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BLUEPRINTS FOR SOUND PUBLIC POLICY

MILITARY POLICY ON TRANSGENDER PERSONNEL IS ILLEGAL BECAUSE IT DISCRIMINATES ON THE BASIS OF SEX

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Context: During the first half of 2016, Pentagon officials in charge of personnel policy were grappling with Defense Secretary Ash Carter's order to study how to lift the ban on military service by transgender personnel. Behind the scenes, some officials supported lifting the ban while others opposed it. While most of the conversation centered around questions of implementation and military readiness, the Palm Center wanted to be sure that officials understood that if they failed to lift the ban and implement inclusive policy, they would likely face litigation. In this memo, a retired two-star admiral who had served as the U.S. Navy's Judge Advocate General (top lawyer) explained why the military ban was illegal and hence vulnerable to litigation challenges.

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MILITARY POLICY ON TRANSGENDER PERSONNEL IS ILLEGAL BECAUSE IT DISCRIMINATES ON THE BASIS OF SEX

By RADM John D. Hutson, USN (Ret.)*

Summary

Department of Defense policy discriminates against transgender personnel by categorically denying medically necessary health care and requiring automatic separation without regard to medical fitness. It is illegal for the following reasons:

• Federal health-care law prohibits discrimination on the basis of sex.
• Military health care is subject to this non-discrimination requirement.
• Federal departments agree that sex discrimination includes gender identity.
• Military medical policies clearly discriminate on the basis of gender identity.
• This discrimination violates federal law and also raises significant constitutional concerns.

None of this is to say that the military cannot make medical judgments about fitness for duty—no one argues that it cannot. However, the military health care system cannot establish different tracks of medical policy *based on gender*, one for transgender members and one for everyone else. It cannot automatically deny medically necessary care to some—based on gender identity—that it would provide to others; it cannot deem one category of persons immediately and automatically unfit for duty—again, based on gender identity—when all other persons would be individually assessed for medical fitness.

Memorandum

I. The Affordable Care Act prohibits discrimination in health care on the basis of sex and also on the basis of gender identity, and it applies to the military.

Section 1557 of the Patient Protection and Affordable Care Act (ACA) states that "an individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 [on the basis of sex] . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance."[1] The Department of Defense (DOD) has determined that this ACA provision applies to the military health care system and that DOD must comply with its non-discrimination mandate. DOD also estimated there would be "no costs" for compliance.[2]

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The Department of Health and Human Services (HHS) has issued a final rule[3] making clear that discrimination in health care on the basis of sex (or gender, terms that are used interchangeably) under Section 1557 also includes discrimination on the basis of gender identity, and both are equally prohibited:

> We proposed that discrimination on the basis of sex further includes discrimination on the basis of gender identity. We noted that like other Federal agencies, HHS has previously interpreted sex discrimination to include discrimination on the basis of gender identity. We also noted that courts, including in the context of Section 1557, have recognized that sex discrimination includes discrimination based on gender identity. Thus, we proposed to adopt formally this well-accepted interpretation of discrimination "on the basis of sex."[4]

This "well-accepted interpretation" reflects a broad consensus across federal departments, including DOD, that discrimination on the basis of gender identity is but another form of gender discrimination. DOD's equal opportunity policy for civilians defines sex discrimination to include gender identity discrimination.[5] The Department of Justice has determined that gender discrimination includes gender-identity discrimination "based on an employee's transitioning to, or identifying as, a different sex altogether."[6] The same interpretation is followed by the Department of Education under Title IX, the Department of Labor, and the Office of Personnel Management.[7]

II. Military policy on transgender personnel discriminates on the basis of gender identity.

Military medical policies affecting transgender personnel are precisely the kind of policies that the ACA non-discrimination clause prohibits. The military justifies the transgender ban solely on medical grounds, but the ban requires illegal medical discrimination on the basis of gender identity in three overlapping yet distinct ways.

Discriminatory denial of care: Transgender individuals who require medical care are categorically barred from receiving it, even if medically necessary treatments are precisely equivalent to treatments that non-transgender military personnel receive. For example, many non-transgender service members require and receive hormone therapy, hysterectomies, chest-reduction surgeries, and mental health counseling. Transgender personnel who require these same treatments under the same standard of medical necessity, however, are barred by medical rules from receiving them.[8] As a result, two completely different standards apply to comparable medical care, or even the same medical care, depending on whether the service member is transgender or not.[9] In direct contradiction of the non-discrimination language of ACA Section 1557, military medical policy in effect requires that transgender members "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under"[10] the military health care system. This is the most literal form of health-care discrimination possible, and it is prohibited by the ACA.

Discriminatory medical assessment standards: The military's medical rules prohibit individualized assessment of a transgender service member's fitness for duty or medical readiness. Transgender personnel are deemed unfit by definition as a group, and they are

specifically barred from the medical evaluation process provided to every other service member as an opportunity to demonstrate fitness for duty.[11] Transgender status and transgender medical issues are redefined by regulation to be "developmental defects," not medical issues, and are therefore diverted out of the medical system and into the summary track of automatic administrative separation.[12] This is an automatic judgment of medical "unfitness" regardless of actual medical fitness or need for medical care, which in any event is care that military doctors are prohibited from providing. In complete contrast, military personnel who are not transgender receive medically necessary care based on individual assessment, and they also are given a reasonable period of time for recovery. Only if medical treatment fails in restoring fitness—*for more than a year*—are individuals referred for a formal medical evaluation that could lead to separation from the military.[13] Non-transgender personnel are entitled to medical care and then, if needed, a standard medical process during which they can demonstrate, on an individual basis, that they are in fact medically fit for duty.

Discriminatory failure to follow modern medical consensus: Military rules governing gender identity are decades out of date and reflect assumptions that have been repudiated by professional consensus. In 2016, the transgender ban is still based on medically discredited assumptions that classify transgender people in categories of mental illness that include voyeurism ("peeping tom") and other paraphilia (sexual disorders that can be dangerous and sometimes criminal).[14] Military medical regulation has failed to recognize the substantive shift in medical understanding of gender identity that has taken place over the last 30 years, and instead bases its medical judgment on an inaccurate view of transgender identity as pathological or deviant. In contrast, non-transgender personnel receive medical treatment based on their individual needs and in accordance with modern medical expertise and best medical practices. Reliance on evidence-based medicine to provide safe, effective, and medically necessary care is uncontroversial, provided the care does not relate to gender identity.

The HHS final rule offers clear and simple guidance in establishing non-discriminatory policy. "We noted that based on these [non-discrimination] principles, an explicit, categorical (or automatic) exclusion or limitation of coverage for all health services related to gender transition is unlawful on its face . . ."[15] Denials or limitations of coverage cannot be "a pretext for discrimination" based on gender identity.[16] While Section 1557 does not require covered entities to provide any particular medical treatment, it does require that medical care be provided under "neutral standards that govern the circumstances in which it will offer coverage to all its enrollees in a nondiscriminatory manner."[17] A neutral standard based on a finding of medical necessity, for example, would comply with Section 1557.

III. Military policy on transgender personnel is an unconstitutional denial of equal protection on the basis of sex, like earlier military medical policies that discriminated on the basis of pregnancy.

While Section 1557 and its non-discrimination provision are fairly new in federal law, the *constitutional* principle of non-discrimination in medical policy based on gender is not new to the military. Forty years ago, the military used to require automatic separation of all women who became pregnant. Pregnancy was the only instance of temporary medical disability that required separation from military service, and did so regardless of degree or length of incapacity. Like

gender-related discrimination against transgender personnel, this policy established two medical tracks, one for pregnant personnel and one for everyone else. A court struck down this medical policy as unconstitutional discrimination on the basis of sex. It was medically irrational, and therefore unconstitutional, for the military to manage all other forms of temporary disability by providing necessary medical care and offering accommodation on an individual basis, but to manage pregnancy with automatic separation. In *Crawford v. Cushman*,[18] the court wrote:

> It is important to note that at the time the appellant was discharged from military service, the only temporary physical disability which was cause for mandatory discharge was that of pregnancy. The capacity to serve of all other temporarily disabled personnel was and presumably still is treated on an individual basis.[19]
>
> Why the Marine Corps should choose, by means of the mandatory discharge of pregnant Marines, to insure its goals of mobility and readiness, but not to do so regarding other disabilities equally destructive of its goals, is subject to no rational explanation.[20]

The irrationality of the military's medical regulations concerning transgender service members echoes the policy that was found unconstitutional in *Crawford v. Cushman*. The military has defended its transgender ban in court by equating deployment of transgender personnel to "placing an individual with known coronary artery disease in a remote location." However, military medical guidance expressly permits deployment by individuals who have had heart attacks or coronary bypass grafts, provided a year has passed before deployment.[21] The absence of neutral and non-discriminatory standards, regardless of gender identity, invites such irrational inconsistency. The military should certainly use medical policy to maintain and promote readiness, and it should make distinctions based on medical fitness. However, under both ACA Section 1557 and the Constitution, what military health care cannot do is discriminate on the basis of gender or gender identity by establishing different sets of rules.

Citing a list of consistent holdings treating gender identity as an aspect of gender, the Eleventh Circuit Court of Appeals ruled in *Glenn v. Brumby* that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" and violates the Constitution's guarantee of equal protection.[22] *Glenn* relied in part on *Frontiero v. Richardson*, a significant Supreme Court decision on sex discrimination and military benefits, which held that the "imposition of special disabilities upon the members of a particular sex because of their sex" was an unconstitutional denial of equal protection.[23] Gender-identity discrimination against transgender individuals is no less a discrimination "because of their sex." In a recent decision particularly apt to the transgender ban for service members, the Equal Employment Opportunity Commission (EEOC) similarly found that the Army's mistreatment of a transgender veteran working as a civilian employee constituted discrimination and harassment on the basis of sex.[24]

IV. Conclusion

The military justifies the transgender ban in terms of medical necessity (a rationale that the American Medical Association has found to be without merit).[25] The all-encompassing system of medical discrimination that the ban requires is so sweeping that it is impossible to distinguish

discrimination in health care from discrimination in ability to serve. In the military system, they are the same thing. The military uses discrimination in the provision of health care and in assessment of medical fitness—illegal under the ACA—as a reason to separate transgender personnel without the medical protections it provides to all other persons. The effect of the ban is to categorically exclude transgender individuals as a group from every aspect of the military health care system: medically necessary care, individual assessment of fitness, and modern scientific consensus.

As it stands now, there is one and only one gender-related medical condition or status that requires separation regardless of fitness for duty and regardless of medical risk, and that is being transgender. The transgender ban operates in ways that are unique to military medical policy and are inconsistent with regulation of health care for everyone else. In order to avoid unlawful gender discrimination, neutral principles must control for all, not different standards that apply depending on whether one is male or female, or depending on whether one was identified as male or female at birth. Current military policy that arbitrarily designates transgender personnel as medically unfit and ineligible for medical care is illegal gender discrimination under federal law and the Constitution.

If DOD fails to update its policies to comply with law that requires equal treatment, the President in his capacity as Commander in Chief should issue an executive order directing compliance. If, however, the Department and the President fail to ensure equality for transgender personnel, courts are likely to intervene and find discriminatory policy illegal or unconstitutional.

Our Constitution, laws, regulations, and policies don't operate in a vacuum. They guide real life, including the interaction of members of our society. While, as with the U.S. Supreme Court, it may not always be desirable for the military to take the lead and get too far out in front of societal values, the military is particularly well suited for smooth implementation of its own commitment to equality and opportunity based on merit. As a hierarchical structure, its great strength from the very beginning is, and has always been, good order and discipline. This has been amply demonstrated.

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[1] Section 1557 is codified at 42 U.S.C. § 18116.

[2] U.S. Government Accountability Office, GAO-11-837R, Impact of Health Care Reform Legislation on the Department of Defense, Sept. 26, 2011, Enclosure I, 10. Enclosure I of this GAO report is a list of the "Health Care Reform Provisions with Which the Department of Defense (DOD) Has Determined It Must Comply and Its Estimated Costs for Compliance." Section 1557 is included on that list.

[3] Department of Health and Human Services, Final Rule, Nondiscrimination in Health Programs and Activities, May 18, 2016 [HHS Final Rule].

[4] HHS Final Rule, 45 (omitting citations). The rule specifically addresses recipients of HHS funding, but it was intentionally written in broad terms with the "hope that the [HHS] final rule will inform enforcement of Section 1557 by other Departments with respect to their federally assisted health programs and activities." HHS Final Rule, 14.

[5] Department of Defense Directive 1020.02E, Diversity Management and Equal Opportunity in the DoD, June 8, 2015, 7, 13.

[6] Office of the Attorney General, Memorandum to United States Attorneys: Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964 (Dec. 15, 2014).

[7] See the HHS Final Rule for an extensive summary of the federal regulatory consensus that gender-identity discrimination is a form of prohibited gender discrimination. HHS Final Rule, 44-45.

[8] TRICARE Policy Manual 6010.57-M (2008), Chapter 1, § 1.2, ¶ 1.1.29 (General Exclusions: Services and supplies related to transsexualism or such other conditions as gender dysphoria (including, but not limited, to intersex surgery, psychotherapy, and prescription drugs)); Chapter 4, § 2.1, ¶ 3.18 (Cosmetic, Reconstructive, and Plastic Surgery); Chapter 4, § 15.1, ¶¶ 4.1, 4.2 (Male Genital System); Chapter 7, § 1.1 (Sexual Dysfunctions, Paraphilias, and Gender Identity Disorders); Chapter 7, § 3.10, ¶ 4.1 (Treatment of Mental Disorders).
[9] Diane H. Mazur, Arbitrary and Capricious: Six Inconsistencies Distinguishing Military Medical Policies for Transgender and Non-Transgender Personnel (Palm Center, October 2014), 5, http://www.palmcenter.org/files/Arbitrary%20and%20Capricious.pdf.
[10] Section 1557 of the Affordable Care Act.
[11] Army Regulation 40-501, Standards of Medical Fitness, August 11, 2015, ¶ 3-35. "These conditions render an individual administratively unfit rather than unfit because of physical illness or medical disability. These conditions will be dealt with through administrative channels …"
[12] Department of Defense Instruction 1332.18, Disability Evaluation System (DES), Aug. 5, 2014, ¶ 3i; Appendix 1 to Enclosure 3, ¶ 4(a)(1).
[13] Department of Defense Instruction 1332.18, Appendix 1 to Enclosure 3, ¶ 2.
[14] Army Regulation 40-501, ¶ 3-35.
[15] HHS Final Rule, 193.
[16] HHS Final Rule, 193.
[17] HHS Final Rule, 193.
[18] Crawford v. Cushman, 531 F.2d 1114 (2nd Cir. 1976).
[19] *Id*. at 1118.
[20] *Id*. at 1123.
[21] Arbitrary and Capricious, 24.
[22] Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011).
[23] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).
[24] Lusardi v. McHugh, EEOC Appeal No. 0120133395 (Apr. 1, 2015).
[25] American Medical Association House of Delegates (2015), Military Medical Policies Affecting Transgender Individuals, Resolution 011, http://www.palmcenter.org/files/A-15%20Resoultion%20011.pdf, accessed April 17, 2016.