

CAN TRANSGENDER TROOPS DEPLOY? INTERNATIONAL STRATEGIES FOR MANAGING TRANSITION-RELATED CARE OF TRANSGENDER MILITARY PERSONNEL

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I was kept at G1 A1 Z1 [physically fit for flying and ground deployment without any restriction] and retained my flying category throughout, with the exceptions of having a month off flying duties when I began my HRT [Hormone Replacement Therapy] (which is the standard time period for any long-term medication) and six months off flying in total, following my Gender Confirmation Surgery (GCS), during which time I was medically downgraded to P7 (non-deployable) . . . I am now A1 P2, which means there's no restriction to my flying or my deploying and is simply a marker to show I am on long-term medication.

— Flight Lieutenant Ayla Holdom, British Armed Forces¹

Military service in America is a touchstone for American patriots of all races, genders, and creeds.

— Secretary of Defense James Mattis²

We all have the right to defend freedom . . . All who entered military service did so of their own free will, and raised their hand, and [took] an oath to defend the Constitution of the United States of America from all enemies, foreign and domestic.

— Retired Sgt. Maj. Jennifer Marie Long, United States Military³

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¹ BRYNN TANNEHILL, ALLYSON DYLAN ROBINSON & SUE FULTON, TRANSGENDER MILITARY SERVICE: A GUIDE TO IMPLEMENTATION 13 (2015), https://d3n8a8pro7vnm.cloudfront.net/sparta/pages/288/attachments/original/1466950956/SPA_RTA_Transgender_Policy_Implementation_Guide_3.22.15.pdf?1466950956 [<https://perma.cc/7BJ2-Z5RG>]. The authors obtained the quote from Lt. Holdom through a personal communication. *Id.* at 14 n.47.

² Sec'y of Def. James Mattis, U.S. Dep't of Def., Remarks by Secretary Mattis at a Martin Luther King Jr. Day Observance in the Pentagon Auditorium 2 (Jan. 25, 2017), <https://dod.defense.gov/News/Speeches/Speech-View/Article/1060238/remarks-by-secretary-mattis-at-a-martin-luther-king-jr-day-observance-in-the-pe/> [<https://perma.cc/66DN-J3YQ>].

³ Emily Wax-Thibodeaux, *'We All Have the Right to Defend Freedom': Transgender Veterans Speak Out Against Trump's Ban*, WASH. POST (Mar. 29, 2018),

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INTRODUCTION

Effective April 12, 2019, individuals diagnosed with gender dysphoria may no longer serve in the United States Armed Forces.⁴ The Department of Defense (DOD), led by Secretary of Defense James Mattis, has enacted this policy (Mattis Policy) primarily because it views treatments for gender dysphoria as barriers to deployment. These treatments include gender-confirmation surgery, hormone therapy, and

https://www.washingtonpost.com/news/checkpoint/wp/2018/03/29/we-all-have-the-right-to-defend-freedom-transgender-veterans-speak-out-against-trumps-ban/?utm_term=.ccb7d12f5484 [<https://perma.cc/K5UU-8J3Z>].

⁴ A narrow exception exists for transgender troops who have already formally transitioned while serving in the military. ACTING DEPUTY SECRETARY OF DEFENSE DAVID L. NORQUIST, U.S. DEP’T OF DEF., DTM-19-004, MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA 2, 7–8 (2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-19-004.pdf?ver=2019-03-13-103259-670> [<https://perma.cc/A77V-CCRQ>] [hereinafter Norquist Memo].

mental health care.⁵ The DOD argues that transgender troops should not be allowed to serve for the same reason that individuals with asthma or heel spurs cannot serve: because their need for ongoing medical care is not compatible with military readiness.⁶

A. TRANSGENDER SERVICE MEMBERS CHALLENGE THE MATTIS POLICY

The Mattis Policy faced several equal-protection challenges, and four federal district judges initially prevented the DOD from enforcing the policy.⁷ In January 2019, the Supreme Court stayed two of those injunctions.⁸ In March 2019, a third injunction was stayed by a federal judge in the District of Maryland pursuant to the Supreme Court's decision.⁹ Five days after the final injunction was lifted, the DOD released

⁵ The DOD also argues that paying for transition-related care would impose an unreasonable financial burden on the military and that transgender personnel would harm unit cohesion. U.S. DEP'T OF DEF., REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 41 (2018) [hereinafter Mattis Policy]. The Mattis Policy was filed as an appendix to the Government's brief in support of Petition for Certiorari Before Judgement. Petition for a Writ of Certiorari Before Judgment at 2, *Trump v. Karnoski*, 139 S. Ct. 946 (2019) (mem.) (denying certiorari) (No. 18-676), 2019 WL 272025 [hereinafter *Karnoski Order Denying Cert.*]. That brief is available on Westlaw, 2018 WL 6169245 (U.S.) (Department of Defense Brief). A copy can also be accessed at <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF> [<https://perma.cc/Z2Z3-EXVS>].

⁶ "Any service member with a medical condition, such as gender dysphoria, has a potential negative impact on force readiness and should be evaluated. All service members, equally, must meet established readiness standards to maintain the effectiveness and lethality of the force," a DOD official said at a press briefing the day after the DOD's announcement that enforcement of the Mattis Policy would begin April 12. Dave Philipps, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html>. See U.S. DEP'T OF DEF., INSTR. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION INTO MILITARY SERVICES 16, 31 (2018), https://www.med.navy.mil/sites/nmotc/nami/arwg/Documents/WaiverGuide/DODI_6130.03_JU_L12.pdf [<https://perma.cc/JBR5-5NXV>] [hereinafter DoDI 6130.03].

⁷ *Stone v. Trump*, 280 F. Supp. 3d 747, 767-69 (D. Md. 2017) (order granting preliminary injunction); *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, slip op. at *1 (W.D. Wash. 2017) (order granting preliminary injunction); *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), 2017 WL 9732572, slip op. at *1 (C.D. Cal. 2017) (order granting preliminary injunction); *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 196-202 (D.D.C. 2017) (order granting preliminary injunction), *vacated*, *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. 2019) (unpublished decision).

⁸ *Trump v. Karnoski*, No. 18A625, 2019 WL 271944, at *1 (U.S. Jan. 22, 2019); *Trump v. Stockman*, No. 18A627, 2019 WL 271946, at *1 (U.S. Jan. 22, 2019).

⁹ Order Granting Mot. to Stay Prelim. Inj. at 6, *Stone v. Trump*, Civil Action No. GLR-17-2459 (D. Md. Mar. 7, 2019). This order is not yet available on Westlaw, but a link to the order can be found in a blog post by Sarah Grant on Lawfare. Sarah Grant, *Transgender Service Ban Nears Implementation*, LAWFARE (Mar. 9, 2019, 12:33PM), <https://www.lawfareblog.com/transgender-service-ban-nears-implementation>

a memo announcing that enforcement of the Mattis Policy would begin on April 12, 2019.¹⁰ Transgender troops will not be allowed to serve unless they have not been diagnosed with gender dysphoria and will not undergo social, medical, or surgical gender transition.¹¹

B. LIKELIHOOD OF CERTIORARI REVIEW

The exclusionary policy could change if the DOD loses its pending appeal in the Ninth Circuit.¹² The Mattis DOD attempted to circumvent this possibility by asking the Supreme Court to conduct a merits review of the Mattis Policy before the Ninth Circuit makes its judgement.¹³ The Court declined.¹⁴ An eventual certiorari review is likely; however, both the Mattis DOD and transgender service members have strong incentives to appeal an unfavorable Ninth Circuit decision. Given the important questions of executive power, military policy, and equal protection that are raised by this pending litigation, it is very likely that the Mattis Policy will reach the Supreme Court on a merits review.¹⁵

Three institutions have the power to end the Mattis Policy: the Court, Congress, and the DOD itself. None of these institutions will be induced to end the policy except upon concluding that transgender individuals can be fully integrated into the United States Armed Forces in a way that is compatible with military readiness.¹⁶ The Court is typically unwilling to interfere with executive policies that are important to national security.¹⁷ Therefore, it is likely that the Court will be loath to strike down the policy if it agrees that accommodating transgender troops poses a threat to readiness. Pending bills in the legislature, including a bill

[<https://perma.cc/M8YM-395Z>]. The fourth injunction had been vacated by the D.C. Court of Appeals. *Doe 2*, 2019 WL 102309, at *22.

¹⁰ Norquist Memo, *supra* note 4, at 1.

¹¹ *Id.* at 8–9.

¹² The Trump Administration’s appeal of *Stockman*, 331 F.Supp.3d 990, was vacated and remanded by the Ninth Circuit, Case No. 18-56539.

¹³ *Trump v. Stockman*, 139 S. Ct. 946 (2019) (mem.) (denying certiorari); *Trump v. Karnoski*, 129 S. Ct. 946 (2019) (mem.) (denying certiorari).

¹⁴ *Karnoski*, 129 S. Ct. at 946.

¹⁵ See generally Carolyn Shapiro, *The Context of Ideology: Law, Politics, and Empirical Legal Scholarship*, 75 MO. L. REV. 79 (2010).

¹⁶ DOD’s official doctrinal definition of readiness is: “The ability of military forces to fight and meet the demands of assigned missions.” U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 180 (2020).

¹⁷ See, e.g., *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (“[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs”); See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017).

currently before the House Armed Services subcommittee, authorize military inclusion of transgender personnel on the basis that such inclusion will not undermine military readiness.¹⁸ Finally, even though the DOD itself could withdraw the Mattis Policy,¹⁹ President Trump has directed the DOD to maintain the bar on transgender service members only “until” the Mattis DOD has “sufficient basis upon which to conclude” that terminating the Mattis Policy would not negatively affect military readiness.²⁰

C. INTERNATIONAL DATA ON TRANSITION-RELATED HEALTHCARE AND DEPLOYABILITY

The future of the Mattis Policy—before the courts, Congress, and the DOD itself—depends in large part on whether readiness problems predicted by the Mattis Policy are supported by evidence. The Mattis Policy is inherently predictive because the United States has never fully implemented a policy of transgender military inclusion.²¹ Because data from the United States Armed Forces is limited, it is difficult to analyze whether the Mattis DOD’s concerns are well-founded. Internationally, however, at least eighteen²² national militaries have fully integrated

¹⁸ H.R. 1032, 116th Cong. § 1 (2019). This bill would provide for the retention and service of transgender individuals in the armed forces. *See also* Tim Fitzsimons & Brooke Sopelsa, *Bipartisan Bills Introduced to Thwart Trump’s Trans Military Ban*, NBC NEWS (Feb. 7, 2019, 3:58 PM), <https://www.nbcnews.com/feature/nbc-out/bipartisan-bills-introduced-thwart-trump-s-trans-military-ban-n969051> [<https://perma.cc/WET4-BRFW>].

¹⁹ Secretary Mattis wrote to President Trump, “You made clear that we could advise you ‘at any time, in writing, that a change to this policy is warranted.’” Mattis Policy, *supra* note 5, at 1 (memorandum of Secretary Mattis).

²⁰ Memorandum for the Secretary of Defense and the Secretary of Homeland Security, 82 Fed. Reg. 41,319, § 1(b) (Aug. 25, 2017) [hereinafter Trump Memo].

²¹ An Obama Administration policy to fully integrate transgender troops was delayed and then reversed by the Trump Administration. Matt Stevens, *Pentagon Delays Accepting Transgender Recruits for 6 Months*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/us/pentagon-delays-transgender-recruits.html> [<https://perma.cc/3HM7-SY3C>].

²² The Hague Centre for Strategic Studies confirms that eighteen countries permit full inclusion of transgender service members in their military: Australia, Austria, Belgium, Bolivia, Canada, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, the Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom. M. Jocelyn Elders, George R. Brown, Eli Coleman, Thomas A. Kolditz & Alan M. Steinman, *Medical Aspects of Transgender Military Service*, 41 ARMED FORCES & SOC’Y 199, 212 n.1 (2015). *See also* Amanda Erickson, *Trump Said Transgender Troops Cause ‘Disruption.’ These 18 Militaries Show Otherwise*. WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/07/26/trump-said-transgender-troops-cause-disruption-these-18-militaries-show-otherwise/?utm_term=.6b6b3fd9090b [<https://perma.cc/8NA9-6WAG>].

transgender troops into their armed forces.²³ The experiences of transgender troops serving in these militaries provide important real-world information about whether and how transition-related healthcare can be managed in a way that is compatible with deployment.

Notwithstanding the importance of this real-world information, some dispute whether data from these militaries is relevant to the U.S. case. The Obama Administration's DOD, led by Secretary Ash Carter, relied partly on evidence from foreign national militaries to conclude that fully integrating transgender individuals into the armed forces would have "no significant impact" on readiness.²⁴ However, the Mattis DOD argues that the Carter DOD erred by relying on "the selective experiences of foreign militaries with different operational requirements than our own" in reaching its conclusions.²⁵

The United States Armed Forces is unique among national militaries with respect to its size, power, and operational capacity.²⁶ Yet, the Mattis DOD has not identified specific objections that would make international solutions irrelevant to the United States military.²⁷ Likewise, no scholarly work has applied data from foreign nations to the particular readiness arguments raised by the Mattis DOD. Nor has such work investigated whether solutions to deployment obstacles employed by foreign militaries could be successful in the United States military.²⁸ The

²³ The real number may be higher, however, because some countries have never had formal policies banning transgender personnel from serving but have informally indicated that trans individuals are welcome to serve. See Hayley Halpin, *Varadkar says transgender people will never be banned from serving in Irish Defence Forces*, THEJOURNAL.IE (July 29, 2017, 6:15 AM), <http://thejournal.ie/transgender-defence-forces-leo-varadkar-3519905-Jul2017> [https://perma.cc/8GA5-3HE8] (quoting Defense Minister Taoiseach Leo Varadkar's statement that a transgender ban "is not something I would ever consider introducing to Ireland."). See also Sasha Brady, *'We Welcome All' - Irish Defence Forces Responds to Trump's 'Transgender Military Ban'*, IRISH INDEP. (July 29, 2017, 11:57 AM), <https://www.independent.ie/irish-news/news/we-welcome-all-irish-defence-forces-responds-to-trumps-transgender-military-ban-35979839.html> [https://perma.cc/H75T-KX84].

²⁴ AGNES GEREKEN SCHAEFER, RADHA IYENGAR, SRIKANTH KADIYALA, JENNIFER KAVANAGH, CHARLES C. ENGEL, KAYLA M. WILLIAMS & AMI M. KRESS, *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* 45 (2016) [hereinafter RAND Report].

²⁵ Mattis Policy, *supra* note 5, at 2 (memorandum of Secretary Mattis).

²⁶ K.K. Rebecca Lai, Troy Griggs, Max Fisher & Audrey Carlsen, *Is America's Military Big Enough?*, N.Y. TIMES, (Mar. 22, 2017), <https://www.nytimes.com/interactive/2017/03/22/us/is-america-military-big-enough.html>.

²⁷ See generally Mattis Policy, *supra* note 5.

²⁸ See, e.g., Jennifer Bendery, *Transgender Troops in Other Nations Are Proof That Inclusive Militaries Work*, HUFFINGTON POST (Oct. 21, 2014), https://www.huffingtonpost.com/2014/10/21/transgender-military-ban_n_6017564.html (updated Dec. 6, 2017) [https://perma.cc/F8FK-3WYB]; *Countries that allow transgender members in the military*, CAN. BROAD. CO. (July 26, 2017), <https://www.cbc.ca/news/world/countries-that-allow->

Carter DOD also did not explain why international strategies for managing transition-related healthcare could be successfully applied to the United States military.²⁹ Furthermore, neither DOD studied examples of individual transgender troops serving in foreign militaries.³⁰ This Comment therefore attempts to fill the gap by analyzing how foreign militaries have integrated transgender personnel and by evaluating whether those same methods could be applied to the United States military. In particular, this Comment examines how the militaries of Israel, Canada, Sweden, Australia, and the United Kingdom have navigated transition-related surgery, hormone treatment, and mental health as barriers to deployment for transgender personnel.

Part I of this Comment provides background on the history of transgender personnel within the United States military and reviews changes in U.S. military policy on transgender individuals since the 1950s. Part II analyzes how transgender personnel have been integrated into foreign militaries and evaluates whether such strategies could be applied in the U.S. Part III concludes that the United States Armed Forces can manage transition-related healthcare without compromising military readiness and urges the courts, Congress, and the DOD to end the Mattis Policy.

transgender-members-in-the-military-1.4222205 [https://perma.cc/93WR-2XHF]; Erickson, *supra*, note 22; Rachel E. Gross, *What Other Countries Can Teach America About Transgender Military Service*, SLATE (Aug. 10, 2015, 3:41 PM), <https://slate.com/human-interest/2015/08/transgender-military-service-lessons-from-around-the-world.html> [https://perma.cc/5AVH-CYL3]; Devin Coon, Paula M. Neira & Brandyn D. Lau, *Threats to United States Fully Reviewed and Strategic Plan for Integration of Transgender Military Members Into the Armed Forces*, 108 AM. J. PUB. HEALTH 7 (July 2018), <https://ajph.aphapublications.org/doi/10.2105/AJPH.2018.304454> [https://perma.cc/2SBV-YZZL]; Tom O'Connor, *Trump's Transgender Military Ban Leaves Only 18 Countries with Full LGBT Rights in Armed Forces*, NEWSWEEK (July 26, 2017, 12:43 PM), <https://www.newsweek.com/trump-transgender-military-ban-leaves-few-countries-lgbt-rights-642342> [https://perma.cc/5GNL-3HKJ].

²⁹ See generally RAND Report, *supra* note 24, at 49–63.

³⁰ The Carter DOD studied general policies from the militaries of Australia, Canada, Israel, and the United Kingdom (focusing on these militaries because of the availability of English-language policy documents) and studied the reports of commanders from those militaries but did not consider how those militaries had dealt with integrating specific transgender individuals into the military. RAND Report, *supra* note 24, at 50. See generally Mattis Policy, *supra* note 5.

I. TRANSGENDER PERSONNEL IN THE UNITED STATES MILITARY

Transgender Americans are over-represented in military service, serving at a rate between 2 and 2.3 times higher than the general population.³¹ Thousands of transgender individuals have served and continue to serve in the United States military, “many of them openly and with the support of their colleagues and commanders.”³² Yet the legal status of these individuals’ service is uncertain. Starting in the 1950s, these military personnel were banned from serving by Department of Defense Instruction (DODI) regulations that medically disqualified individuals with “psychosexual conditions,” including “transvestism.”³³ This Part outlines the military’s historical policy on transgender service members, changes to the policy enacted under the Obama and Trump administrations, and data on transgender military service.

A. HISTORICAL DEPARTMENT OF DEFENSE MEDICAL POLICY BARRING TRANSGENDER PERSONNEL

Unlike gay, lesbian, and bisexual Americans, transgender Americans were never prohibited by federal law from serving openly in

³¹ The American military recognizes just under 1,000 troops as officially transgender. Dave Phillips, *Transgender Troops Caught Between a Welcoming Military and a Hostile Government*, N.Y. TIMES (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/transgender-troops-military.html> [<https://perma.cc/Y5HU-SXT8>] (“Nearly 1,000 troops officially deemed as transgender are currently serving in the American military, according to the Defense Department, and another 228 are in the process of enlisting”). The real number is much higher. The RAND Report used a prevalence-based approach to estimate that between 2,500 and 7,000 active-duty service members are transgender and that between 1,500 and 4,000 reserve service members are transgender. RAND Report, *supra* note 24, at 16. The Williams Institute estimated in 2014 that 15,500 transgender individuals were serving on active duty or in the Guard or Reserve forces and that 134,300 veterans or retired guard and reserve service members were transgender. Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, WILLIAMS INST., UCLA L., 1 (2014). The 2008–09 National Transgender Discrimination Survey (NTDS), which is the largest survey of transgender Americans to date, surveyed 6,456 transgender individuals. 21% of the individuals had served in the military, at just more than double the rate for the general population. *Id.* at 3. A 2015 update to the NTDS found that transgender Americans were 1.9 times more likely to have served in the armed forces than the general population. SANDY E. JAMES ET AL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 166 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [<https://perma.cc/9BRX-YECH>].

³² JAMES ET AL., *supra* note 31, at 166.

³³ DoDI 6130.03, *supra* note 6, at 29(r).

the military.³⁴ Rather, their service was prohibited by DODI regulations enacted in the aftermath of World War II.³⁵ Nonetheless, some transgender individuals have long served in the military,³⁶ even as others have been discharged for being transgender.³⁷ Rapid changes in public perception of lesbian, gay, and bisexual persons between the 1970s and 2010s³⁸ created pressure for Congress to allow these individuals to serve openly in the military.³⁹ Transgender military personnel did not benefit from the same public pressures on Congress because the ban on transgender individuals was contained in military regulations, not in an act of Congress.

The landmark Don't Ask, Don't Tell Repeal Act of 2010 provided for the open service of gay, lesbian, and bisexual troops. But it did not remove barriers to service for transgender troops. Though the Veterans Health Administration (VHA) issued an updated policy in 2013 that covered at least some gender-affirming health care for transgender and intersex veterans,⁴⁰ DODI rules disqualifying transgender individuals

³⁴ The National Defense Authorization Act of 1994 enshrined into federal law a longstanding military law prohibiting homosexual conduct. The act provided that “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” The act did not mention transgender individuals. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-60, § 571(a), 107 Stat. 1547 (1993) (repealed by Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010)).

³⁵ DoDI 6130.03, *supra* note 6; U.S. DEP'T OF DEF., INSTR. 1332.14 ENLISTED ADMINISTRATIVE SEPARATIONS (2012) [hereinafter DoDI 1332.14].

³⁶ Gates & Herman, *supra* note 31.

³⁷ *Doe v. Alexander*, 510 F. Supp. 900, 905 (D. Minn., 1981) (civil rights complaint of transgender servicewoman dismissed because “reviewing a medical fitness regulation with possible far reaching consequences would be improvident . . . The army might well conclude that those factors could cause plaintiff to lose excessive duty time and impair her ability to serve in all corners of the globe”); *Leyland v. Orr*, 828 F.2d 584, 585 (9th Cir., 1987) (affirming summary dismissal of Air Force reservist's challenge to her discharge for “transsexualism” and sex reassignment surgery where Air Force urologist testified that sex reassignment surgeries “constitute a risk significant enough to restrict the individual's performance of Air Force duties”); *DeGroat v. Townsend*, 495 F. Supp. 2d 845 (S.D. Ohio, 2007) (dismissing transgender Air Force officer's appeal for reinstatement following discharge for wearing women's clothing to Sunday church services was moot where officer had been rendered medically ineligible by sex-reassignment surgery).

³⁸ For an aggregation of 325 surveys on public perception of LGBT individuals conducted between 1977 to 2014, see Andrew R. Flores, *National Trends in Public Opinion on LGBT Rights in the United States*, WILLIAMS INST., UCLA L. (2014), <https://escholarship.org/uc/item/72t8q7pg> [<https://perma.cc/2CGU-8PTT>].

³⁹ See, e.g., Aaron A. Seamon, *The Flawed Compromise of 10 U.S.C. § 654: An Assessment of the Military's "Don't Ask, Don't Tell" Policy*, 24 U. DAYTON L. REV. 319 (1999); Michelle Benecke, *Turning Points: Challenges and Successes in Ending Don't Ask, Don't Tell*, 18 WM. & MARY J. WOMEN & L. 35 (2011).

⁴⁰ U.S. DEP'T VETERANS AFF., DIRECTIVE 2013-003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS (2013). For an excellent overview of transgender veterans' experience

from service remained intact.⁴¹ Even as gay, lesbian, and bisexual service members came out to their chain of command without incident, transgender service members continued to be discharged under DODI regulations.⁴²

B. CARTER POLICY

The repeal of Don't Ask, Don't Tell generated attention to the military's bar on service for transgender individuals. *Military Law Review* published an article by Major Mark R. Milhiser advocating for the end of military prohibition on transgender service members.⁴³ That same year, Secretary of Defense Chuck Hagel announced that he was open to ending the policy.⁴⁴ In 2015, Secretary of Defense Ash Carter created a working group to study "the policy and readiness implications of welcoming transgender persons to serve openly."⁴⁵ The group worked with the leadership of the armed services, personnel, training, readiness, and

of VA transition-related healthcare received from 2011 through 2016 while the DODI regulations were still in place and before the Carter Policy was announced, see Kris Rosentel, Brandon J. Hill, Connie Lu & Joshua Trey Barnett, *Transgender Veterans and the Veterans Health Administration: Exploring the Experiences of Transgender Veterans in the Veterans Affairs Healthcare System*, 1 TRANS. HEALTH 1, 108–16 (2016).

⁴¹ DoDI 6130.03, *supra* note 6, at 29(r). Transgender service members also continued to be dischargeable under Enlisted Administrative Separations regulations that allowed for the administrative separation of troops "based on a diagnosis of gender dysphoria where the Service member is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender." DoDI 1332.14, *supra* note 35, at Enc. 3 §3(8)(h). For an excellent review of the status of transgender troops after the repeal of "Don't Ask Don't Tell," see Kayla Quam, *Unfinished Business of Repealing "Don't Ask, Don't Tell": The Military's Unconstitutional Ban on Transgender Individuals*, 2015 UTAH L. REV. 721.

⁴² For example, Petty Officer Landon Wilson, on deployment in Afghanistan, was sent back to the United States just hours after his sergeant major confronted him about his gender identity status, saying, "I need to know what you are. Your paperwork here says female, but you certainly don't look like one." Mr. Wilson was ultimately discharged. Emma Margolin, *'Don't Ask, Don't Tell' Lives on for Transgender Troops*, MSNBC.COM, <http://www.msnbc.com/msnbc/dont-ask-dont-tell-lives-transgender-troops> [https://perma.cc/M9E2-ZN5W].

⁴³ Major Mark R. Milhiser, *Transgender Service: The Next Social Domino for the Army*, 220 MIL. L. REV. 191 (2014).

⁴⁴ Ellen Nakashima, *Hagel: Policies on transgender personnel serving in the military should be reviewed*, THE WASHINGTON POST (May 11, 2014), https://www.washingtonpost.com/world/national-security/hagel-policies-on-transgender-personnel-serving-in-the-military-should-be-reviewed/2014/05/11/a34618b8-d936-11e3-b745-87d39690c5c0_story.html?utm_term=.c13e27ecce9f [https://perma.cc/FYM5-XN3M].

⁴⁵ U.S. DEP'T OF DEFENSE, *Statement by Secretary of Defense Ash Carter on DOD Transgender Policy*, Release No. NR-272-15, July 13, 2015, <https://dod.defense.gov/News/News-Releases/News-Release-View/Article/612778/> [https://perma.cc/Q8G4-Z5KK].

medical specialists from across the Carter DOD and commissioned the RAND Corporation to analyze relevant data.⁴⁶ The Transgender Military Service Commission, chaired by former U.S. Surgeon General Dr. Jocelyn Elders, concluded that U.S. military policies that banned transgender service members were not based on medically sound reasons.⁴⁷

On June 30, 2016, Department of Defense Secretary Carter announced a policy of inclusion for transgender troops (Carter Policy): medical regulations prohibiting the open service of transgender troops would be lifted, and gender-affirming health care, including surgery, would be available to transgender service members and veterans.⁴⁸ By September of 2016, the Carter DOD had issued an extensive “implementation handbook” titled *Transgender Service in the U.S. Military*.⁴⁹ The handbook provided “an explanation of the basics of what it means to be transgender and to undergo gender transition; guidance on how transgender service members can request an in-service transition and communicate with their leadership about their transition process; and guidance for commanders interacting with transgender service members.”⁵⁰ The guidance provided by the handbook was exhaustive and addressed healthcare issues: the gender transition approval process that transgender troops would have to go through to transition; uniform and grooming standards; shower, bathroom, and sleeping facilities; harassment and bullying; and readiness scenarios.⁵¹

Some hiccups characterized early implementation of the trans-inclusive policy.⁵² Overall reactions, however, were positive. This policy

⁴⁶ U.S. DEP’T OF DEFENSE, *Press Briefing by Secretary Carter on Transgender Service Policies in the Pentagon Briefing Room*, (June 30, 2016), <https://dod.defense.gov/News/Transcripts/Transcript-View/Article/822347/departement-of-defense-press-briefing-by-secretary-carter-on-transgender-service/> [<https://perma.cc/5R4R-A9JA>].

⁴⁷ JOYCELYN ELDERS & ALAN M. STEINMAN, REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 4 (Palm Center, 2014).

⁴⁸ U.S. DEP’T OF DEFENSE, *supra* note 46.

⁴⁹ Acting Undersecretary of Defense Peter Levine, *Transgender Service in the U.S. Military: An Implementation Handbook* (DOD Memorandum for All Service Members, Sep. 30, 2016) (hereinafter *Implementation Handbook*). Though the *Implementation Handbook* is no longer available through the Department of Defense, it can be downloaded from the University of North Texas Digital Library, <https://digital.library.unt.edu/ark:/67531/metadc949052/>.

⁵⁰ *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 181–82 (D.D.C., 2017) (vacated on other grounds by *Doe 2 v. Shanahan*, 2019 WL 102309 (C.A.D.C., 2019)).

⁵¹ See *Implementation Handbook*, *supra* note 49, at 31–71.

⁵² The policy was not mandated to go into full effect until July 1 of 2017, and transgender recruits attempting to enlist in the military in early 2017 found they were unable to join up. Dave Phillips, *Ban Was Lifted, but Transgender Recruits Still Can’t Join Up*, N.Y. TIMES (July 5, 2018), <https://www.nytimes.com/2018/07/05/us/military-transgender-recruits.html>

was welcomed by transgender rights groups,⁵³ and transgender troops began to share their stories with United States media outlets.⁵⁴ Purple Heart recipient Stephanie Heart told of hiding her gender identity from her fellow soldiers even as she enlisted in 2000 and was among the first troops deployed to Afghanistan, where she was wounded in an attack.⁵⁵ Another Purple Heart recipient who also received both a Bronze Star with a “V” for valor and a Joint Service Commendation, Kristen Beck, spoke of serving as a Navy SEAL for twenty years while hiding her gender identity from her colleagues.⁵⁶ Transgender service members began to receive hormone therapies from military physicians and to enjoy certain freedoms, such as proudly marching in the regulation dress blues that matched their gender identity. Meanwhile, transgender aspiring service members eagerly awaited July 1st, 2017—the deadline for full implementation of the Carter Policy.⁵⁷

[<https://perma.cc/9XYJ-MMLV>]. A loophole in the policy also caused one transgender West Point cadet and one transgender Air Force Academy cadet to be denied admission in May of 2017. Sheryl Gay Stolberg, *Loophole in Rules on Transgender Troops Denies 2 Their Commissions*, N.Y. TIMES (May 26, 2017), <https://www.nytimes.com/2017/05/26/us/loophole-in-rules-on-transgender-troops-denies-2-their-commissions.html> [<https://perma.cc/6H94-BEUM>].

⁵³ For example, Mara Keisling, executive director of the National Center for Transgender Equality, said:

Allowing anyone who is willing and able to serve to do so without lying about who they are is a sound policy that reflects American values. This is the right decision for the military and brings much needed certainty for thousands of currently serving soldiers who have put their lives on the line for their country, as well as for their units.

Katy Steinmetz, *Defense Secretary Ash Carter: Transgender Troops Can Serve Openly*, TIME MAG. (June 30, 2016, 3:10 PM), <http://time.com/4390082/defense-secretary-ash-carter-transgender-troops-can-serve-openly/> [<https://perma.cc/K5C5-4H2W>].

⁵⁴ For examples, see the stories of transgender service members Paxton Eakin, Adrian Rodriguez, and Kathryn Goldston published in *The Smithsonian*. Jennie Rothenberg Gritz, *The Faces Behind Transgender Troops’ Struggle for Acceptance*, THE SMITHSONIAN MAG. (January 2019), <https://www.smithsonianmag.com/arts-culture/transgender-soldiers-photo-essay-180971015/> [<https://perma.cc/WP89-2GQ7>].

⁵⁵ Suzette Reynoso, *Local Veteran, Purple Heart Recipient Shares Story About Being Transgender in Military*, KBAK/KBFX EYEWITNESS NEWS (July 26, 2017), <https://bakersfieldnow.com/news/local/local-veteran-shares-her-story-about-being-transgender-in-the-military> [<https://perma.cc/C4UB-RRGN>].

⁵⁶ Ben Terris, *Meet Kristin Beck, a Transgender Former Navy SEAL Running for Congress*, WASH. POST (Jun. 22, 2015), https://www.washingtonpost.com/lifestyle/style/meet-kristin-beck-a-transgender-former-navy-seal-running-for-congress/2015/06/22/299006e4-0b87-11e5-9e39-0db921e47b93_story.html?utm_term=.1448ddcd4e2 [<https://perma.cc/8BSS-YWSS>].

⁵⁷ Phillips, *supra* note 52.

C. PRESIDENTIAL TWEET AND MEMORANDA

A change in presidential administration, however, disrupted the implementation of the new policy of inclusion. On June 30, 2017, the day before that policy was supposed to go into effect,⁵⁸ the new Secretary of Defense, Jim Mattis, announced a six-month delay in implementing the policy. He claimed that the Mattis DOD needed time to allow service leaders to “review their accession plans and provide input” and to consider how transgender recruits would affect “the readiness and lethality of our forces.”⁵⁹ With that delay, transgender servicepeople entered a legal limbo and were unsure about whether they could keep their jobs.⁶⁰

1. *President Trump’s Tweet*

Less than a month after Secretary Mattis announced the six-month implementation delay, the Carter Policy’s status was thrown into further uncertainty when President Donald J. Trump announced on Twitter that “the United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military.”⁶¹ The president’s tweet cited “the tremendous medical costs and disruption that transgender in the military would entail.”⁶² The legal status of the tweet was unclear,⁶³ and a letter from the joint chiefs of staff to the service chiefs indicated that

⁵⁸ Jonah Engel Bromwich, *How U.S. Military Policy on Transgender Personnel Changed Under Obama*, N.Y. TIMES (July 26, 2017), <https://www.nytimes.com/2017/07/26/us/politics/trans-military-trump-timeline.html> [<https://perma.cc/QNQ5-PRD3>].

⁵⁹ Matt Stevens, *Pentagon Delays Accepting Transgender Recruits for 6 Months*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/us/pentagon-delays-transgender-recruits.html> [<https://perma.cc/79RF-3C93>].

⁶⁰ “I was completely blindsided by it. It was devastating that I’d gone through all of this work and all of these trials and I wasn’t going to be allowed to commission. My entire life was planned out for five to 10 years, and suddenly I was going to be unemployed in three weeks,” transgender West Point cadet Riley Dosh told the BBC. Joel Gunter, *Delays Leave Transgender Military Recruits in Limbo*, BBC (July 11, 2017), <https://www.bbc.com/news/world-us-canada-40538805> [<https://perma.cc/QJQ9-WS96>].

⁶¹ Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/5BTX-5ZTV>] [hereinafter “the tweet”].

⁶² *Id.*

⁶³ Jeannie Suk Gersen, *Trump’s Tweeted Transgender Ban Is Not a Law*, NEW YORKER (July 27, 2017), <https://www.newyorker.com/news/news-desk/trumps-tweeted-transgender-ban-is-not-a-law> [<https://perma.cc/X5UH-SVMT>]; Russell Spivak, *Trump’s Transgender Tweet Isn’t in Force Yet, but It’s Close*, FOREIGN POLICY (Aug. 2, 2017, 12:52 PM), <https://foreignpolicy.com/2017/08/02/trumps-transgender-tweet-isnt-in-force-yet-but-its-close/> [<https://perma.cc/66MG-TE6Y>]; *Tweets on Transgender Military Servicemembers: In Tweets, President Purports to Ban Transgender Service Members*, 131 HARV. L. REV. 934, 934 (2018).

the Carter Policy would remain in place “until the President’s direction ha[d] been received by the Secretary of Defense.”⁶⁴

Transgender service members spoke out against the tweet that same day. Logan Ireland, a transgender staff sergeant, told the *Air Force Times*: “I would like to see them try to kick me out of my military. You are not going to deny me my right to serve my country when I am fully qualified and able and willing to give my life.”⁶⁵ Army Sergeant Kennedy Ochoa, a transgender man who was in the process of transitioning with the approval of his Army physician, was five days away from reenlistment when President Trump published the tweet. “My stomach dropped,” he told the BBC.⁶⁶ “It was heartbreaking.”⁶⁷ The Commandant of the Coast Guard told transgender service members awaiting formal guidance following the president’s tweet, “I will not turn my back. We have made an investment in you, and you have made an investment in the Coast Guard, and I will not break faith.”⁶⁸ The tweet was also immediately subject to legal challenge.⁶⁹

⁶⁴ Rebecca Kheel, *Joint Chiefs: No Change in Transgender Policy Until Trump Sends Pentagon Direction*, THE HILL (July 27, 2017, 11:09 AM), <https://thehill.com/policy/defense/344107-joint-chiefs-chairman-no-change-in-transgender-policy-until-trump-sends> [<https://perma.cc/MQ8G-F2YA>].

⁶⁵ Stephen Losey, *Transgender Airman: ‘I would like to see them try to kick me out of my military’*, AIR FORCE TIMES (July 26, 2017), <https://www.airforcetimes.com/news/your-air-force/2017/07/26/transgender-airman-i-would-like-to-see-them-try-to-kick-me-out-of-my-military/> [<https://perma.cc/AP59-U4WJ>]. Staff Sergeant Logan Ireland, a transgender man, gave his interview to the *Air Force Times* on July 26, the same day of the tweet. Transgender Army reservist and Marine Corps veteran Sergeant Jack Schuler also told the *Air Force Times*: “I love serving this country and its people. I love being a part of this military family. My dream is to retire after a long career. I’m not going anywhere, anytime soon.” *Id.*

⁶⁶ Joel Gunter, *‘My stomach dropped’: Transgender Troops Hit Hard by Trump Ban*, BBC NEWS (July 27, 2017), <https://www.bbc.com/news/world-us-canada-40735545> [<https://perma.cc/9H8K-SMDL>].

⁶⁷ *Id.*

⁶⁸ Thomas Gibbons-Neff, *Despite Trump Announcement, Coast Guard Will Not ‘break faith’ with Transgender Troops*, WASH. POST (Aug. 1, 2017, 2:28 PM), https://www.washingtonpost.com/news/checkpoint/wp/2017/08/01/despise-trump-announcement-coast-guard-will-not-break-faith-with-transgender-troops/?utm_term=.bab9d4a8cf34 [<https://perma.cc/5K7M-F4P5>].

⁶⁹ Complaint for Declaratory & Injunctive Relief, *Doe v. Trump*, No. 17-1597, 2017 WL 4873042 (D.D.C. 2017). Plaintiffs succeeded in obtaining an initial injunction enjoining enforcement of the policy, but that was overturned in 2019 when the Court of Appeals for the D.C. Circuit found that government had met its burden of showing significant change such that public interest warranted vacatur of preliminary injunction. *Doe 2 v. Shanahan*, 755 Fed. Appx. 19 (D.C. Cir. 2019).

2. Memoranda

On August 25th, 2017, the president issued formal direction to Secretary Mattis.⁷⁰ The Presidential Memorandum on Military Service by Transgender Individuals (August 2017 Memo) concluded that “the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality.”⁷¹ It directed the Mattis DOD to “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016.”⁷² The August 2017 Memo occasioned further legal challenges.⁷³

The August 2017 Memo was followed by a second memo in March 2018 (March 2018 Memo). In response to a September 2017 report by Secretary Mattis⁷⁴ attempting to mitigate several issues that had led federal district courts to issue preliminary injunctions against the Trump Administration’s new policy, this second memo articulated a narrower policy of exclusion.⁷⁵ The March 2018 Memo revoked the August 2017 Memo and authorized the DOD to “disqualify from military service except under certain limited circumstances” all “transgender persons with a history or diagnosis of gender dysphoria—individuals who the policies state may require substantial medical treatment, including medications and surgery.”⁷⁶ This directive became known in some media outlets as the “trans military ban,”⁷⁷ although the DOD denies that the policy is a ban on

⁷⁰ Trump Memo, *supra* note 20.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Complaint for Declaratory & Injunctive Relief, *Karnoski v. Trump*, No. 2:17-cv-1297 (W.D. Wash. Aug. 28, 2017); Complaint for Declaratory & Injunctive Relief, *Stone v. Trump*, No. 17-2459, 2017 WL 5589122 (D. Md. Nov. 21, 2017).

⁷⁴ See Terri Moon Cronk, *Secretary Mattis Issues Interim Guidance on Transgender Personnel Service*, DoD NEWS (Sep. 18, 2017), <https://dod.defense.gov/News/Article/Article/1315306/secretary-mattis-issues-interim-guidance-on-transgender-personnel-service/> [<https://perma.cc/EBJ8-59MC>].

⁷⁵ *Doe 2 v. Shanahan*, 755 Fed. Appx. 19, 23 (2019) (“The government took substantial steps to cure the procedural deficiencies the court identified in the enjoined 2017 Presidential Memorandum.”).

⁷⁶ Presidential Memorandum on Military Service by Transgender Individuals, 83 Fed. Reg. 13,367 (Mar. 23, 2018).

⁷⁷ See, e.g., Todd Starnes, *Starnes Debates: Majority of Americans Want Trans Ban*, FOXNEWS.COM (July 27, 2017), <https://video.foxnews.com/v/5523723335001/#sp=show-clips> [<https://perma.cc/BCV8-MTSA>]; Riley Dosh, *What the Supreme Court’s Latest Decision on the Trans Military Ban Means*, VOX (Jan. 25, 2019, 9:33 AM), <https://www.vox.com/first-person/2019/1/24/18195975/trump-trans-military-ban-supreme-court-decision> [<https://perma.cc/J3ED-VL58>]; Reynoso, *supra* note 55; Calpernia Addams, *I’m a Transgender Navy Veteran, and I Was Willing to Give Up Everything*, ESQUIRE (Jan. 25, 2019),

transgender service members, pointing out that a narrow exception allows service members who identify as transgender to serve if they have not been diagnosed with gender dysphoria and will not undergo transition.⁷⁸ Critics counter that the policy is merely “Don’t Ask, Don’t Tell” for transgender persons.⁷⁹

D. MATTIS POLICY AND RELATED LITIGATION

In February 2018, the DOD released the Mattis Policy. Titled *Report and Recommendations on Military Service by Transgender Persons*, it represents the DOD’s final guidance on military service of transgender individuals⁸⁰ and declares that individuals who “seek or have undergone gender transition generally should not be eligible for accession or retention in the Armed Forces absent a waiver.”⁸¹ The Mattis Policy mandates a return to the historical bar on transgender service members based on the concern that permitting openly transgender individuals to serve “could undermine readiness.”⁸² The Mattis DOD’s readiness argument is that three types of transition-related healthcare will render transgender troops non-deployable and thus pose “substantial” and “time-sensitive” risks to the military readiness.⁸³ The DOD predicts that

<https://www.esquire.com/news-politics/a26006499/calpernia-adams-trump-trans-military-ban-supreme-court/> [https://perma.cc/5DSJ-DKUF].

⁷⁸ Air Force Gen. James N. Stewart, acting DOD undersecretary of defense for personnel and readiness, told Congress in February 2019 that the policy “is not a ban on transgender individuals,” but critics of the ban argued that the narrow exception forces transgender troops to serve in silence and without access to appropriate medical care. Julie Watson, *Transgender Troops Tell Congress They Excel in Military*, ASSOC. PRESS (Feb. 27, 2019), <https://www.apnews.com/5edfee54946f4fc905f9f546325d209> [https://perma.cc/C6F2-H3JL]; *Transgender Service in the Military Policy: Hearings Before the Subcomm. on Military Personnel of the U.S. H. Armed Services Comm.*, 116th Cong. 4 (Feb. 27, 2019) (testimony of Jesse M. Ehrenfeld, MD, MPH) <https://docs.house.gov/meetings/AS/AS02/20190227/108938/HHRG-116-AS02-Wstate-EhrenfeldJ-20190227.pdf> [https://perma.cc/GG89-URM3].

⁷⁹ “Gender dysphoria involves a conflict between a person’s physical or assigned gender and the gender with which he/she/they identify.” *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS’N (2016), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> [https://perma.cc/J2QU-LAZB]. Maryland Representative Anthony Brown echoed this argument when he told Congress, “You’re transgender and only if you agree not to transition, then you can serve, that’s just like ‘don’t ask, don’t tell.’” Watson, *supra* note 78.

⁸⁰ Mattis Policy, *supra* note 5.

⁸¹ Petition for a Writ of Certiorari Before Judgment, *Trump v. Karnoski*, 139 S.Ct. 946 (2019) (No. 18-676), 2018 WL 6169245, at *21.

⁸² Mattis Policy, *supra* note 5, at 2.

⁸³ See Petition for a Writ of Certiorari Before Judgment, *Trump v. Karnoski*, 139 S.Ct. 946 (2019) (No. 18-676), 2018 WL 6169245, at *18, 21–22.

deployability problems will arise because of these three types of transition-related care: (1) surgery, (2) hormone therapy, and (3) mental health care.

First, the Mattis DOD argues that surgical procedures associated with transition may undermine readiness because surgery may render transgender troops nondeployable for a “potentially significant period of time” or force them to leave their theater of military operations. Second, the DOD argues that hormone replacement therapy used to treat gender dysphoria in transgender individuals is not consistent with deployment. Third, the Department argues that transgender individuals are likely to suffer from poor mental health that could render them non-deployable.⁸⁴

Temporary federal district court injunctions against enforcement of the Mattis Policy left transgender troops in legal limbo.⁸⁵ The Supreme Court’s stays of those injunctions did nothing to resolve that limbo, since the high court declined to offer substantive certiorari review of the policy before pending appeals are resolved.⁸⁶ Whether transgender service members will be allowed to keep their jobs, and whether transgender recruits will be accepted into the military, remains an open question.

II. DEPLOYMENT OF TRANSGENDER PERSONNEL IN FOREIGN MILITARIES

The nations that permit transgender troops to serve openly in the military vary widely in their operational needs and in how they implement a policy of inclusion. For example, most require transgender troops to receive approval from a military doctor, undergo hormone therapy or surgery, and meet physical fitness standards for their transitioned gender. Argentina’s military, in contrast, does not require medical transition and allows personnel to legally change their gender without permission from a judge.⁸⁷ Some militaries, for example those in the Netherlands, Canada,

⁸⁴ *Id.*, at *21–22 (internal quotations and citations omitted).

⁸⁵ David Crary, *Transgender Military Personnel in Limbo Over Trump Plan*, ASSOC. PRESS (Jan. 26, 2019), <https://www.apnews.com/990cb347f5a24eac85b47550b43fb68f> [<https://perma.cc/R7BM-NKQZ>].

⁸⁶ The Trump Administration appealed *Stockman v. Trump*, 331 F. Supp.3d 990 (C.D. Cal. 2018). On appeal the Ninth Circuit granted a motion to remand. *Stockman v. Trump*, No. 18-56539, 2019 WL 6125075, at *1 (9th Cir. Aug. 26, 2019). The petition for writ of certiorari before judgment was denied. *Trump v. Stockman*, 139 S.Ct. 946 (2019) (denying certiorari). Likewise, the Ninth Circuit recently rendered an opinion in *Karnoski v. Trump*. *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019). The Supreme Court also declined to review this case before judgment. *Trump v. Karnoski*, 139 S.Ct. 946 (2019) (denying certiorari).

⁸⁷ Erickson, *supra* note 22. See generally Monica Malta, Reynaldo Cardoso, Luiz Montenegro, Jaqueline Gomes de Jesus, Michele Seixas, Bruna Benevides, Maria das Dores Silva, Sara

and Australia, will pay for medical transition, whereas others require the servicemember to pay for transition privately.⁸⁸ This Part reviews the diverse practices that foreign militaries employ in fully integrating transgender troops into military service. It also evaluates which of these policies could be applied in the U.S. military context.

The Mattis DOD's first concern about fully integrating transgender troops into the military is that such a move may compromise military readiness. Trump's tweet obliquely referenced readiness concerns related to trans service members when it referred to "disruption." Expressing similar concerns, litigation subsequently brought by the Mattis DOD argues that transgender troops' unusually high needs for medical care will compromise their readiness for missions and deployment. The Mattis DOD argues that the medical process of transition can exceed a year; that not all theaters of operation can support treatment;⁸⁹ and that rates of surgical complication with genital reassignment surgery are high, which may increase transitioning service members' unavailability.⁹⁰ The Mattis DOD further argues that high rates of psychiatric hospitalization and suicidal behavior among transgender individuals present a risk for readiness.⁹¹ It also disputes⁹² the medical consensus⁹³ that medical and social transition ameliorate high risks of mental health problems among

LeGrand & Kathryn Whetten, *Sexual and Gender Minorities Rights in Latin America and the Caribbean: A Multi-Country Evaluation*, 19 BMC INT'L HEALTH HUM. RTS. 31, 40 (2019).

⁸⁸ See Erickson, *supra* note 22.

⁸⁹ Mattis Policy, *supra* note 5, at 33.

⁹⁰ Petition for a Writ of Certiorari Before Judgment, *Trump v. Karnoski*, 139 S.Ct. 946 (2019) (No. 18-676), 2018 WL 6169245, at *22; Mattis Policy, *supra* note 5, at 23–24.

⁹¹ Mattis Policy, *supra* note 5, at 32.

⁹² The DOD concedes that "[t]he prevailing judgment of mental health practitioners is that gender dysphoria can be treated with the transition-related care" but calls the scientific evidence "unclear." *Id.* at 24. Reviewing a literature review from the Centers for Medicare and Medicaid Services (CMS), the DOD finds that "the four best designed and conducted studies that assessed the quality of life before and after surgery using validated (albeit, non-specific) psychometric studies did not demonstrate clinically significant changes or differences in psychometric test results after [sex reassignment surgery]." *Id.* at 24 (citing Tamara Jensen, Joseph Chin, James Rollins, Elizabeth Koller, Linda Gousis & Katherine Szarama, *Final Decision Memorandum on Gender Reassignment Surgery for Medicare Beneficiaries with Gender Dysphoria*, CENTERS FOR MEDICARE & MEDICAID SERVICES, 46 (Aug. 30, 2016), <https://www.cms.gov/medicare-coverage-database/details/nca-decision-memo.aspx?NCAId=282>).

⁹³ See, e.g., Stephanie L. Budge, Jill L. Adelson & Kimberly A.S. Howard, *Anxiety and Depression in Transgender Individuals: The Roles of Transition Status, Loss, Social Support, and Coping*, 81 J. CONSULTING AND CLIN. PSYCHOL. 544, 554 (2013). See also Jaye Cee Whitehead, Kath Bassett, Leia Franchini & Michael Iacolucci, "The Proof Is in the Pudding": How Mental Health Practitioners View the Power of "Sex Hormones" in the Process of Transition, 41 FEM. STUD. 623, 623–50 (2015).

transgender individuals and argues that the persistence of such problems pose a threat to readiness.⁹⁴

Commentators who oppose military integration of transgender individuals have echoed the Mattis DOD's concerns. They argue that the Obama Administration's push to integrate was unsupported by scientific research⁹⁵ and was "nothing but social engineering and political correctness."⁹⁶ One such commentator wrote "For service members to be considered medically fit, they are supposed to be deployable anywhere in the world at any time, without the need for specialized medical care. Yet those who have had gender reassignment surgery do need specialized medical care, and they require hormones *for the rest of their lives*."⁹⁷ Rolling back Obama-era integration policies is seen by these commentators as appropriately centering military readiness over political correctness. Like the Government, these commentators cite sex-reassignment surgeries and associated recovery times, access to hormone medication, and mental health needs of transgender service members as barriers to deployability.⁹⁸ However, the experiences of nations that fully

⁹⁴ The American Medical Association responded to this argument directly in a letter to Secretary Mattis, writing that "there is no medically valid reason—including a diagnosis of gender dysphoria—to exclude transgender individuals from military service." Letter from James L. Madara, MD, Exec. VP and CEO, Am. Medical Ass'n to Sec'y James N. Mattis, Dep't of Defense (Apr. 3, 2018). A copy of this letter may be accessed at <https://www.politico.com/f/?id=00000162-927c-d2e5-ade3-d37e69760000> [<https://perma.cc/WV5H-Z3UN>].

⁹⁵ Jamie Shupe, *I Became Transgender in the Military. That's How I Know People Shouldn't*, THE FEDERALIST (Apr. 12, 2018), <http://thefederalist.com/2018/04/12/became-transgender-military-thats-know-people-shouldnt/> [<https://perma.cc/T458-F2XJ>].

⁹⁶ Tony Perkins, *Trump's Right: Transgender Patriotism Isn't the Issue—Military Readiness Is*, THE HILL (July 27, 2017, 3:40 PM), <https://thehill.com/blogs/pundits-blog/the-military/344175-opinion-transgender-patriotism-isnt-the-issue-military> [<https://perma.cc/3NT2-X6C4>].

⁹⁷ *Id.* (emphasis in original).

⁹⁸ *Trump Transgender Policy Promotes Military Readiness, Not Political Correctness*, CTR. FOR MIL. READINESS (April 2018), https://cmrlink.org/data/sites/85/CMRDocuments/CMRSR_TrumpTransgenderPolicyReport-041518A.pdf [<https://perma.cc/QSU4-XC28>]. See also Thomas Spoehr, *Should Transgender Americans Be Allowed in the Military? Not So Fast: Military Readiness Has to Be First Concern*, THE HERITAGE FOUND. (Aug. 8, 2017), <https://www.heritage.org/defense/commentary/should-transgender-americans-be-allowed-the-military-not-so-fast-military> [<https://perma.cc/2KA7-QTLH>]; Leo Shane III, *Troops Support Trump's Transgender Policies*, MIL. TIMES (Oct. 23, 2017), <https://www.militarytimes.com/news/pentagon-congress/2017/10/23/military-times-poll-troops-support-trumps-transgender-policies/> [<https://perma.cc/H5FZ-AUR2>]; Ryan Anderson, *5 Good Reasons Transgender Accommodations Aren't Compatible with Military Realities*, THE HERITAGE FOUND. (July 26, 2017), <https://www.heritage.org/civil-society/commentary/5-good-reasons-why-transgender-accommodations-arent-compatible-military> [<https://perma.cc/RE8N-32D4>]. In the 2015 Republic Primary Debates, former Gov. Mike Huckabee said regarding the Obama Administration's move to integrate transgender servicemembers, "The military is not a social experiment. The purpose of the military is to kill people and break things . . . I'm not sure

integrate transgender service members into the military suggest that each of the three identified barriers to deployability—surgery, hormone medication, and mental health care—can be managed without deleterious effects on readiness. This Part reviews how the DOD’s predictions regarding the claimed readiness impacts square with data drawn from foreign militaries. It also evaluates whether foreign strategies for handling each issue can be applied in the United States.

A. SURGERY

The Mattis DOD predicts that transition-related surgeries will remove service members from their theaters of operation for extended periods. The Mattis Report policy asserts that

The estimated recovery time for each of the surgical procedures, even assuming no complications, can be substantial. For example, assuming no complications, the recovery time for a hysterectomy is up to eight weeks; a mastectomy is up to six weeks; a phalloplasty is up to three months; a metoidioplasty is up to eight weeks; an orchiectomy is up to six weeks, and a vaginoplasty is up to three months. When combined with 12 continuous months of hormone therapy, which is required prior to genital surgery, the total time necessary for surgical transition can exceed a year.⁹⁹

The government predicts that the specialized nature of transition-related surgeries, along with their potential for complications and long recovery times, will keep transgender troops from being deployable and could even result in their removal from military operations during important missions. Though the government acknowledges that only roughly 2 percent of transgender men and 10 percent of transgender women undergo genital reassignment surgeries,¹⁰⁰ it predicts that these figures are likely to grow among military personnel if transition-related care is available through the military,¹⁰¹ and that such surgeries will

how paying for transgender surgery for soldiers, sailors, airmen, marines makes our country safer.” *Annotated transcript: The Aug. 6 GOP debate*, WASH. POST (Aug. 6, 2015, 10:47PM), https://www.washingtonpost.com/news/post-politics/wp/2015/08/06/annotated-transcript-the-aug-6-gop-debate/?utm_term=.1699fb5c0491 [<https://perma.cc/DVK2-2HXZ>].

⁹⁹ Mattis Policy, *supra* note 5, at 23. These estimates came from the Center for Transgender Health at University of California, San Francisco. *Id.*, note 74. *Guidelines for the Primary and Gender-Affirming Care of Transgender and Gender Nonbinary People*, CTR. OF EXCELLENCE FOR TRANSGENDER HEALTH, UNIV. OF CAL. (Madeline B. Deutch ed., 2d ed. June 17, 2016), <http://transhealth.ucsf.edu/pdf/Transgender-PGACG-6-17-16.pdf>.

¹⁰⁰ Mattis Policy, *supra* note 5, at 23.

¹⁰¹ *Id.*

prevent a significant number of transgender service members from meeting standards for deployability. Foreign militaries have used two primary strategies to handle transition-related surgeries and associated recovery without compromising military readiness: (1) authorizing related-surgeries to the small percentage of transgender troops for whom they are medically indicated, without requiring surgeries for the large number of troops for whom social and hormonal transition may be sufficient and (2) planning such surgeries around military missions and deployments.

1. *Authorizing Surgeries when Medically Indicated*

First, foreign militaries recognize that not all transgender individuals require surgery as part of their transition.¹⁰² The American Medical Association, American Psychological Association, Endocrine Society, and World Professional Association for Transgender Health report that surgery is a vital treatment for some transgender individuals.¹⁰³ However, the groups note that surgery is not medically indicated for all transgender persons. “As the field [of transgender healthcare] matured, health professionals recognized that while many individuals need both hormone therapy and surgery to alleviate their gender dysphoria, others need only one of these treatment options and some need neither.”¹⁰⁴ Foreign militaries authorize transition-related surgeries for troops who need them, but none of the militaries studied require transgender troops to undergo surgery as a precondition of serving in their identified gender.¹⁰⁵

For example, Israel’s military, the Israel Defense Forces, issues its first draft notice to Israeli citizens at sixteen and immediately allows the recruits to use the name, pronouns, uniform, and bunking arrangement that match the individual’s gender identity.¹⁰⁶ Britain requires military

¹⁰² “It is worth noting that none of the allied armed forces examined here requires GCS in order for transgender service members to continue serving or to deploy. This acknowledges the aforementioned variation in required courses of treatment among transgender individuals, as well as the sufficiency of social transition in treating some cases of gender dysphoria. Such a “common sense” policy also accounts for bioethical concerns (which forbid forcing an individual to submit to unwanted or unnecessary medical procedures) and functional differences in the surgical interventions often required by transgender women and men.” TANNEHILL, *supra* note 1, at 16.

¹⁰³ Elders et al., *supra* note 22, at 207.

¹⁰⁴ Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, 13 INT’L J. OF TRANSGENDERISM 165, 170–71 (2012).

¹⁰⁵ TANNEHILL, *supra* note 1, at 16.

¹⁰⁶ See Yoav Zitun, *IDF to Support Transgender Recruits Throughout Sex Change Process*, YNETNEWS.COM (Dec. 26, 2014, 3:09 PM), <https://www.ynetnews.com/articles/0,7340,L->

personnel to live as their target gender for two years before surgery will be authorized.¹⁰⁷ Australia's National Defence Force (ADF) has found that, of openly transgender service members who require medical interventions, just over half require any surgical procedures whatsoever; over a five-year period, only seventeen ADF soldiers underwent gender-confirmation surgery.¹⁰⁸ Each of these nations is therefore able to limit transition-related surgeries to the relatively small number of cases in which surgery is medically indicated.

Authorizing only medically indicated transition-related surgeries is a strategy that can be applied in the United States military context. As the Mattis DOD acknowledges, only a small number of transgender troops require transition-related surgeries.¹⁰⁹ The RAND Report projected that between 25 and 130 Active Component transgender military personnel are likely to access surgical treatment for gender dysphoria in an annual period.¹¹⁰ Furthermore, the United States military has already determined whether some individual transition surgeries are medically indicated.¹¹¹ For example, in November 2017, even as the Mattis Policy was being litigated in federal courts, the Mattis DOD announced that it had paid for the surgery of an active duty servicemember. Pentagon spokeswoman Dana White said, "Because this service member had already begun a sex-reassignment course of treatment, and the treating doctor deemed this surgery medically necessary, a waiver was approved by the director of the

4608141,00.html [https://perma.cc/2G4T-6XQL] ("The IDF decided to support and assist transgender soldiers, starting from their first draft notice at age of 16 . . . The purpose of the new policy is to offer help throughout the personal process which the soldier has chosen to undertake"); Yoav Zitun, *IDF Moves to Expand Integration of Transgender Troops*, YNETNEWS.COM (Aug. 7, 2019, 9:17 PM), <https://www.ynetnews.com/articles/0,7340,L-5565201,00.html> [https://perma.cc/FCD6-5KEN] ("Treatment nowadays begins in the first stages of the recruitment process, and Brig. Gen. Nir has instructed staff at induction centers to address a candidate using their chosen gender identity and new name to avoid causing them any harm and embarrassment on their first steps in the military").

¹⁰⁷ Erickson, *supra* note 22.

¹⁰⁸ Shalailah Medhora, *Where Does Australia Stand on Transgender People Serving in the ADF?*, AUSTL. BROAD. CO. (Aug. 11, 2017, 3:20 PM), <https://www.abc.net.au/triplej/programs/hack/whats-aust-policy-on-transgender-military-service/8798664> [https://perma.cc/X39K-W9EQ] ("Between November 2012 and March 2017, the ADF's health system helped 27 serving members with gender dysmorphia . . . Seventeen of them had surgery.").

¹⁰⁹ Mattis Policy, *supra* note 5, at 23.

¹¹⁰ RAND Report, *supra* note 24, at 31–32 tbl.4.8.

¹¹¹ Idrees Ali & Michael Perry, *Pentagon Pays for Service Members' Gender-Reassignment Surgery*, REUTERS (Nov. 14, 2017, 9:27 PM), <https://www.reuters.com/article/us-usa-military-transgender/pentagon-pays-for-service-members-gender-reassignment-surgery-idUSKBN1DF0CE> [https://perma.cc/5EFL-4296].

Defense Health Agency.”¹¹² It is therefore reasonable to conclude that the United States military can successfully limit transition-related surgeries to those that are medically necessary, thereby limiting the deployability of only a small number of transgender personnel.

2. *Planning Surgeries Around Deployment*

For those transgender service members who do require surgery, foreign militaries have found that such surgeries can be planned around military missions. For example, the United Kingdom successfully helped Warrant Officer Class 2 Deborah Penny, a bomb disposal expert, undergo surgical transition without compromising her front-lines missions. Penny served in the military for twenty-three years before she began her transition, and after surgery and recovery she resumed mission-critical work in the Helmand province campaign against Taliban insurgents.¹¹³ Similarly, Corporal Vincent Lamarre, of the Canadian armed forces, underwent transition-related surgeries only after completing a critical mission in Afghanistan’s Panjawi region.¹¹⁴ In June of 2017, he told reporters that he expected in the coming years to complete other transition-related surgeries in a way that would be consistent with the demands of an ongoing military career.¹¹⁵ His surgeries were supported both by his military commander and by the master corporal who had been his commander in Afghanistan.¹¹⁶ A third such example comes from Corporal Natalie Murray, also of the Canadian Armed Forces, who waited until she finished her deployment as a radar technician in Bosnia to begin her transition.¹¹⁷

Planning surgeries around deployment is another strategy that is applicable to the United States military. The experiences of Warrant

¹¹² *Id.*

¹¹³ At the time of article publication Penny had served in the army for thirty years. She began her transition in 2007. Ian Drury, *Deborah Becomes the First Transgender Soldier on the Front Line in Army History: Military Chiefs Say Bomb Disposal Expert Has Won Respect of Comrades for her Courage*, DAILY MAIL (Aug. 20, 2014, 19:38 EDT), <https://www.dailymail.co.uk/news/article-2730340/Deborah-Penny-transgender-soldier-line-Army-history.html> [https://perma.cc/J9XJ-YKCN].

¹¹⁴ Mike Blanchfield, *Cpl. Vincent Lamarre, Transgender Veteran of Afghanistan War, Fights for Identity*, MONTREAL GAZETTE (June 17, 2017), <https://montrealgazette.com/news/quebec/cpl-vincent-lamarre-transgender-veteran-of-afghanistan-war-fights-for-identity> [https://perma.cc/LB9B-BHDZ].

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Bendery, *supra* note 28.

Officer Penny, Corporal Vincent Lamarre, and Corporal Natalie Murray are consistent with the Carter DOD's conclusion in 2016 that "gender transition can often be planned in ways that do not interfere with deployment or pose a risk to service member health."¹¹⁸ Although surgical transition is medically necessary for some individuals, it is rarely necessary that the surgery be completed immediately. In most cases,

a transgender service member, in coordination with his or her chain of command and military medical providers, develops a transition plan that incorporates the service member's health care needs and the unit's mission readiness; the mission always comes first. The service member cannot begin any transition-related medical treatment until the plan is reviewed and approved through the processes implemented by each service.¹¹⁹

By working with transgender personnel and their military health care providers to plan transitions around deployment, the United States can avoid any significant readiness impacts arising from transition-related surgeries.

B. HORMONE TREATMENT

The Mattis Policy identifies hormone therapy as another potential barrier to deployability. The Policy's reasoning is based on the Endocrine Society's recommendation that cross-sex hormone therapy should be attended by laboratory monitoring of hormone levels during the first year of treatment and by ongoing quarterly bloodwork.¹²⁰ The Mattis DOD argues that conditions requiring this type of ongoing treatment disqualify individuals from military service and that no exception should be made for the health condition of gender dysphoria.¹²¹ Sex hormones are already prescribed to military personnel for a variety of health conditions. Therefore, national militaries have been able to prescribe hormone

¹¹⁸ Implementation Handbook, *supra* note 49, at 31; VICE ADMIRAL DONALD C. ARTHUR, ET AL., DOD'S RATIONALE FOR REINSTATING THE TRANSGENDER BAN IS CONTRADICTED BY EVIDENCE 18 (Palm Center, 2018), <https://www.palmcenter.org/wp-content/uploads/2018/04/Transgender-troops-are-medically-fit-pdf.pdf> [<https://perma.cc/NB8Q-P5A9>].

¹¹⁹ Coon et al., *supra* note 28, at 893.

¹²⁰ Mattis Policy, *supra* note 5, at 33 (citing Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3869–903 (2017)).

¹²¹ James N. Stewart, Undersecretary of Defense for Personnel and Readiness, argued before Congress that permitting transgender individuals to serve despite their need for ongoing medical treatment would constitute "special accommodations" for transgender troops that are not extended to other personnel. Watson, *supra* note 78.

replacements for deployed transgender individuals using two primary strategies: (1) using existing protocols for hormone prescription and (2) training military medical doctors on the use of sex hormones in transition-related care.

1. Existing Protocols for Hormone Prescription

First, the British Armed Forces have used existing hormone prescription protocols to prescribe hormones to transgender patients. For example, the United Kingdom's Royal Air Force (RAF) allows transgender personnel to stock up on hormone medications prior to deployment, just as it would for military personnel prescribed hormones for conditions other than gender dysphoria. Ayla Holdom, a transgender Flight Lieutenant in the RAF, reported that a National Health Service endocrinologist prescribed enough hormone replacement therapy drugs to see her through a deployment to the Falklands in 2011.¹²² When her deployment was extended, she was able to order more medication.¹²³ Lt. Holdom has remained classified as G1, A1, Z1 (physically fit for flying and ground deployment without any restriction) while receiving hormone replacement therapy, with the exception of a one-month period immediately following her initial commencement of hormone therapy.¹²⁴ Another member of the British Armed Forces, Captain Hannah Winterbourne, deployed to Kenya for five months without any interruption in her hormone replacement therapy.¹²⁵

The United States can adapt existing protocols for the prescription of sex hormones to provide transgender troops with hormone replacement therapy, just as the British armed forces have. The United States DOD already prescribes hormones to deployed troops for conditions other than gender dysphoria.¹²⁶ Although United States military regulations do stipulate that certain medications will disqualify individuals from deployment to some geographic areas, hormone medications are not among the suspect medications.¹²⁷ Long-term use of cross-sex hormone

¹²² TANNEHILL, *supra* note 1, at 67.

¹²³ *Id.*

¹²⁴ *Id.* at 13.

¹²⁵ *Id.* at 14.

¹²⁶ See generally Candy Wilson, Robert Corrigan, Sharon Reese, Angelica Almonte & Danielle Simpson, *Military Medics' Insight into Providing Women's Health Care in Deployed Settings*, 181 MIL. MED. 1608, 1613 (2016).

¹²⁷ DEP'T OF THE ARMY, STANDARDS OF MEDICAL FITNESS, ARMY REG. 40-501, 60-64 (2007).

treatment in transgender patients has been found to be safe.¹²⁸ Although medications that “require laboratory monitoring or special assessments, including lithium, anticonvulsants, and anti-psychotics do disqualify the taker from deployment to certain geographic areas,”¹²⁹ hormone medications are not analogous to lithium, anticonvulsants, or antipsychotics.¹³⁰ The deployment of British transgender service members receiving cross-sex hormone therapy suggests that any necessary laboratory monitoring can be conducted between deployments, especially after the initial month following initiation of hormone replacement therapy.

2. *Training Doctors in Hormone Replacement Therapy*

A second strategy for managing cross-sex hormone prescriptions without compromising the deployability of transgender troops is educating military doctors who act as primary care providers about the use of cross-sex hormones in treating gender dysphoria. This strategy has been employed successfully by the IDF. The IDF has educated its medical doctors about the proper protocol for prescribing hormone replacement therapy. For example, Colonel Eyal Fruchter, a medical doctor and former Mental Health Department head of the Israel Defense Forces, acknowledged that providing cross-sex hormone therapy to transgender soldiers in the IDF required the military to adapt, saying, “We had to deal with some problems when the first [openly transgender] people came. We didn’t know how to give them the right hormones because they’d never been bought by the medical corps before.”¹³¹ However, Col. Fruchter reported that the adaptation was not problematic: “But we solved it

¹²⁸ See generally Henk Asscheman et al., *A Long-Term Follow-Up Study of Mortality in Transsexuals Receiving Treatment with Cross-Sex Hormones*, 164 EUR. J. ENDOCRINOLOGY 635 (2011); Maria Cristina Meriggiola & Marta Berra, *Long-Term Cross-Sex Hormone Treatment Is Safe in Transsexual Subjects*, 14 ASIAN J. ANDROLOGY 813 (2012).

¹²⁹ DEP’T OF THE ARMY, *supra* note 127, at 62.

¹³⁰ The main difference is the potential for adverse effects if the dose is no longer in therapeutic range. The recommendation for both lithium and hormone replacement is to check levels once every six-to-twelve months once on a stable dose. But the adverse effects for lithium, anticonvulsants, or antipsychotics falling below therapeutic range are severe and dangerous within a much shorter period of time. Conversely, if a person’s hormone replacement therapy falls below therapeutic range, the adverse effects are more psychosocial and less immediately dangerous. See generally Cécile A. Unger, *Hormone therapy for transgender patients*, TRANSL. ANDROL. UROL., Vol. 5(6), 877–84 (Dec. 2016); M. Kamali, V.B. Krishnamurthy, R. Baweja, et al. *The American Psychiatric Association Publishing Textbook of Psychopharmacology*, 889 (2017).

¹³¹ PALM CENTER, OPEN SERVICE BY TRANSGENDER MEMBERS OF ISRAEL DEFENSE FORCES, 4 (2015).

immediately, and then no problems occurred. The commanders were very flexible.”¹³²

The United States military can also train military doctors to effectively treat gender dysphoria with cross-sex hormone therapy. Writing such prescriptions does not require expertise beyond that of a primary care provider. However, specific training in hormone replacement therapy may be advisable because United States medical schools do not all include gender transition content in their curricula.¹³³

That U.S. military doctors can prescribe cross-sex hormones to deployed personnel is further supported by the fact that some military doctors are already prescribing hormones for transgender personnel on deployment. For example, Landon Wilson, a transgender petty officer 3rd class in the U.S. Navy who began hormone replacement therapy a year after he enlisted,¹³⁴ was provided with over a year’s worth of hormone medications for his deployment to Afghanistan.¹³⁵ He reported:

When I was given orders to deploy to Afghanistan for a year, I immediately set up an appointment with my doctor to ask the question: what about my medical care overseas? I remember him looking at me with a raised eyebrow and asking “What do you mean they won’t refill your prescription overseas? It’s just as necessary as anything else.”¹³⁶

Further training of primary care providers within the military’s healthcare system will allow transgender troops to successfully deploy while continuing to receive hormone replacement therapy. Retired Sgt. Maj. Jennifer Marie Long similarly told the *Washington Post* that she was able to continue hormone therapy while deployed in Afghanistan in what was “the toughest direct combat environment [she] would face.”¹³⁷

¹³² *Id.*

¹³³ Irene Folaron & Monica Lovasz, *Military Considerations in Transsexual Care of the Active Duty Member*, 181 MIL. MED. 1182, 1185 (2016).

¹³⁴ Michelangelo Signorile, *Landon Wilson, Transgender Navy Sailor, on Being Discharged and His Documentary Project*, HUFFINGTON POST (May 3, 2014, 10:23 AM), https://www.huffingtonpost.com/2014/05/03/landon-wilson-transgender-navy-_n_5253439.html [<https://perma.cc/SC6E-8LCK>]; TANNEHILL, *supra* note 1, 14–15.

¹³⁵ TANNEHILL, *supra* note 1, 14–15.

¹³⁶ *Id.*

¹³⁷ Emily Wax-Thibodeaux, *‘We All Have the Right to Defend Freedom’: Transgender Veterans Speak out Against Trump’s Ban*, WASH. POST (Mar. 29, 2018), https://www.washingtonpost.com/news/checkpoint/wp/2018/03/29/we-all-have-the-right-to-defend-freedom-transgender-veterans-speak-out-against-trumps-ban/?utm_term=.ccb7d12f5484 [<https://perma.cc/65BS-34XD>].

C. MENTAL HEALTH CARE

The DOD argues that there is not enough scientific evidence to establish that the mental health consequences of gender dysphoria can be adequately treated with gender-affirming health care such as hormone therapy and sex-reassignment surgery. The DOD predicts that mental health problems may prevent transgender individuals from being deployable.¹³⁸ Other national militaries have primarily supported the mental health of transgender service members by training commanders to create a gender-affirming unit.

Transgender individuals serving their militaries in Australia, Britain, Israel, Canada, and Sweden report that the mental health benefits of open military service improve their ability to do their jobs. Commanders and high-level military officials play a significant role in creating a unit culture in which transgender individuals are welcomed. For example, Major Alexandra Larsson, a transgender intelligence officer for the Swedish Air Force, spoke about her pride in serving openly with the support of high-level Swedish military personnel. She told the *Huffington Post* “I have the best job in the world. I really, really do. I’m so grateful to be in that position.”¹³⁹ The Australian Department of Defence provides Defence Force commanders with a handbook on how to communicate about transition and how to assist transgender personnel with changes to their military uniforms, bathing and berthing facilities, service records, and official documents.¹⁴⁰

Donna Harding, a transgender major in the Royal Australian Army Nursing Corps, explained that open service allows transgender service members to complete military missions “to the best of our abilities” and to “serve with dignity.”¹⁴¹ A transgender member of the British Armed Forces reported that, before Britain welcomed transgender troops, she was discharged and fought alongside U.S. troops as part of a NATO contingent, where being “finally celebrated for who [she] was” allowed her to “just get on with the job.”¹⁴² A British Armed Forces

¹³⁸ Mattis Policy, *supra* note 5, at 32.

¹³⁹ Bendery, *supra* note 28.

¹⁴⁰ DEP’T OF DEF. (AUSTL.), UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (2011), http://www.defence.gov.au/FOI/Docs/Disclosures/146_1819_Docs.pdf.

¹⁴¹ Bendery, *supra* note 28.

¹⁴² Alexandra Genova, *The UK’s First Transgender Army Officer Full of Praise for ‘Tolerant’ Liverpool - Where She Now Calls Home*, LIVERPOOL ECHO (Nov. 21, 2015, 11:57 AM), <https://www.liverpoolecho.co.uk/news/liverpool-news/uks-first-transgender-army-officer-10479504> [<https://perma.cc/M4DM-PVDL>].

military chief seemed to agree. He said of transgender personnel: “Only if individuals are free to be themselves can we release the genie of their potential.”¹⁴³ Lt. Shachar Erez, Israel’s first openly transgender soldier who now commands more than 200 troops, reported: “Serving in the army and being recognized for who I really am by my fellow soldiers made me feel like a real man for the first time in my life. It made me feel like myself. When you feel accepted and happy as who you are, you want to do your best as a soldier, as a person.”¹⁴⁴ Some transgender military personnel even report that military service, with its emphasis on functional competence over gender, can be a respite from mental health challenges that attend gender dysphoria.¹⁴⁵ These reports from transgender personnel serving in militaries around the world show that a gender-affirming unit has positive impacts on the mental health and military effectiveness of transgender troops.

The strategy of training commanders to create gender-affirming military service units is one that is very applicable to the United States military. Many transgender U.S. military personnel already report they are welcomed by inclusive units and that being treated like any other soldier and being valued for their competence rather than their gender allows transgender troops to focus on their work.¹⁴⁶ For example, Petty Officer Landon Wilson told CBS News that living with the other men in his unit in Afghanistan “was the best experience of my entire military career. It was probably the only time that I knew 100 percent that I could focus on my job without worrying about my gender coming into play.”¹⁴⁷ Retired generals and admirals have also argued that full integration actually promotes readiness because transgender service members represent

¹⁴³ *UK Military Chiefs Praise Transgender Troops*, BBC NEWS (July 26, 2017), <https://www.bbc.com/news/uk-40733701>.

¹⁴⁴ PALM CENTER, *supra* note 131, at 4; Judy Bolton-Fasman, *Introducing Lt. Shachar Erez, the IDF’s First Transgender Officer*, JEWISH BOSTON (Apr. 10, 2017), <https://www.jewishboston.com/introducing-lt-shachar-erez-the-idfs-first-transgender-officer/> [<https://perma.cc/DT6D-852U>].

¹⁴⁵ Blanchfield, *supra* note 114 (“Toiling within the heart of the Taliban insurgency offered Lamare a brief respite from the emotional war that had been raging inside him since he was three years old. Here, he needed only one label: soldier.”).

¹⁴⁶ Dave Phillips, *Transgender Troops Caught Between a Welcoming Military and a Hostile Government*, N.Y. Times (Mar. 9, 2019), <https://www.nytimes.com/2019/03/09/us/transgender-troops-military.html> [<https://perma.cc/MQQ9-CM74>].

¹⁴⁷ Jonathan Lapook, *Transgender People Push for Acceptance in Military – and Beyond*, CBS NEWS (Mar. 17, 2015, 7:05 PM), <https://www.cbsnews.com/news/transgender-people-hope-for-acceptance-in-military-society/> [<https://perma.cc/6SET-NT6M>].

mission-critical talent.¹⁴⁸ These statements indicate that United States commanders are ready to create units that are gender-affirming and support the mental health of transgender troops. Furthermore, the Carter DOD already issued instructions for commanders of transgender troops in 2016; those instructions educate commanders about how to create a gender-affirming unit that supports the mental health of transgender service members and allows them to do their jobs.¹⁴⁹ By enforcing a unit culture that is welcoming to transgender individuals, the United States military can boost the mental health of transgender troops and avoid negative mental health impacts that could interfere with deployment.

III. CONCLUSION

Transgender American patriots serve in the armed forces at twice the rate of the general population and have excelled in mission-critical deployments to the front lines. Yet the Department of Defense presently bars most transgender individuals from serving in the United States Armed Forces on the grounds that their service is a threat to military readiness.

Data from other national militaries suggests that the United States military could successfully accommodate surgery, hormone therapy, and mental health needs associated with gender transition without compromising military readiness. Only a small number of transgender personnel require surgery, and those who do can plan their surgeries around deployment obligations. The military can manage hormone therapy by using already-existing protocols for prescribing hormones to deployed troops and by training military doctors on the use of hormones in transition-related care. Finally, the military can support transgender service members' mental health by training commanders to create a gender-affirming unit.

In light of evidence that transition-related care can be managed in a way that is consistent with deployment, the courts, Congress, and the DOD itself should move to fully open the U.S. Armed Forces to transgender service members. As Secretary Mattis observed at a 2017 ceremony honoring Martin Luther King Jr. Day, "Military service in America is a touchstone for American patriots of all races, genders, and

¹⁴⁸ PALM CENTER, *Retired Generals and Admirals Warn of Grave Consequences to Transgender Military Ban*, (Feb. 26, 2019), <https://www.palmcenter.org/wp-content/uploads/2019/02/Generals-and-Admirals-transgender-ban.pdf> [<https://perma.cc/NDM3-8X79>].

¹⁴⁹ Implementation Handbook, *supra* note 49, at 31.

creeds.”¹⁵⁰ Military service is a touchstone for American patriots of *all* genders. The courts, Congress, and the Department of Defense should support our distinguished transgender service members in upholding their oath to defend our country.

¹⁵⁰ Sec’y of Def. James Mattis, *supra* note 2.