPs): “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.”⁵¹ The services may further restrict this authority; for example, in the Army, approval authority for ETPs for transgender servicemembers is withheld to the Assistant Secretary of Army for Manpower and Reserve Affairs.⁵²

This ETP policy is similar in the Air Force, with decisional authority withheld to the Air Force A1, the Deputy Chief of Staff for Manpower, Personnel and Services.⁵³ However, under the Air Force policy, a transitioning airman can request an exemption from the applicable Fitness Assessment (FA) requirements only after documenting an FA failure and only with documentation from their military medical provider validating that they are undergoing cross-sex hormone treatment as part of their transition plan.⁵⁴ The Department of the Navy’s policy indicates that the Chief of Naval Operations (CNO) and the Commandant of the Marine Corps (CMC) are directed to establish policies and procedures pertaining to readiness issues surrounding transitioning servicemembers, including ETPs.⁵⁵ To aid each of the branches in the accommodation and ETP context, the DoD called for the establishment of an entity within each service referred to as the Service Central Coordination Cell (SCCC) for guidance and processing, with ultimate decisions made by the aforementioned officials.⁵⁶

Notwithstanding the DoD’s provision of ETP-granting authority, in the Army’s implementation of the policy, the Secretary of the Army seemed to suggest that ETPs for transitioning Soldiers would be disfavored, at least as a first resort:

In the event that a Soldier undergoing gender transition is unable to meet a particular Army standard as a result of medical treatment or other aspects of the Soldier’s gender transition, the Soldier’s chain of command, together with the Soldier and/or the military medical provider, should consider options (for example, adjusting the date of a physical fitness test or extended leave options) *other than* requesting an ETP to depart from Army standards. If submitted, a request for an ETP to depart from the standards of a Soldier’s gender marker in DEERS must be processed according to the procedures outlined in this paragraph⁵⁷

In forwarding an ETP request, the requesting servicemember is supposed to provide “an assessment of the expected effects, if any, the ETP will have on mission readiness and the good order and discipline of the unit.”⁵⁸

Beyond being the initial screen for accommodations and ETP requests, commanders are given front-line responsibility for approving the timing of medical treatment associated with a gender transition. As the Army’s policy explains, a Soldier’s brigade-level commander makes this decision, considering “the Soldier’s individual facts and circumstances”; “military readiness” and “effects to the mission”; and the “morale, welfare, good order, and discipline of the unit.”⁵⁹ Once a military medical provider certifies that the transition is complete, the provider will notify the commander and recommend when the Soldier’s gender marker should be changed in DEERS.⁶⁰ Once the Soldier formally requests approval for a change, the commander confirms that the request has all required information (formal medical diagnosis, medical certification that the transition is complete, and civil legal documentation supporting a gender change), consults with the SCCC, and approves the change.⁶¹ Presumably, if there is any adverse impact on a mission or a deployment, commanders have the discretion under the policy to take that into account in making their decision regarding the timing of gender transitions and gender-marker changes.

change physical appearance), and/or surgery.”); see also TRANS BODIES, *supra* note 48, at 265–90 (discussing surgical transitions for transgender individuals).

⁵¹ DoDI 1300.28, *supra* note 7, at 4.

⁵² ARMY DIR. 2016-35, *supra* note 14, para 5.d.

⁵³ APFM2016-36-01, *supra* note 18, para. 5.2.

⁵⁴ *Id.* para. 5.4.a.(1).

⁵⁵ SECNAVINST 1000.11, *supra* note 18, at encl. 1, para. 1.

⁵⁶ DoDI 1300.28, *supra* note 7, at 2.2.c; ARMY DIR. 2016-35, *supra* note 14, para 4.e (“The Assistant Secretary of the Army (Manpower and Reserve Affairs) (ASA (M&RA)) has established a Service Central Coordination Cell composed of medical, legal, and military personnel experts to provide advice and assistance to commanders, address their inquiries, and process requests

for ETPs in connection with gender transition for decision by the ASA (M&RA).”).

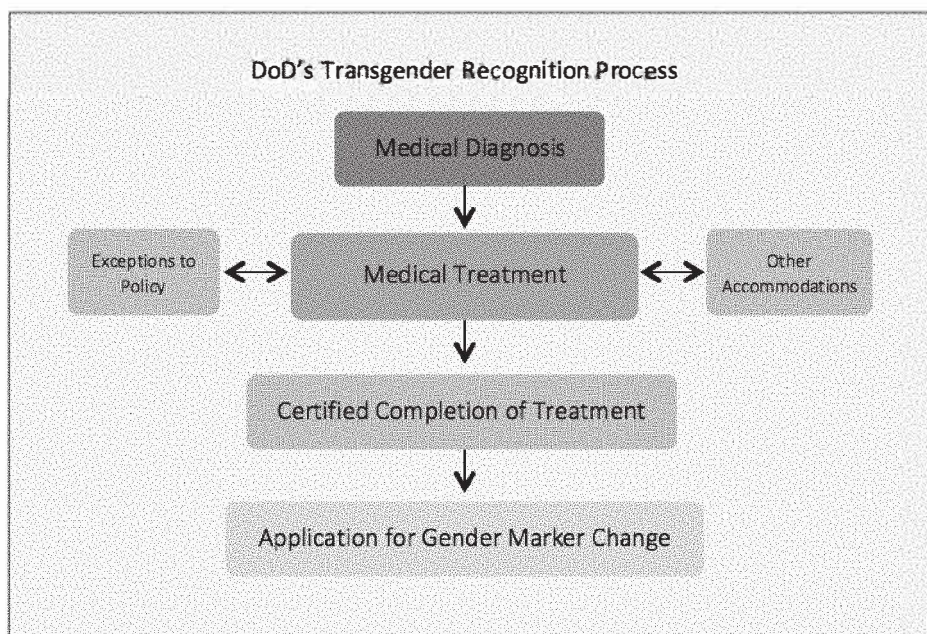
⁵⁷ ARMY DIR. 2016-35, *supra* note 14, para. 5 (emphasis added).

⁵⁸ *Id.* para. 5.c.

⁵⁹ *Id.* para. 3. See also SECNAVINST 1000.11, *supra* note 18, para. 4.g (“Commanders and Commanding Officers will assess expected impacts on mission and readiness after consideration of the advice of military medical providers.”).

⁶⁰ *Id.* para. 4.

⁶¹ *Id.* para. 4.a, 4.b. The Department of the Air Force and Department of the Navy policies do not differ materially from the Army policy on this topic. See APFM2016-36-01, *supra* note 18, para. 5.2.b.; SECNAVINST 1000.11, *supra* note 18, para. 4.h.



To recap, the steps in the military's transgender recognition process may be summarized as follows: The servicemember must first obtain a diagnosis from a military medical provider that gender transition is medically necessary. The servicemember then receives medical care and treatment for the diagnosed medical condition of gender dysphoria. In the course of receiving treatment, the servicemember may request approval of any needed exceptions to policy (ETPs) to accommodate the servicemember during his or her transition or other accommodations short of an ETP. Once the military medical provider certifies that the treatment regime is complete and that the servicemember is stable in the preferred gender, the servicemember requests approval for a gender marker change in DEERS, which must be supported by documentation (such as a certified birth certificate, court order, or U.S. passport reflecting the preferred gender). The following figure illustrates this process:

Upon completing this process, recognition in the preferred gender—and application of the gender-distinct regulations, policies, and practices relevant thereto—is achieved.

⁶² See generally AGNES GEREBEN SCHAEFER ET AL., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY (2016), http://www.rand.org/content/dam/rand/pubs/research_reports/RR1500/RR1530/RAND_RR1530.pdf [hereinafter RAND REPORT].

⁶³ DoDI 1300.28, *supra* note 7, para. 3.1 (“These policies and procedures are applicable, in whole or in relevant part, to those Service members who intend

III. Select Issues Under the Policy

Although there are many potential implications of this new policy,⁶² it is worth discussing here just a few.

A. The Meaning of “Transgender” and the Transition Commitment Requirement

As previously discussed, the new transgender policy only recognizes as transgender a servicemember who has been diagnosed with gender dysphoria, has been prescribed a gender transition as the treatment, and is either intent on, in the process of, or at the end of completing such a transition.⁶³ For servicemembers who identify as transgender and wish to receive recognition of their preferred gender, they must commit to transitioning to that gender. But transitioning is a choice, and not one that all transgender persons make.⁶⁴ This may be particularly true for those persons embracing or experiencing gender fluidity and for the “growing number of trans people [who] explicitly resist categories that stabilize

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.”).

⁶⁴ See TRANS BODIES, *supra* note 48, at 124 (“Once we make a decision to begin making changes that will better reflect our identity, there are numerous ways to start.”) (emphasis added).

gender in any way.”⁶⁵ Thus, for those gender nonconforming transgender servicemembers uninterested in or unwilling to commit to a transition, their preference for expressing their gender fluidly will not be recognized under the policy. As such they will have to conform to and comply with the gender-distinct regulations, policies, and practices applicable to their natal sex as indicated in DEERS. For those who do commit, the DoD’s policy leaves unanswered whether the conversion is irrevocable or irreversible. May a fully transitioned servicemember subsequently complete another gender transition back to the previously recognized gender and if so, is there any requirement of stability or duration in the chosen gender before one abandons it to revert to the previous gender? That may not be a realistic scenario if the condition of gender dysphoria is one that has permanence, although the notion of gender fluidity suggests that for some transgender persons, it does not. Nevertheless, policymakers should clarify whether a gender transition is a one-way street.

Relatedly, at the initial entry point, the new policy requires a gender stability that gender non-conforming transgender persons may not be able to exhibit. Under the new policy, transgender persons with a history of gender dysphoria who are interested in accessing into the military remain ineligible for service if they cannot have a medical provider certify that they have been stable “without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.”⁶⁶ It may be particularly difficult for gender-fluid/nonconforming transgender persons to meet this standard, although it remains to be seen how it is further defined and implemented.⁶⁷ The Navy Department policy provides for the possibility that the 18-month stability period can be reduced or waived on a case-by-case basis.⁶⁸

The lesson here is given that “transgender” as a category in society is broader than the DoD policy embraces, and given that a wider array of persons with gender identity issues may variously consider themselves gender-variant, gender-queer, cross-dressers, intersex, androgynous, or some other place within or beyond the gender binary,⁶⁹ a future issue that military policymakers are likely to confront is whether and to what extent these identities should also be recognized and accommodated within the services. For example, recall that one can complete a gender transition within the military without having to undergo any type of medical transition.⁷⁰

⁶⁵ Christine Labuski & Colton Keo-Meier, *The (Mis)Measure of Trans*, 2 TRANSGENDER STUD. Q. 13, 14 (2015). See also *id.* at 13 (“We define transgender as dynamic, unstable, and porous.”).

⁶⁶ DTM 16-005, *supra* note 2, at Attachment para. 2.a.(1).

⁶⁷ The Department of Defense is currently drafting policies that will apply to the accession of transgender persons into the military. See, e.g., ARMY DIR. 2016-35, *supra* note 14, para. 6.b (“This directive does not alter Army accessions policy. No later than July 1, 2017, the Under Secretary of Defense (Personnel and Readiness) will update the policies and procedures governing accessions for transgender applicants in DoD Instruction 6130.03.”).

Thus, a biological male who has transitioned to a female will be permitted (indeed required) to wear the female Army Service Uniform (ASU) but a nontransgender biological male who is a cross-dresser will not.⁷¹ Or gender-fluid or androgynous persons who are not interested in assigning themselves to a fixed gender category must choose a gender identity and clothe themselves accordingly based on their markers in DEERS.

If transgenderism is being taken seriously as a condition worth accommodating, why not address these other categories that the community recognizes as equally valid within the gender identity continuum? Ultimately, as members of those aforementioned groups press for the accommodation that only a subclass of transgendered persons has been granted under DTM 16-005, the even deeper question of the enduring value and relevance of the various gender-distinct policies and practices in the military are likely to become subject to reconsideration as well. That is, why retain gender-based distinctions in the military at all if being subject to them is connected only to one’s subjective state of mind, particularly if other gender-questioning states of mind are not similarly empowered? Just a decade or more ago one could not have imagined the military taking the step that it has with respect to recognizing and accommodating transgender servicemembers. It may be just a matter of time before further steps will need to be taken for others that could yield the unravelling of gender-based distinctions in their entirety.

B. Transgender Servicemembers and Gender-Distinct Policies and Practices in the Military

Perhaps one of the most challenging aspects of the new policy will be the interface between recognized transgender servicemembers and the various sex/gender-distinct regulations, policies, and practices within the military. The new policy does not indicate that these sex/gender-based distinctions are going to be abandoned. Rather, such distinctions will be retained, with transgender personnel fitting within them as their preferred gender. What are these distinctions and what issues may arise in applying them to transgender personnel?

⁶⁸ SECNAVINST 1000.11, *supra* note 18, para. 6.a (“The 18-month periods may be waived or reduced, in whole or in part, in individual cases for applicable reasons. Requests for waiver or reduction of the 18-month periods shall be sent to the Assistant Secretary of the Navy (Manpower and Reserve Affairs) (ASN (M&RA)) for adjudication.”).

⁶⁹ See TEICH, TRANSGENDER 101, *supra* note 43, at 2 (explaining these categories).

⁷⁰ See *supra* notes 46-47 and accompanying text.

⁷¹ See *infra* Part III.B. for a further discussion of the interaction between the transgender policy and the uniform and appearance regulations.

With the end of the combat exclusion for women in the military,⁷² the remaining distinctions based on sex or gender in the armed forces pertain primarily to the following areas: (1) housing, bathroom, and shower use (“facilities”); (2) uniform and grooming standards (“appearance”); and (3) physical fitness, individual medical readiness (IMR), testing for drug use, and body composition standards (“physical readiness”). Under the DoD’s transgender policy, once gender transition is complete, the standards in the above categories applicable to the preferred gender will apply. To fully assess what the implications of applying these standards to a transgender servicemember might be, it is important to articulate the purpose behind each of these sex-based distinctions.

1. Facilities

Distinctions in facilities—which exist both inside and outside the military—presumably are linked to some mix of privacy concerns; societal norms of discretion, modesty; and/or safety concerns, such as an interest in mitigating instances of sexual assault.⁷³ These rationales can and certainly have been challenged.⁷⁴ Regardless of one’s view on their legitimacy, it cannot be denied that the introduction of a recognized transgender servicemember into gender-specific facilities will require directly confronting these rationales. Deriving principally from the fact that gender recognition under DTM 16-005 does not require a medical transition, a recognized transgender male (born female) who retains the biological incidents of the female sex—but has attained formal recognition as a male due to a completed social transition—will be housed with and share common showers and bathroom facilities with biological nontransgender males. The same is true, of course, for transgender females who remain biologically male.

The DoD recognized this possibility in one of the scenarios it put forward in the transgender policy implementation handbook it released.⁷⁵ Scenario 11, entitled “Use of Shower Facilities” sets up the following hypothetical: “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.”⁷⁶ Rather than indicating that the transgender person may be excluded under such circumstances, the guidance provided to the servicemember is to discuss these concerns with their commander and to “[c]onsider altering your shower hours.”⁷⁷ Regarding the commander in this situation, the handbook advises the commander to “employ reasonable accommodations” and to do so “avoiding any stigmatizing impact.”⁷⁸ Examples of accommodations include modifying the facility to install shower curtains or making “adjustments to the timing of the use of shower or changing facilities.”⁷⁹ Army Dir. 2016-35 concurs in this commander guidance.⁸⁰

The key takeaway here seems to be that transgender servicemembers will be entitled to use the facilities designated for their preferred gender notwithstanding the retention of the biological features of their natal sex. This is so, notwithstanding privacy, modesty, or safety concerns (real or perceived) that may exist among non-transgender servicemembers. The obligation of transgender servicemembers, nontransgender servicemembers, and their commanders is to communicate about any concerns that arise in this context and to work towards reasonable, non-stigmatizing accommodations to account for the same.

The question is whether the approach taken by the handbook makes sense in light of the purpose behind gender-distinct facilities. Good order and discipline is certainly connected to sex-segregated showering facilities, especially—one would imagine—among junior enlisted personnel still in their teenage years. Further, there are likely many Soldiers who would be disturbed or alarmed to find someone with different genitalia sharing an open-bay shower. Although the DoD has anticipated such a scenario under its new policy, its offered solution for the commander is to find non-stigmatizing accommodations that will permit the transgender servicemember to use the facility of his or her gender identity, notwithstanding the retention of his or her natal genitalia. It seems, though, that such guidance gives insufficient weight to the concerns of nontransgender

⁷² Press Release, U.S. Dep’t of Def., Defense Department Rescinds Direct Combat Exclusion Rule; Services to Expand Integration of Women into Previously Restricted Occupations and Units (Jan. 24, 2013), <http://archive.defense.gov/releases/release.aspx?releaseid=15784>.

⁷³ Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 250 (2013) (“Safety is probably the most common argument in favor of sex-segregated restrooms.”); Katherine A. Womack, *Please Check One—Male or Female?: Confronting Gender Identity Discrimination in Collegiate Residential Life*, 44 U. RICH. L. REV. 1365, 1378 (2010) (“While using these categories to separate residents does not appear to have a ‘sinister purpose’ on its surface, the underlying rationale seems to rely on the belief that sex segregation decreases violence.”).

⁷⁴ See, e.g., Kosbie, *supra* note 74, at 250 (“[P]reventing trans people from using sex-segregated restrooms is not related to safety. . . . [T]here is no

evidence that preventing trans people from using their restroom of choice actually enhances safety.”).

⁷⁵ See DoD IMPLEMENTATION HANDBOOK, *supra* note 33, at 60.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 61.

⁸⁰ See, e.g., ARMY DIR. 2016-35, *supra* note 14, at para. 4b (“[C]ommanders have discretion to employ reasonable accommodations to respect the modesty or privacy interests of Soldiers, including discretion to alter billeting assignments or adjust local policies on the use of bathroom and shower facilities . . .”).

servicemembers impacted by the accommodation. The guidance also assumes that making alterations that accommodate the transgender servicemember but impact everyone else will not itself be stigmatizing; however, it is likely that other servicemembers subjected to such changes will be well aware of why they are being imposed, which may prove to be even more stigmatizing to the transgender servicemember. Finally, in deployed environments, it might be infeasible to make accommodations that might be possible at established military installations. Commanders facing these and other potentially complex scenarios will have to use sound judgment as they balance the rights and needs of transgender servicemembers, the concerns of other servicemembers, and the need to promote good order and discipline.

2. Appearance Standards

Unlike distinctions pertaining to facilities, gender-distinct appearance standards are less widespread outside of the military and are generally unconnected with privacy or safety rationales. Instead, uniform and grooming regulations in the military generally reflect conformity with stereotypical, gender-conforming ideals surrounding personal appearance embraced by society at large, with some allowance for personal taste and style. Thus, for example, women may (not must) have long hair; may (at times) wear earrings, hosiery, and cosmetics; and can carry a handbag or purse, but they may not wear a mustache.⁸¹ Physical fitness uniforms tend to be unisex, although in the Navy for its swim test, males may wear the standard issue PT shorts while females typically will wear top coverage to comply with the accepted social norm in this country against public nudity. What happens if a transgender male who remains biologically female does not wish to conform with this norm?

This latter circumstance is addressed by Scenario 14 in the DoD transgender handbook: “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.”⁸² Again, as with facilities, the new policy does not declare that such persons are obliged to conform to the female top coverage standard if they identify as male. Rather, the guidance provided in the handbook simply advises the servicemember to discuss his desires with his chain of command and reminds the servicemember that it is “courteous and respectful to consider social norms and mandatory to adhere to military standards of conduct.”⁸³

⁸¹ U.S. DEP’T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA, paras. 1-8, 1-14, 3-4, 27-13, 27-24 (3 Jan. 2005) [hereinafter AR 670-1].

⁸² DOD IMPLEMENTATION HANDBOOK, *supra* note 33, at 63.

⁸³ *Id.*

Commanders facing such a scenario are reminded that they have “discretion to take measures ensuring good order and discipline,” although there does not seem to be any suggestion that such measures may include ordering or requiring the transgender servicemember to wear top cover. The only clear option the handbook suggests is to consider “requiring all personnel to wear shirts” as a solution.⁸⁴

As noted with respect to the handbook’s suggested accommodations in the context of sex-segregated facilities, the approach offered in this context is not ideal. Requiring all personnel to wear shirts can be just as stigmatizing—if not more stigmatizing—for transgender servicemembers given that the nontransgender servicemembers will be aware of the reason for the imposition and some may begrudge the transgender servicemember for preferring to impact everyone else rather than simply covering up out of respect for the sensibilities of others. Again, ensuring unit cohesion and morale, as well as good order and discipline, is a commander responsibility that should empower commanders to seek sensible solutions. However, given the admonition that commanders may not require the transgender servicemember to take some measure that others are not asked to undertake, commanders may have limited options in addressing such situations. Fortunately, the specter of a biologically female transgender male appearing in public without top-cover does not seem to be a likely prospect in light of broadly-accepted norms against public nudity that are not generally challenged.

Moving on to the more cosmetic aspects of the uniform and appearance policy, given that transgender servicemembers who have not surgically transitioned will nevertheless be able—indeed obligated—to comply with the uniform regulations applicable to their preferred gender as revised in DEERS, a biological male Soldier who is recognized as a socially-transitioned female will be permitted, for example, to have long hair in a bun, carry a purse, and wear earrings and cosmetics.⁸⁵ Conversely, transgender males who are biologically female will be prohibited from having or doing these things.⁸⁶ Is there any problem with this?

To address that question, one must ask whether these aspects of the gender-distinct clothing and appearance regulations further any interests that should take priority over the recognition of a servicemember’s preferred gender identity. On the one hand, the “feminine” apparel and accessorization allowances in the regulations seem to be a concession to the personal tastes and preferences that females are socially permitted to have. The prohibition against

⁸⁴ *Id.*

⁸⁵ AR 670-1, *supra* note 82, paras. 1-8, 1-14, 3-4, 27-13, 27-24 (explaining the circumstances in which these accouterments are allowed).

⁸⁶ *Id.* at paras. 3-2, 3-4 (prescribing “tapered” hairstyles, limiting jewelry to females in certain uniforms, and stating that “[m]ales are prohibited from wearing cosmetics”).

“feminine” apparel and accouterments for males is equally tied to social conventions of appearance for males, but seems less connected with furthering good order and discipline when compared with the gender-based facilities restrictions discussed above. On the other hand, one could argue that there is a connection between the gendered aspects of the uniform and appearance standards and good order and discipline; prevailing social conventions suggest that, at present, a biologically male transgender female who dresses in female attire is likely to garner a potentially disruptive reaction from some non-transgender servicemembers uncomfortable with such displays. Further, military uniforms in this country are designed to inspire pride and confidence in the military, sentiments that currently are connected with prevailing social norms and expectations regarding differential appearance between the sexes. Transgender servicemembers and commanders will need to be mindful of all of these considerations as they navigate the appearance standards under the new policy.

As previously noted, in view of the fact that under the new policy, biological males identifying as females may follow the female-specific provisions of the uniform and appearance policy, one can legitimately ask whether it is justified to limit such access to transgender persons who have transitioned, or even to transgender persons at all? In other words, if biological males will be permitted to dress as females under the policy, provided they have changed their gender marker in DEERS, what is the rational basis for prohibiting nontransgender males who are simply cross-dressers from doing the same?⁸⁷ This is not said to be snide; rather, the question is raised because the reality of these possibilities hints at the further possibility that sex/gender-based distinctions pertaining to clothing and appearance may be abandoned as more servicemembers come forward seeking to express themselves through their appearance in a way that conforms with their identity.⁸⁸ Currently, accommodations around uniform and appearance regulations are tied to things like religious rights,⁸⁹ medical conditions,⁹⁰ and now gender identity, but one could imagine a loosening of the gender-based distinctions if societal norms migrate in that direction (just as societal norms around tattoos have evolved in ways that have shaped military regulations).⁹¹

⁸⁷ Note that even after the issuance of Army Dir. 2016-35, “transvestism” or cross-dressing remains a disabling mental condition that may serve as a ground for involuntary separation of reserve component Army personnel. See U.S. DEP’T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS para. 6-7a (18 Mar. 2014); ARMY DIR. 2016-35, *supra* note 14, encl. 6 (leaving in place the “transvestism” reference while deleting references to gender dysphoria and transsexualism as disqualifying conditions).

⁸⁸ This was the case for Captain Simratpal Singh, who recently obtained permission from the Army to wear long hair under a turban and a beard in uniform in conformity with his Sikh religious faith. Nadeen Shaker, *Sikh Army Captain Allowed To Wear Beard and Turban in Uniform*, CNN.com, <http://www.cnn.com/2016/04/04/us/sikh-army-captain-simratpal-singh-beard-turban/> (updated Apr. 5, 2016).

The Army’s uniform regulation—AR 670-1—was not revised by Army Dir. 2016-35, the directive implementing the DoD’s transgender policy. Instead, the Secretary of the Army indicated that the Deputy Chief of Staff, G-1, will review that regulation and provide any updates or revisions as necessary. Thus, it remains to be seen what, if any, changes will be made to account for some of the aforementioned issues. It is possible, for example, that some gender-specific uniform and appearance standards may be revised to become gender neutral as occurred with the wide-mouth collection cup policy for drug testing under AR 600-85.⁹² But it does not appear that it would be consistent with DTM 16-005 for AR 670-1 to be revised in a way that requires non-biologically transitioned transgender Soldiers to conform to the clothing and appearance designated for their biological sex rather than their preferred gender, unless policymakers reach the conclusion that such “cross-dressing” would present too much a threat to good order and discipline (a conclusion that likely would evoke some pushback if not adequately supported by solid evidence).

3. Physical Readiness

Beyond stylistic and cultural considerations are the fitness requirements associated with military service. In each branch, the fitness standards generally applicable to servicemembers vary by gender. These gender-based distinctions are rooted in generalized understandings of physiological differences between males and females that presume males are stronger and faster than equally fit females of the same age.⁹³

Under DTM 16-005, transgender servicemembers who have completed a transition and had their gender marker changed in DEERS will be held to that standard. That raises the prospect of a transgender female who remains biologically male being subject to the female fitness and body composition standards. On the one hand, the female physical readiness standards for each exercise tend to be lower, e.g., longer times allowed for runs and fewer push-ups and sit-ups required within a given period of time.⁹⁴ On the other hand, the weight allowed for males is greater than for females of the same

⁸⁹ See *id.*

⁹⁰ See, e.g., AR 670-1, *supra* note 82, para. 3-2b(1) (permitting males to wear cosmetics “when medically prescribed”).

⁹¹ See *It’s Official: Army Issues New Tattoo Rules*, ARMY TIMES (Apr. 10, 2015), <https://www.armytimes.com/story/military/careers/army/2015/04/10/army-regs-tattoos-uniforms/25576197/>.

⁹² AR 600-85, *supra* note 26, para. E-4, E-5.

⁹³ Kristy N. Kamarck, Cong. Res. Serv., R42075, *Women in Combat: Issues for Congress* (2015).

⁹⁴ See NAVY PHYSICAL READINESS PROGRAM, GUIDE 5: PHYSICAL READINESS TEST (PRT) (2016), <http://www.public.navy.mil/bupers->

height.⁹⁵ Thus, a Soldier fitting this profile would be held to “lower” fitness standards than biologically identical nontransgender males, but a “tougher” weight standard.

The question is whether this makes sense in light of the interests that the fitness and weight regulations are meant to further. Asked differently, what bearing does or should a person’s gender identity have on how the military assesses one’s physical readiness? If there are legitimate innate physiological differences between biological males and females that justify these distinctions in the first place, one’s gender identity does not necessarily bear on or alter those differences—particularly if there has been no medical transition.

To illustrate, in the Army a 22-year-old male Soldier must be able to run 2 miles in no more than 16:36 minutes.⁹⁶ That Soldier’s psychological identification as a female does not diminish his/her ability to complete the run within that same time period. However, under DTM 16-005, that Soldier will be subjected to the female Physical Readiness Training (PRT) standard if he/she completes all of the steps required to change his/her gender designation in DEERS, which does not require a medical/surgical transition. This Soldier—a transgender female who is biologically male—will now be permitted to complete the 2-mile run in 19:36 minutes.⁹⁷

If a biologically male 22-year old Soldier must be able to run 2 miles in 16:36 minutes to be considered qualified for continued Army service and ready for deployment, there does not appear to be any justification for dispensing with that requirement on the ground that the biological male Soldier is transgender and identifies as female. Setting that view to the side, the point is that policymakers need to confront this issue and determine whether physical readiness assessments should continue to be connected to gender identity or whether it makes sense to revise the regulations to base fitness assessments on physiological/biological realities.

What of those transgender servicemembers who have medically transitioned? Hormone treatment will impact testosterone levels, which will likely have some bearing on muscle mass and body fat percentages, which in turn could impact performance or the satisfaction of body composition standards. Servicemembers and commanders will need to keep these realities in mind both during and after the transition process to ensure that the relevant policies are applied in ways that are consistent with the interests that they are designed to further. Additionally, for all transgender servicemembers,

regardless of the type of transition they have undergone, there may be challenges in complying with the newly applicable physical readiness standards that could result in failures of the Army Physical Fitness Test (APFT). Current regulations permit separation from the military for repeated weight⁹⁸ or APFT failures;⁹⁹ policymakers will need to decide whether it will remain acceptable to separate servicemembers based on repeated body composition or physical fitness failures that are caused by their transgender status. One would think that if the physical readiness standards are truly meaningful, failures connected with one’s gender transition and the resulting application of more challenging standards will continue to warrant separation. That possibility should be part of what commanders and transgender servicemembers take into account when determining whether a recognized gender transition is an appropriate course of action.

A separate component of physical readiness is being free from drug use, which is policed in the Army through the Army Substance Abuse Program. The regulation governing the program, AR 600-85, mandates that observers (those who watch specimen donors to ensure provenance) be the same gender as the Soldier being tested.¹⁰⁰ Army Directive 2016-35 does not change this aspect of the regulation, although it does eliminate the female-only entitlement to an “[o]ptional wide mouth collection cup” for collecting the urine specimen.¹⁰¹ Indeed, this revision to the drug testing procedure provides an example of the elimination of a gender-distinct rule that the Army has made gender neutral in light of the advent of transgender Soldiers. It may be that in other spheres gender-distinct regulations may migrate toward becoming gender neutral if appropriate and consistent with the purposes underlying the rule.

In any event, by retaining the requirement that urinalysis observers be the same gender, it will be possible for a biologically male transgender female to serve as an observer for a non-transgender female, and vice versa. The DoD’s transgender policy implementation handbook recognizes this possibility in Scenario 12, entitled “Urinalysis.” The handbook suggests that in such situations, the privacy and comfort concerns of all persons involved should be discussed and alternate observation options should be considered: “Depending on Service regulations, you may consider alternate observation options if a request from a transgender Service member or an observer is made. Options could include observation by a different observer or medical

npc/support/21st_Century_Sailor/physical/Documents/Guide%205-Physical%20Readiness%20Test.pdf.

⁹⁵ See, e.g., U.S. DEP’T OF ARMY, REG. 600-9, THE ARMY BODY COMPOSITION PROGRAM, tbl. B-1 (28 June 2013) [hereinafter AR 600-9].

⁹⁶ U.S. DEP’T OF ARMY, FORM 705, ARMY PHYSICAL FITNESS TEST SCORECARD, 2-Mile Run Standards (May 2010).

⁹⁷ *Id.*

⁹⁸ AR 635-200, *supra* note 22, para. 18-1.

⁹⁹ AR 635-200, *supra* note 22, para. 13-2.e.

¹⁰⁰ AR 600-85, *supra* note 26, para. 4-9.c.(2) (“Observers must . . . [b]e the same gender as the Soldier being observed.”).

¹⁰¹ See ARMY DIR. 2016-35, *supra* note 14, encl. 6 (amending Appendix E of AR 600-85 as noted).

personnel.”¹⁰² However, the integrity of the program may not be undermined in favor of privacy concerns.¹⁰³ Thus, as with issues that arise in the housing, bathroom, and other facilities context, there are legitimate privacy/modesty concerns that servicemembers and commanders will have to work out as these issues arise, taking care not to violate the policy requiring recognition of a servicemember’s preferred gender as indicated in DEERS. That said, it would seem to be reasonable, at a minimum, for a nontransgender servicemember to be granted a request for a same-sex observer out of deference to their legitimate privacy concerns.

IV. Conclusion

Having reviewed the new transgender policy and some of its implications, the following observation is worth noting. It is interesting that the very idea of transgenderism—that one’s gender identity can vary from one’s biological, natal sex—requires an embrace of socially-determined concomitants of gender identity. That is to say that what makes one “female” is not one’s genitalia, but one’s affinity for things, behaviors, attire, and behavior that society has labeled feminine; as the DoD states it, “Gender is the socially defined roles and characteristics of being male and female associated with that sex.”¹⁰⁴

Thus, a female transgender biological male is not simply a man who likes feminine things but rather is a female because of her affinity for those things. The deep irony of transgenderism is that its definitional attribute of gender nonconformity is actualized by expressions that in truth embrace rather than reject conformity with the societal expectations associated with a person’s preferred gender.¹⁰⁵ Indeed, it may be more accurate to regard being transgender not as gender nonconformity but simply as a pronouncement of an entitlement to live and be accepted as one who conforms with gender stereotypes that diverge from their biological sex. The DoD’s new policy does not seek to address this conundrum at all; rather, it takes transgenderism as it presents itself and simply says, “Ok, if you want to identify as gender X, that’s fine with us, so long as you commit to that and conform to the military standards that apply to gender X.”

This observation is offered because that reality is what I think contributes to much of the tension that may arise as the policy is implemented. Because transgender persons within the military’s definition (i.e., those who have transitioned) do not challenge gender-specific policies and practices but rather merely seek to traverse them—potentially while still

presenting as phenotypically divergent from their expressed preferences—the military will end up with countless gender-bending non-sequiturs. In other words, by maintaining the array of gender-based distinctions discussed above rather than tearing them down, and plugging gender non-conforming socially-transitioned transgender persons into such a system, a mismatch between the original—potentially no longer tenable—rationale for the distinction and its application to such personnel is inevitable.

Going forward, although there will likely be conflict and challenges as the new policy is implemented,¹⁰⁶ there does appear to be sufficient guidance for how many of these challenges are to be addressed on the ground. Commanders will be key figures, and should remain fully empowered to make decisions that are in the best interest of good order and discipline, unit cohesion, and morale. The interests of transgender servicemembers cannot always trump the interests of the team and the mission; reasonable accommodations should be identified that do not compromise these interests, even if some reasonable imposition on the transgender servicemember—or others—results. Most people are sensible, and with sufficient training and reasonable accommodation, it is likely that the military and its servicemembers will adjust without too much difficulty as personnel in the armed forces of other nations with such policies have done.¹⁰⁷ The key to successful implementation will be strong and supportive leadership, which, fortunately, in our military is not in short supply.

¹⁰² DoD IMPLEMENTATION HANDBOOK, *supra* note 33, at 61.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Labuski & Keo-Meier, *supra* note 66, at 14 (“Quantifying the so-called trans population also risked allying with forms of legitimacy and conformity through which many trans people have thus far been marginalized.”).

¹⁰⁶ See RAND REPORT, *supra* note 63, at 61–62 (discussing how the experience of foreign militaries has shown some instances of resistance, bullying, harassment of transgender personnel).

¹⁰⁷ See *id.* (discussing experience of other militaries that have integrated transgender servicemembers into their ranks).

APPENDIX

Gender change regulations in U.S. States with the largest populations of active-duty military personnel

| State | Name Change | Driver ID Update | Birth Certificate Amendment | Authorities |
|-------|---|--|--|--|
| CA | The applicant files a petition for a name change order in Superior Court; change of name related to gender identity does not require publication of a newspaper notice or, unless an objection is filed, an in-person hearing. Additional requirements apply to individuals under the jurisdiction of the Department of Corrections and registered sex offenders. | The applicant must change their name with the Social Security Administration before changing Department of Motor Vehicles records, and must provide documentary evidence of the new name and a Medical Certification and Authorization (Gender Change) form completed by a licensed physician or psychologist. Forms are available online. | The applicant files a petition in the Superior Court, including the affidavit of a licensed physician that the applicant has "undergone clinically appropriate treatment for the purpose of gender transition, based on contemporary medical standards." A single petition may be filed to change an applicant's name and order the issuance of a new birth certificate. The new birth certificate becomes the only birth certificate open to public inspection. | Cal. Civ. Proc. Code §§ 1275–1279.5; Cal. Code Regs. tit. 13, §§ 20.04-.05; Cal. Health & Safety Code §§ 103425–103440 |
| FL | The applicant submits a petition to the Circuit Court; an official form is available online. The applicant must be fingerprinted for a national criminal history records check. No publication is required. | The applicant must submit a certified copy of the court order for a name change. Changing gender designation requires a statement from the attending physician that the applicant is undergoing appropriate clinical treatment for gender transition. | The Department of Health amends a birth certificate when it receives a Report of Legal Change of Name. Changing the sex on a birth certificate requires "original, certified, or notarized supporting documentary evidence." According to advocacy groups, this evidence must include a physician's affidavit that the applicant has completed sex reassignment in accordance with the appropriate medical procedures. Application form is available online. | Fla. Stat. §§ 68.07, 382.016; Fla. Admin. Code rr. 64V-1.002 to .033 |
| NC | The applicant submits a petition to the Superior Court after publishing notice at the courthouse door for ten days. The publication notice is not required if the applicant is a victim of domestic violence, sexual offense, or stalking. The petition must include proof of the applicant's good character by two county citizens and the results of a criminal history record check. Registered sex offenders are prohibited from obtain name changes. | A person whose name changes must notify the Division of Motor Vehicles within sixty days. According to advocacy groups, changing the gender designation on a license requires submitting a letter from a physician that the applicant has undergone gender reassignment surgery. | The State Registrar will issue a new birth certificate because of sex reassignment surgery, upon written request accompanied by a notarized statement from the physician who performed the surgery or a licensed physician who can certify that the applicant has undergone the surgery. | N.C. Gen. Stat. §§ 101-2 to -7, 20-7.1, 130A-118 |
| TX | The applicant submits a notarized petition to the District Court or County Court. The applicant must submit fingerprints and information on any criminal record. There are further requirements for applicants with felony convictions and registered sex offenders. No publication is required. | A change of name must be reported to the Department of Public Safety within thirty days. Individuals who want to change their gender must visit a driver license office and provide an original certified court order or an amended birth certificate verifying the change. | An amended birth certificate can be issued upon application. Change of sex as a result of gender reassignment surgery requires a certified copy of a court order. Application form is available online. | Tex. Fam. Code Ann. §§ 45.101–.103; 37 Tex. Admin. Code §§ 15.24, 15.36; Tex. Health & Safety Code §§ 192.010–.011 |

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| VA | The applicant submits an Application for Change of Name (Adult) to the Circuit Court. Forms are available online. Applications are not accepted from incarcerated persons, probationers, or registered sex offenders except for good cause. No publication is required, and the court may order the record sealed if the applicant shows cause to believe that a public record would be a serious safety threat. | The applicant submits a Driver's License and Identification Card Application requesting a change of name, accompanied by a copy of the court order granting the change. A change of gender requires a Gender Designation Change Request signed by a physician, psychiatrist, nurse practitioner, clinical social worker, psychologist, or professional counselor certifying the applicant's gender identity. Forms are available online. | The State Registrar will amend a birth certificate to show change of sex upon receipt of a certified copy of a court order indicating "that the sex of an individual has been changed by medical procedure." A notarized affidavit from the physician performing the gender reassignment surgery is also required. | Va. Code Ann. §§ 8.01-217, 46.2-323, 32.1-269; Va. Admin. Code § 5-550-320 |