

**TRANSGENDER SERVICE: THE NEXT SOCIAL DOMINO
FOR THE ARMY**MAJOR MARK R. MILHISER^{*}

*The point is that if the Army completely wasted me over
40 years ago, how many more career caliber, and
otherwise high caliber officers, NCO (Non-
Commissioned Officer) and enlisted personnel has it
wasted and does it continue to waste over its stupid anti-
trans regulations?¹*

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¹ E-mail from Phyllis Randolph Frye, Senior Partner, Frye & Assocs., PLLC Law Firm & Assoc. Mun. Judge in Houston, Tex., to author (Sept. 27, 2013, 05:18 PM EST) (on file with author). Phyllis Frye was born Phillip Randolph Frye on February 10, 1948, and grew up in San Antonio, Texas. Phillip was an Eagle Scout, varsity letter winner and Cadet Colonel for his high school's Corps of Cadets. Phillip went to Texas A&M on a four-year ROTC scholarship in 1966. He completed his Civil Engineering degree in three-and-a-half years. He immediately pursued his Masters Degree in Mechanical Engineering and completed the program after being commissioned as a Second Lieutenant (2LT) in the Regular Army in January 1970. While in the Army, Phillip served at Fort Sam Houston, Texas, and Landstuhl, Germany. In 1972, as his wife was leaving him, Phillip was accused of crossdressing. The Army initiated separation procedures against then-First Lieutenant (1LT) Frye because of the alleged crossdressing. First Lieutenant Frye was ultimately separated with an Honorable discharge in August 1972. In 1976 Phillip transitioned to Phyllis. While presenting as a female, Phyllis was blackballed by engineering firms and was unable to find work in Houston. With the G.I. Bill, Phyllis enrolled in the University of Houston and earned an M.B.A. and J.D. Phyllis has been a lawyer since 1981. In the intervening years, she has become the senior named partner in a law firm, has been appointed a municipal court judge and has an annual Advocacy Award named after her that is presented during Texas A&M diversity celebrations. Phyllis Randolph Frye is the self-proclaimed "Grandmother of the National TG (Transgender) Legal and Political Movement." ALLY WINDSOR HOWELL, TRANSGENDER PERSONS AND THE LAW, at xiv (2013).

I. Introduction

The U.S. military has a track record of adapting to societal shifts.² Sometimes the military is the impetus for change and at other times it is the last to adapt. Women were once relegated to non-uniformed and non-combat support positions. Today, women are allowed to serve, attend military academies, and participate in ground combat hostilities.³ African-Americans encountered segregation, lack of opportunity for advancement, and targeted hatred while serving in uniform, and today an African-American is Commander in Chief of the armed forces. Currently, the Army celebrates its diversity by recognizing the heritage and history of its minority personnel,⁴ yet gender, race, and ethnicities are not the only societal issues that the U.S. military has addressed. Recent reform of sexual assault laws⁵ and the Department of Defense's (DoD's) initiative to eradicate hazing and bullying⁶ in the service academies and in the ranks shows a continually adapting military that reflects the U.S. military and society as a whole.

² Women's Armed Services Integration Act of 1948, Pub. L. No. 625, ch 449, 62 Stat. 356 (authorizing enlistment and appointment of women in the active duty and reserve armed forces).

³ U.S. Dep't of Def. Appropriation Authorization Act, Pub. L. No. 94-106, tit. VIII, 89 Stat. 531 (1975) (authorizing women to attend the U.S. service academies). See U.S. DEP'T OF DEF., REPORT TO CONGRESS ON THE REVIEW OF LAWS, POLICIES AND REGULATIONS RESTRICTING THE SERVICE OF FEMALE MEMBERS IN THE U.S. ARMED FORCES (2012). See also U.S. DEP'T OF ARMY, DIR. 2012-16, CHANGES TO ARMY POLICY FOR THE ASSIGNMENT OF FEMALE SOLDIERS (27 June 2012).

⁴ Memoranda from Sec'y of Army, Chief of Staff of the Army, and Sergeant Major of the Army, announcing African American Black History Month (Feb. 2013), Asian Pacific American Heritage Month (May 2013), National Hispanic Heritage Month (15 Sept.–15 Oct. 2013), and National American Indian Heritage Month (Nov. 2013) (on file with author). See also U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY ch. 6 (18 Mar. 2008) [hereinafter AR 600-20] (RAR 20 Sept. 2012).

⁵ National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, § 1701–1753.

⁶ U.S. DEP'T OF DEF., DIR. 1322.22, SERVICE ACADEMIES para. 4.5.3 (24 Aug. 1994). See also AR 600-20, *supra* note 4, para. 4-20. See also *On Quality of Life in the United States Army*, 112th Cong. 2d Sess. (2012) (statement of Sergeant Major of the Army). See also Army Sergeant First Class Tyron C. Marshall, Jr., *Pentagon Official Underscores Zero Tolerance Policy for Bullying*, AM. FORCES PRESS SERV., Dec. 21, 2011, available at <http://www.defense.gov/news/newsarticle.aspx?id=66573>. See also *defense.gov/news/newsarticle.aspx?id=66573*. See also Donna Miles & Army Sergeant First Class Tyrone C. Marshall, Jr., *Dempsey: Hazing, Bullying 'Intolerable' in Military*, AM. FORCES PRESS SERV., Dec. 23, 2011, available at <http://www.defense.gov/news/newsarticle.aspx?id=66590>.

“Don’t Ask, Don’t Tell” (DADT) was repealed on September 20, 2011.⁷ As a result, lesbian, gay, and bisexual servicemembers can now serve openly and are no longer subject to administrative separation based on homosexual acts, homosexual statements, marriage, or attempts to marry a person of the same biological sex.⁸ The lesbian, gay, bisexual, and transgender (LGBT) community championed this historic change.⁹ However, a growing, well-funded, organized minority argues that the repeal of DADT was not enough.¹⁰

The repeal of DADT did not change the prohibition of service for transgender personnel; their service is currently prevented by regulation.¹¹ In the Army, Army Regulation (AR) 40-501, *Standards of Medical Fitness*, prohibits servicemembers from serving in the military if they have “a history of, or current manifestations . . . of transsexualism, gender identity disorder to include major abnormalities or defects of the

⁷ 10 U.S.C. § 654 (2010) (originally enacted as Don’t Ask, Don’t Tell Repeal of Act of 2010, Pub. L. No. 111-321, 124 Stat. 3516, (2010)) (codified as Repeal 10 U.S.C. § 654) Act of 2010, triggered review by the military. The review took place and certification was signed by President Obama, Secretary of Def. Gates, and Chairman, Joint Chiefs of Staff Mullen. Implementation of the repeal took place sixty days later. That repeal was formalized by an Under Sec’y of Def. memorandum. See *infra* note 8.

⁸ Memorandum from Under Secretary of Def. (Personnel and Readiness), to Secretaries of the Military Departments et al., subject: Repeal of “Don’t Ask, Don’t Tell” (20 Sept. 2011).

⁹ Lieutenant Colonel Steve Loomis, *A Difficult Fight Pays Off*, OUTSERVE MAG., Nov. 2011, at 20. See also Aaron McQuade, *GLAAD Applauds Passage of DADT Repeal in House* (Dec. 15, 2010), <http://www.glaad.org/2010/12/15/glaad-applauds-passage-of-dadt-repeal-in-house>. The Gay & Lesbian Alliance Against Defamation (GLAAD) was founded in 1985. Its stated mission rewrites the script for Lesbian Gay Bisexual Transgender (LGBT) equality in addition to acting as dynamic media force and provoking dialogue that leads to positive change. Gay & Lesbian Alliance Against Defamation (GLAAD), <http://www.glaad.org/about#mission>. See also Sheryl Gay Stolberg, *Obama Signs Away ‘Don’t Ask, Don’t Tell’*, N.Y. TIMES, Dec. 23, 2010.

¹⁰ Tom Vanden Brook, *Transgender Troops Serve in Silence*, USA TODAY, July 23, 2013. See also Press Release, Palm Center, *Blueprints for Sound Public Policy, New Multi-Year Research Project to Address Transgender Military Service* (July 30, 2013) (on file with author). See also *Tawani Foundation, Wells Fargo Award \$1.35 Million for Research on Transgender Military Service*, PHILANTHROPY NEWS DIG. (Aug. 1, 2013), <http://www.philanthropynewsdigest.org/news/tawani-foundation-wells-fargo-award-1.35-million-for-research-on-transgender-military-service>.

¹¹ U.S. DEP’T OF DEF., INSTR. 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES para. 29r (28 Apr. 2010) [hereinafter DoDI 6130.03] (C1, 13 Sept. 2011). The following conditions listed are those that do *not* meet the medical standards for appointment, enlistment, or induction into the military services; current or history of psychosexual conditions, including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias.

genitalia such as change of sex or a current attempt to change sex”¹² The medical diagnoses that prevent transgender servicemembers from serving in the military have a close relationship to the diagnosis criteria found in the Diagnostic and Statistical Manual of Mental Disorders (DSM).¹³ The most recent edition, the DSM-5, contains revisions to the diagnoses of those who are not content with their assigned gender or who identify with the opposite gender.¹⁴ These changes more accurately define the diagnosis, reduce the stigma associated with transgender terminology, and remove the diagnosis from being grouped with sexual dysfunctions.¹⁵ In part, based on these changes, the military’s perception of transgender individuals is also changing.

The transgender community is slowly gaining acceptance throughout U.S. society, but that acceptance has yet to reach the U.S. armed forces. However, the militaries of U.S. allies accept transgender personnel into their ranks.¹⁶ Australia allows transgender servicemembers to serve openly and advises its defense force, supervisors, and commanders to create a more inclusive workplace and culture for transitioning these

¹² U.S. DEP’T OF ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS para. 3-35a (14 Dec. 2007) [hereinafter AR 40-501] (RAR 4 Aug. 2011). This regulation covers medical fitness standards for enlistment, induction, and appointment, as well as retention and separation, including retirement. *Id.* para. 1-1.

¹³ AM. PSYCHIATRIC ASSOC.: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed., text rev. 2000) [hereinafter DSM-IV-TR]. *See also* AM. PSYCHIATRIC ASSOC.: DSM-5 DEVELOPMENT, *Frequently Asked Questions*, <http://www.dsm5.org/about/Pages/faq.aspx#1> (last visited Mar. 14, 2014). The DSM is an official publication from the American Psychiatric Association (APA). It is the handbook that health care professionals in the United States use as a guide to diagnose patients. Moreover, behavioral health care providers around the world consider it the “authoritative guide” in their profession. *Id.*

¹⁴ AM. PSYCHIATRIC ASSOC.: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 822 (5th ed. 2013) [hereinafter DSM-5]. The Roman numeral was dropped from this edition of the DSM, DSM-5, so incremental updates, i.e., *DSM-5.1*, *DSM-5.2*, etc., can be facilitated until a new edition is required. AM. PSYCHIATRIC ASSOC., *Frequently Asked Questions*, available at <http://www.dsm5.org/about/Pages/faq.aspx#8>.

¹⁵ AM. PSYCHIATRIC ASSOC., GENDER DYSPHORIA (2013) [hereinafter GENDER DYSPHORIA FACT SHEET], available at <http://www.dsm5.org/Documents/Gender%20Dysphoria%20Fact%20Sheet.pdf>.

¹⁶ DEP’T OF DEF. (2011) UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.) (Nov. 10, 2011) [hereinafter UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.)], available at <http://www.defglis.com.au/resources/UnderstandingTransition.pdf>. *See also* U.K. MINISTRY OF DEFENCE, DEFENCE INSTR. AND NOTICES (DIN) 2009DIN01-007, POLICY FOR THE RECRUITMENT AND MANAGEMENT OF TRANSSEXUAL PERSONNEL IN THE ARMED FORCES (Jan. 2009) [hereinafter DIN 01-007].

members.¹⁷ Likewise, the United Kingdom (UK) issued statutory protections resulting in transgender troops being held to the same standards as their colleagues.¹⁸ Although the U.S. military still prohibits transgender service, changes within U.S. society, as discussed later in this article, indicate legislators may need to reevaluate the current prohibition.

This article contains five sections. First, it identifies the terminology associated with being transgender as well as the changes included in the most recent publication of the DSM. Then, a discussion follows on the current procedures in place that prevent transgender recruits and servicemembers from serving in the U.S. armed forces, specifically in the U.S. Army.¹⁹ Third, this article examines the policy and legislative changes that U.S. allies have taken to include transgender servicemembers in their defense force. Fourth, a survey of grassroots campaigns to overturn the military's prohibition against transgender service assists the reader in understanding how the current service of civilian transgender personnel in the DoD will benefit the military as it creates and fosters an atmosphere of tolerance and acceptance. The fifth section of this article reviews recent court decisions, legislative action, and Veterans Affairs (VA) policy that indicate an increased level of acceptance in society for transgender individuals. The U.S. military rarely makes policy changes in a vacuum. Before delving into transgender evolution in foreign services and in U.S. courts, it is helpful to review the history of transgender issues in both the medical and the military communities.

II. The Evolution of Transgender in the Diagnostic and Statistical Manual of Mental Disorders

The DSM is an official publication of the American Psychiatric

¹⁷ AIR FORCE DIVERSITY HANDBOOK: TRANSITIONING GENDER IN AIR FORCE 5 (Austl.) (Apr. 2013), available at <http://defglis.com.au/guides/GenderTransition.pdf>. See also UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.), *supra* note 16.

¹⁸ The Sex Discrimination Act 1975 (U.K.), Sex Discrimination (Gender Reassignment) Regulations 1999 (U.K.), Gender Recognition Act 2004 (U.K.). See also DIN 01-007, *supra* note 16.

¹⁹ This article does not address potential impacts on the military health system or on TRICARE, the health care program serving uniformed servicemembers, retirees, and their families worldwide. This article evaluates the current prohibition of transgender servicemembers as it relates to the Army and policy implications.

Association (APA) that is used by clinicians, physicians, researchers, and mental health professionals to diagnose and classify mental disorders.²⁰ Historically, U.S. mental health statistics were gathered by census in order to determine mental illness frequency in the population.²¹ After World War II, with the assistance of the U.S. Army, a broader set of diagnoses were developed to address the mental health of returning servicemen and veterans.²² Since that time, the APA has published numerous editions of the DSM, beginning with the DSM-I in 1952, and most recently, the DSM-5 in May 2013.²³

Transgender is an inclusive term referring to the broad spectrum of individuals who transiently or persistently identify with the gender that is the opposite of their natal gender.²⁴ The term transgender can also include transsexuals and cross-dressers.²⁵ A transsexual is an individual who lives full-time in a gender role consistent with his or her inner gender identity, and not his or her natal gender, with or without surgery.²⁶ Sex reassignment surgery is not a requirement to be identified specifically as a transsexual or in the broader category of transgender. Gender Dysphoria (GD) replaced Gender Identity Disorder (GID) as a diagnosis in the most recent DSM publication that falls within the category of transgender, as explained below.

Before the DSM-5, the version of the DSM was the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), published in 2000. The DSM-IV-TR diagnosis of GID was based upon two components. The first component required that a person demonstrate evidence of a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of

²⁰ GENDER DYSPHORIA FACT SHEET, *supra* note 15.

²¹ AM. PSYCHIATRIC ASSOC., *DSM: History of the Manual*, available at <http://www.www.psychiatry.org/practice/dsm/dsm-history-of-the-manual> (last visited Feb. 28, 2014).

²² *Id.*

²³ *Id.*

²⁴ GENDER IDENTITY RESEARCH AND EDUCATION SOCIETY (GIRES), GENDER VARIANCE (DYSPHORIA), vers. 2.0 (rev. Aug. 31, 2008), available at <http://www.gires.org.uk/assets/gdev/gender-dysphoria.pdf>. See also DSM-5, *supra* note 14 at 451, 822. Gender Assignment is defined as “[t]he initial assignment as male or female, which usually occurs at birth and is subsequently referred to as the ‘natal gender.’”

²⁵ HOWELL, *supra* note 1, at 194. See also GLAAD MEDIA REFERENCE GUIDE TRANSGENDER GLOSSARY OF TERMS, available at <http://www.glaad.org/reference/transgender> (last visited Feb. 28, 2014).

²⁶ HOWELL, *supra* note 1, at 194.

the opposite sex.²⁷ The second component encompassed an individual showing evidence of persistent discomfort about one's assigned birth sex or a sense of inappropriateness in the gender role of that sex.²⁸ The DSM-IV-TR groups the GID diagnosis in a chapter with Sexual Desire Disorders, Orgasmic Disorders, Sexual Pain Disorders, other Sexual Dysfunctions and Paraphilias.²⁹ The diagnosis and alignment, however, was short-lived, as the DSM-5, recently published in 2013, does not list GID as a diagnosis. Further, the DSM-5 removes the new diagnosis, which is now classified as GD from the chapter of Sexual Desire Disorders, Sexual Dysfunctions, and Paraphilias and places it in its own independent chapter.³⁰ This is significant because the grouping of GID with the other diagnoses in the DSM-IV-TR matches the grouping in the Army regulation. Now that GD is in its own chapter, separate from the other diagnoses, it will be a challenge to keep GD with the other diagnoses in any update or revision to AR 40-501.³¹

As with the diagnosis of GID, the diagnosis of GD has two components. The first component requires that an individual has a marked incongruence between his gender expression and his assigned gender at birth or natal gender.³² The second component is that the incongruence results in distress for the individual.³³ The change in diagnosis aspires to better characterize the experiences of affected children, adolescents, and adults.³⁴ The DSM-5 diagnosis of GD is an effort to "emphasize the phenomenon of 'gender incongruence' rather than cross-gender identification."³⁵ The chapter change removes the

²⁷ DSM-IV-TR, *supra* note 13, at 576.

²⁸ *Id.*

²⁹ *Id.* at 535. Paraphilias are characterized by recurrent, intense sexual urges, fantasies, or behaviors that involve unusual objects, activities, or situations and cause clinically significant distress or impairment in social, occupational, or other important areas of functioning. Paraphilias include Exhibitionism, Fetishism, Pedophilia, Sexual Masochism, and Sexual Sadism. *Id.*

³⁰ DSM-5, *supra* note 14, at 451.

³¹ For the Army, the challenge in keeping GD with the previous groupings is that the Army would be ignoring a significant shift in the DSM-5, which is considered the "bible" of American psychiatry.

³² *Id.* at 453.

³³ *Id.*

³⁴ GENDER DYSPHORIA FACT SHEET, *supra* note 15. The new diagnostic name is more applicable to the symptoms and behaviors of the patient yet does not jeopardize access to treatment options.

³⁵ DSM-5, *supra* note 14, at 814. Gender Dysphoria (GD) takes into account the wide variation of gender-incongruent conditions that an individual can experience, whereas Gender Identity Disorder (GID) only addressed the identification with the opposite sex,

diagnosis from being considered a sexual dysfunction and treats it as a mental health issue. Additionally, the changes in the new edition avoid stigmatizing GD individuals by offering a diagnostic name that is more appropriate, without jeopardizing access to effective treatment options.³⁶ These changes are expected to allow insured clinical care for individuals who express themselves differently from their birth gender.³⁷

Despite being considered the “bible of psychology,”³⁸ not all mental health professionals agree that DSM-5, or its development process, is perfect. Gary Greenberg, a practicing psychotherapist who participated in the development of the DSM-5, is critical of its revision process and is largely skeptical of the DSM-5.³⁹ In *The Book of Woe* he details what he observes as flaws in the DSM-5 research and revision process by questioning the politics and business of psychiatry and the APA.⁴⁰ Similarly frustrated with the DSM-5 is Dr. Allen Frances, who led the DSM-IV edition.⁴¹ As a leader in the psychiatric community, Dr. Frances was privy to the proposed changes to the DSM-5 before its publication.⁴² In his book, *Saving Normal*, he cautions the public and his colleagues that using the new DSM-5 may lead to mislabeling normal people, promoting diagnostic inflation, and encouraging medical

male or female. *DSM-V Self-Exam: Gender Dysphoria*, PSYCHIATRY ONLINE (Oct. 30, 2013), <http://psychnews.psychiatryonline.org/newsArticle.aspx?articleid=1764484&RelatedWid>.

³⁶ GENDER DYSPHORIA FACT SHEET, *supra* note 15.

³⁷ *Id.* See also Kelly Winters, *Gender Dysphoria Diagnosis to be Moved Out of Sexual Disorders Chapter of DSM-5* (The Bilerico Project), Dec. 9, 2012, available at http://www.bilerico.com/2012/12/gender_dysphoria_diagnosis_to_be_moved_out_of_sex_u.php (last visited Mar. 2, 2014).

³⁸ Sharon Begley, *Psychiatrists Unveil Their Long-Awaited Diagnostic “Bible.”* REUTERS, May 17, 2013, available at <http://www.reuters.com/article/2013/05/17/us-science-psychiatry-dsm-idUSBRE94G04420130517> (last visited Mar. 2, 2014).

³⁹ GARY GREENBERG, *THE BOOK OF WOE* 287 (2013). Gary Greenberg is the author of four books, a contributing writer for *Mother Jones*, and a contributing editor for *Harper’s*. Gary Greenberg, *Biography*, <http://www.garygreenbergonline.com/pages/bio.php>.

⁴⁰ *Id.*

⁴¹ ALLEN FRANCES, *SAVING NORMAL: AN INSIDER’S REVOLT AGAINST OUT OF CONTROL PSYCHIATRIC DIAGNOSIS, DSM-5, BIG PHARMA, AND THE MEDICALIZATION OF ORDINARY LIFE*, at xiii (2013). Allen Frances, M.D., was the chairman of the DSM-IV Task Force and part of the leadership group for DSM-III and DSM-III-R. He is Professor Emeritus and Chair of the Department of Psychiatry and Behavioral Science at Duke University School of Medicine. The following websites provide further details on the Duke faculty and Allen Frances: <http://psychiatry.duke.edu/faculty/details/0098224>, <http://www.psychiatrictimes.com/authors/allen-frances-md>.

⁴² FRANCES, *supra* note 41, at 172–76.

providers to prescribe medication inappropriately.⁴³ Moreover, he argues that the danger of increased prescription medications in the mental health world will impede a patient's ability to heal himself.⁴⁴

While both authors take issue with numerous parts of the DSM-5, such as the research validity or certain diagnoses, neither challenges the removal of GID or its replacement of GD. With the absence of GID from the DSM-5 and the addition of GD in a different chapter from Sexual Disorders, Sexual Dysfunctions, and Paraphillias, the military must evaluate and reform its policies and regulations addressing transgender servicemembers because the current Army regulation still reflects GID, not the more modern and medically accurate GD diagnosis.⁴⁵

III. Current State of Transgender in the Military

Department of Defense Instruction (DoDI) 6130.03, last updated in 2011, contains the DoD's policy and guidance on medical standards for the assessment and retention of military personnel.⁴⁶ These standards are subject to periodic review by the DoD and are based on the needs of the military.⁴⁷ By operation of DoDI 6130.03, the Secretary of Defense (SecDef) directs the Secretaries of the Military Departments to develop and enforce those medical standards.⁴⁸ If a recruit or servicemember is unable to meet medical standards to assess or remain in the armed forces, DoDI 6130.03 permits each branch of service to exclude or discharge that individual from the military.⁴⁹ Each service has the ability to waive

⁴³ *Id.* at 3–34.

⁴⁴ *Id.* at xx, 209–11.

⁴⁵ DSM-5, *supra* note 14.

⁴⁶ DoDI 6130.03, *supra* note 11, enclosure 4, para. 29r.

⁴⁷ U.S. DEP'T OF DEF., INSTR. 5025.01, DOD DIRECTIVES PROGRAM para. 3c (26 Sept. 2012) (C1, 20 Aug. 2013). The Secretary of Defense (SecDef) derives his power to exercise authority, direction, and control of the Department of Defense (DoD) from 10 U.S.C. § 113. To establish and implement his policies, delegate authorities, and to lead the DoD, the SecDef uses a number of DoD Issuances to communicate his message. These official issuances include DoD Directives (DoDD), DoD Instructions (DoDI), DoD Manuals (DoDM), and other similar documents.

⁴⁸ DoDI 6130.03, *supra* note 11, enclosure 2, para. 3.

⁴⁹ *Id.* A recruit can enter the military and not disclose his desire to express himself in a different gender. After becoming a member of the armed forces, that individual may express himself as a transgender individual. Once that happens, the military may initiate proceedings to separate the individual from the service. *Id.*

accession standards found in the DoDI based on individual service needs.⁵⁰ Accession standards outline the minimum medical standard required for any and all service positions while retention standards are specific to each service.⁵¹

In the Army, Army Regulation 40-501, Standards of Medical Fitness addresses retention standards. The regulation was last revised in 2011.⁵² In this regulation, a person diagnosed with GID is administratively unfit for service.⁵³ Such a declaration in the Army is significant. An “administratively unfit” finding prohibits the individual from being medically evaluated for continued service.⁵⁴ The approach is different from most other diagnoses enumerated in AR 40-501. Other diagnoses allow unfit soldiers to be reconsidered for service through the Army’s Medical Evaluation Board (MEB) and Physical Evaluation Board (PEB) system.⁵⁵ These boards are the Army’s mechanism for evaluating whether a soldier with an ailment or diagnosis, such as a mental health diagnosis, can continue his military service.⁵⁶ A Soldier who is diagnosed who can continue performing his responsibilities in the Army will continue serving. Notably, individuals with GID or GD cannot even be evaluated for further military service in the U.S. Army. The GID or GD diagnosis removes the ability for their cases to be treated individually. They may, however, be able to continue to serve in the military of our allies.⁵⁷

⁵⁰ *Id.* enclosure 2, para. 3b.

⁵¹ *Id.* para. 1b. Being free from a contagious disease that will probably endanger the health of other personnel and being medically capable of completing required training are two examples of accession standards. *See id.* para. 4c(1) & (3). Soldiers incapable of performing their duties with a hearing aid or soldiers that have challenges with range of motion for one of their joints are examples of retention standards that would require medical review for continued service. *See* AR 40-501, *supra* note 12, paras. 3-10a and 3-12b.

⁵² AR 40-501, *supra* note 12, at Summary of Change. The revisions in 2011 implemented the Don’t Ask, Don’t Tell Repeal Act of 2010 by deleting references to separation for homosexual conduct. *Id.*

⁵³ *Id.* para. 3-35b. *See also* U.S. DEP’T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS chs. 3–5 (6 June 2005) (RAR 6 Sept. 2011). A soldier who is administratively unfit for service and is separated may lose continued benefits, health care, and retirement.

⁵⁴ *Id.* para. 3-3.

⁵⁵ *Id.*

⁵⁶ U.S. DEP’T OF DEF., INSTR. 1332.38, PHYSICAL DISABILITY EVALUATION enclosure 3 (14 Nov. 1996) (C2, 10 Apr. 2013).

⁵⁷ DR. JOYCELYN ELDERS & REAR ADMIRAL ALAN M. STEINMAN (RET.), REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION 21 (Mar. 2014) [hereinafter REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION], *available at* <http://www>.

IV. Foreign Services Allowing Transgender Servicemembers

A. Australia

The Australian Defence Force (ADF) allows transgender military members to serve openly.⁵⁸ The ADF's acceptance of transgender servicemembers results from parliamentary action and regulatory implementation.⁵⁹ The ADF regulations state, "Defence is committed to fostering a diverse, inclusive, equitable, fair and safe work environment."⁶⁰ The Australian military is dedicated to fostering an environment of trust and openness where people are comfortable and can demonstrate initiative, efficiency, and effectiveness.⁶¹

Historically, the Australian government and the leadership of the ADF have sought to expand the diversity of its military. In November 1992, the Australian government ended its ban on homosexuals serving in the military,⁶² nineteen years before the United States repealed DADT. Today, the ADF shows public support of its homosexual and transgender servicemembers in a variety of ways.

On March 2, 2013, in celebration of the twentieth anniversary since lifting its ban on gays and lesbians serving in the military,⁶³ the ADF authorized attendance for ADF members to march in formation and in

palmcenter.org/files/Transgender%20Military%20Service%20Report.pdf. The report focuses on the current regulatory rationale that prevents transgender service as well as the medical aspects of transgender service—mental health, cross-sex hormone therapy, gender confirming surgery, deployability, and adaptability and continuity of care. This report is part of the Transgender Military Initiative that is being funded by the Tawani foundation and Wells Fargo. The Tawani Foundation, *infra* note 79. This report states that at least twelve countries allow transgender personnel to serve; Australia, Belgium, Canada, the Czech Republic, Denmark, Israel, the Netherlands, New Zealand, Norway, Spain, Sweden, and the UK.

⁵⁸ The Australian Defence Force (ADF) is comprised of the Royal Australian Air Force, the Royal Australian Navy, and the Australian Army. See DEFENCEJOBS.GOV, <http://www.defencejobs.gov.au/>.

⁵⁹ *Sex Discrimination Act 1984* (Cth) pts. 5A and 5B (Austl.). DEP. PERSONNEL INSTR. 1/2001 EQUITY AND DIVERSITY IN THE DEP. OF DEFENCE (Austl.) (22 Jan. 2001).

⁶⁰ UNDERSTANDING TRANSITIONING GENDER IN THE WORKPLACE (Austl.), *supra* note 16, at 3.

⁶¹ *Id.*

⁶² *Sex Discrimination Act 1984* (Cth) pt. 5A (Austl.).

⁶³ *Australia Ends a Prohibition on Homosexuals in Military*, N.Y. TIMES, Nov. 24, 1992, <http://www.nytimes.com/1992/11/24/world/australia-ends-a-prohibition-on-homosexuals-in-military.html>.

uniform at the Sydney Mardi Gras Parade.⁶⁴ An additional purpose of this display was to generate positive media coverage of the Defence's respect for and inclusion of transgender individuals.⁶⁵ In another example, the Australian Chief of the Air Force, Air Marshal Geoff Brown, published a handbook to assist transgender servicemembers and their supervisors in creating a more inclusive workplace and culture for transitioning members.⁶⁶ This handbook covers outreach sources, as well as a roadmap outlining all expectations for affected personnel during the transition.⁶⁷ Further, the ADF has publicly supported the transition of a senior officer.⁶⁸ In addition, another strong ally of the United States has

⁶⁴ THE AUSTRALIAN DEFENCE LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX INFORMATION SERV. (DEFGLIS), ADMIN. INSTR. NO. 01/2012, amend. 1 (Feb. 21, 2013). The Sydney Mardi Gras parade is the largest event of the annual Sydney Gay and Lesbian Mardi Gras. The organizing group, Sydney Gay and Lesbian Mardi Gras (SGLMG) holds the event in order to raise the visibility of the lesbian, gay, bisexual, transgender, queer, and intersex communities. *About*, MARDIGRAS.ORG, <http://www.mardigras.org.au/homepage/about/> (last visited Mar. 2, 2014).

⁶⁵ *Id.*

⁶⁶ AIR FORCE DIVERSITY HANDBOOK: TRANSITIONING GENDER IN AIR FORCE 5 (Austl.) (Apr. 2013), available at <http://defglis.com.au/guides/GenderTransition.pdf>. Air Marshal Geoff Brown is the current Chief of Air Force for the Royal Australian Air Force (RAAF). He joined the RAAF in 1980. Since that time he has more than five thousand hours in military aircraft and has held multiple leadership positions. AIRFORCE.GOV.AU, http://www.airforce.gov.au/Our_People/Our_Leaders/Chief_of_Air_Force/?RAAF-cIPygZYc/Fwxxi5dCKVD3g8SFEpfUGXS.

⁶⁷ *Id.*

⁶⁸ Recently, the ADF publicly showed its support of transgender personnel in its treatment of Australian Army Lieutenant Colonel (Lt Col) Cate McGregor. Lieutenant Colonel Cate McGregor, before she changed her name, was known as Lt Col Malcolm McGregor. Ian McPhedran, *Transgender Lieutenant Colonel Cate McGregor Speaks Out About Abuse and Support*, NEWS.COM.AU, July 5, 2013, <http://www.news.com.au/national/transgender-lieutenant-colonel-cate-mcgregor-speaks-out-about-abuse-and-support/story-fncynjr2-1226674523255>. Lieutenant Colonel McGregor is the highest-ranking transgender person in the ADF. She is a published author, MALCOLM MCGREGOR, AN INDIAN SUMMER OF CRICKET: REFLECTIONS ON AUSTRALIA'S SUMMER GAME (2012), and former reporter on the sport of cricket. Cate McGregor, *Pointing to the End of a Legendary Generation*, AUSTRALIAN FIN. REV., Dec. 1, 2012; *Clark Wins Struggle for Acceptance*, AUSTRALIAN FIN. REV., Nov. 24, 2012; *Australia Questions Cricket*, AUSTRALIAN FIN. REV., Nov. 17, 2012; *Too Early to Tell*, AUSTRALIAN FIN. REV., Nov. 13, 2012. She is also a speechwriter for the senior Australian Army Officer, Army Chief, Lieutenant General (Lt Gen) David Morrison. McPhedran, *supra*. In the summer of 2013, Lt Gen Morrison gained international attention for his speech that addressed the behavior of Australian military officers and non-commissioned officers who, without consent, produced and distributed, on defence computers, videos, and pictures of themselves having sex with women who were members of the ADF. *Id.* See also Australian Associated Press, *ADF Officers Allegedly Emailed Sex Films*, HERALD SUN (Austl.), June 14, 2013 available at

opened its military to transgender servicemembers in an attempt to advance tolerance and acceptance within its ranks.

B. United Kingdom

The United Kingdom enacted laws over the past four decades eliminating discrimination, including transgender discrimination. This legal position is reflected in military policy and practice. In 1975, the Sex Discrimination Act (SDA) guaranteed a servicemember would not be subject to discrimination based on individual sex.⁶⁹ In 1999, the SDA expanded anti-discrimination rights to those undergoing gender reassignment. The expansion is known as the Sex Discrimination Regulations of 1999 and covers “persons who intend to undergo, are undergoing or have undergone gender reassignment.”⁷⁰ In addition to the SDA and the Sex Discrimination Regulations of 1999, the UK continued to legislate to ensure equality. In the last decade, the UK enacted the Gender Recognition Act of 2004, which governs the legal rights related to changing gender; the Equality Act of 2006, establishing a Commission of Equality and Human Rights; and the Equality Act of 2010, which replaced the SDA and other anti-discrimination acts.⁷¹

Despite the legislation, the Ministry of Defence (MoD) was still challenged with enhancing tolerance, opportunity, and equality. The Armed Forces Act of 2006 created the Services Complaints Commissioner.⁷² The position was created to help combat improper

news/adf-officers-allegedly-emailed-sex-films/story-fni0xqi4-1226663588676. His tone and speech emphasized the ADF’s intolerance for the denigrating behavior. *Chief of Army Message Regarding Unacceptable Behavior* (June 12, 2013), http://www.youtube.com/watch?v=QaqpoeVgr8U&list=UUSXqARiuZFpFaRDE_056y3w&feature=c4-over-overview. Lieutenant General Morrison’s speech was authored by Lt Col Cate McGregor. McPhedran, *supra*. Lieutenant Colonel McGregor recently took part in an interview about her transition and the professional relationship she shares with Lt Gen Morrison, both currently as a woman, and formerly as a man. Interview by Jane Hutcheon, Australian Broadcasting Corp. (ABC) journalist and host of One Plus One, with Lieutenant Colonel Cate McGregor, Speechwriter to Australian Chief of Army Lt Gen David Morrison, <http://www.abc.net.au/news/2013-07-05/one-plus-one-lieutenant-colonel-cate-mcgregor/4802564>. Despite the attention her transition has brought to Lt Gen Morrison, Lt Col McGregor retains his support. *Id.*

⁶⁹ Sex Discrimination Act 1975, ch. 65, §§ 6, 7, 85 (U.K.).

⁷⁰ Sex Discrimination (Gender Reassignment) Regulations 1999, § 7(1) (U.K.).

⁷¹ Gender Recognition Act 2004, ch. 7 (U.K.), Equality Act 2006, ch. 3 (UK), Equality Act 2010, ch. 15 (U.K.).

⁷² Armed Forces Act 2006, ch. 52 § 334–39, 366 (U.K.).

behavior in the armed forces, including bullying, harassment, and unlawful discrimination.⁷³ In addition to the legislation and creation of an office to monitor and address soldier complaints, the MoD implemented regulatory guidance detailing expectations of transgender recruits, transgender personnel and their managers.⁷⁴ These policies and regulations provide guidelines on how to address issues involving transgender servicemembers, including accession, gender reassignment surgeries, physical fitness standards, housing, law enforcement, and detention by the military police.⁷⁵ Although the transition has taken decades, the UK has made great strides in achieving its stated goal of gender equality throughout its government.

C. Other U.S. Allies

It is important to recognize that deployed U.S. troops may serve with transgender personnel from other militaries in a joint environment. In addition to Australia and the UK, other U.S. allies also support transgender servicemembers. Since 1998, the Canadian military affords its soldiers the right to have government-funded gender reassignment surgery.⁷⁶ Canada also requires those servicemembers who emotionally and psychologically feel they belong to the opposite sex to wear the uniform of their target gender.⁷⁷ Israel has also reportedly started to accept transgender recruits; in August of 2013, the press reported that a female-to-male transgender soldier was accepted for conscription into the Israeli military.⁷⁸ Not all U.S. allies allow transgender servicemembers, but the Pentagon should take note that its closest allies do allow

⁷³ Press Release, Service Complaints Commissioner for the Armed Forces, After 5 Years the Armed Forces Complaints System is Still Inefficient and Undermines Confidence in the Chain of Command. Service Complaints Commissioner Urges Ombudsman as Way Ahead (U.K.) (Mar. 21, 2013) (on file with author).

⁷⁴ DIN 01-007, *supra* note 16. See also Equality and Diversity of Schemes 2008–2011, Ministry of Defence (U.K.).

⁷⁵ DIN 01-007, *supra* note 16.

⁷⁶ Thaddeus Baklinski, *Canadian Military Established Dress Rules for Transsexuals*, LIFESITENEWS.COM. (Dec. 8, 2010, 16:59 EST), http://www.lifesitenews.com/news/canadian-military-establishes-dress-rules-for-transsexuals?utm_tm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=7cf5fdde7e-LifeSiteNews_com_US_Headlines_12_08_2010&utm_medium=email.

⁷⁷ *Id.*

⁷⁸ Cheryl K. Chumley, *Israel Drafts First Transgender Female Soldier*, WASH. TIMES, Aug. 15, 2013, available at <http://www.washingtontimes.com/news/2013/aug/15/israel-drafts-first-transgender-female-soldier/>.

transgender service.

V. Grassroots Movement to Change the U.S. Military Ban

Organizational change is not always generated by high-level leadership. Outside forces and individual ideas from within can sometimes play a significant role leading to change. The push to allow transgender servicemembers is a hybrid of interior and exterior forces attempting to effect change. As stated earlier, current regulations do not allow a transgender individual to serve in the military. To explore the possibility of transgender service in the U.S. military, the Tawani Foundation⁷⁹ and Wells Fargo donated more than \$1.35 million to the Palm Center to fund the Transgender Military Service Initiative in July 2013.⁸⁰ The grant is being used to conduct eleven studies on whether and how the U.S. armed forces could include transgender troops without undermining readiness.⁸¹

In addition to the research at the Palm Center, other parties are also advocating for transgender service. In July 2013, Kristen Beck, formerly Chris Beck, a retired U.S. Navy Senior Chief–Sea, Air, and Land (SEAL), published a book detailing the struggles she faced growing up and serving in the Navy.⁸² Although Kristen had to conceal her true self,

⁷⁹ The Tawani Foundation was founded by Colonel Jennifer N. Pritzker (IL) ARNG (Retired). Formerly known as James Pritzker, Jennifer Pritzker announced on August 16, 2013, that she identifies as a woman (Tawani Foundation). *See also* Press Release, Palm Ctr., New Multi-Year Research Project to Address Transgender Military Service (July 30, 2013), <http://www.palmcenter.org/files/July-30-13-release.pdf>.

⁸⁰ The Palm Center, founded in 1998, originally was known as the Center for the Study of Sexual Minorities in the Military (CSSMM) and was housed at the University of California, Santa Barbara. In 2006, in recognition of a \$1 million dollar endowment gift from the Michael D. Palm Foundation, the Center was renamed. From 1998 to 2012 the Palm Center's "don't ask, don't tell" project sponsored state-of-the-art scholarships on the impact of the DADT policy on military effectiveness. Palm Center research has been cited on the floor of Congress and covered by newspapers and radio and television stations throughout the world. Palm scholars have delivered briefings and lectures at the British Ministry of Defence, the U.S. Military Acad. at West Point, the U.S. Naval Acad., the U.S. Air Force Acad., the Army War Coll. and the Nat'l Def. Univ., *available at* http://www.palmcenter.org/dadt_project (last visited June 16, 2014).

⁸¹ Press Release, Ind. Univ. Bloomington, Kinsey Institute Receives Grant to Study Transgender Issues in the U.S. Military (Aug. 22, 2013), <http://newsinfo.iu.edu/news/page/normal/24519.html>.

⁸² KRISTEN BECK & ANNE SPECKHARD, *WARRIOR PRINCESS: A U.S. NAVY SEAL'S JOURNEY TO COMING OUT TRANSGENDER* (2013). Chris Beck grew up as a boy. He joined the Navy and became part of the Navy Sea, Air, Land Team (SEAL). He served

her struggle to live with the internal conflict did not detract from her or her unit's missions and responsibilities.⁸³ While it is an individual account, her story illustrates how transgender service is possible. Groups such as the Transgender American Veterans Association (TAVA), the Servicemembers Legal Defense Network, SPART*A (an LGBT military community), and the National Center for Transgender Equality are also advocating that transgender men and women should be allowed to serve.⁸⁴

While outside influences calling for change in transgender service are encouraging, real change will still require support from senior leadership. In June 2013, Secretary of Defense Chuck Hagel portrayed strong optimism at an LGBT Pride Month event at the Pentagon Auditorium.⁸⁵ Secretary Hagel recognized the contributions that gay and lesbian servicemembers make and the struggles that they may endure.⁸⁶ Further, Secretary Hagel remarked how integral LGBT civilians are to the United States.⁸⁷ Although his words were not an endorsement of transgender service in the military, he was the first Secretary of Defense to ever speak at a Pride event. The former executive director of the LGBT military organization, OutServe-SLDN,⁸⁸ thought that Secretary

for twenty years and went on thirteen deployments. While in the Navy, he earned a Purple Heart and a Bronze Medal with "V" device in addition to many other awards. Since 2013, Kristen has lived her life as a woman and is a speaker and activist in the transgender community. *Id.*

⁸³ *Id.* at 85–94.

⁸⁴ TAVA (Transgender American Veterans Association), <http://tavausa.org/> (last visited Mar. 2, 2014). *See also* OutServe-Servicemembers Legal Defense Network, <http://www.sldn.org/> (last visited Mar. 2, 2014); SPART*A, Service Members [sic], Partners, Allies for Respect and Tolerance for All. SPART*A is a group of LGBT people who currently serve or have served in the military <http://www.spartapride.org/> (last visited June 15, 2014). Nat'l Ctr. for Transgender Equal., <http://transequality.org/> (last visited Mar. 2, 2014).

⁸⁵ Proclamation 8989 Lesbian, Gay, Bisexual, and Transgender Pride Month, 2013 DAILY COMP. PRES. DOC. (May 31, 2013). President Obama proclaimed June 2013 as LGBT Pride month. In his proclamation he stated that his administration has extended hate crime protections to include attacks on gender identity, has prohibited discrimination based on gender identity in federal housing, and has implemented the Affordable Care Act, which prohibits insurers from denying coverage to consumers based on their gender identity.

⁸⁶ Chuck Hagel, U.S. Sec'y of Def., Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013).

⁸⁷ *Id.*

⁸⁸ Outserve-SLDN is an organization that empowers, supports, and defends the DoD and military service LGBT community. Their mission is to "educate the community, provide legal services, advocate for authentic transgender service, provide developmental

Hagel's attendance and speech served as a nod to transgender civilians and was a big step in the long road toward transgender equality for servicemembers.⁸⁹ Senior leaders might consider looking to cultural shifts in the United States, as well as judicial and legislative changes, as reasons for policy changes regarding transgender service in the military.

VI. Culture Shift and Judicial and Legislative Changes

The U.S. Office of Personnel Management (OPM), which oversees all policy created to support federal human resources departments, ensures that its employees are treated with dignity and respect, including transgender employees.⁹⁰ The OPM policy addresses how it accommodates employees during their transition process, the responsibilities of transgender employees, and the expectations of managers.⁹¹ The policy protections offered by the OPM are grounded in legal precedent and administrative rulings. A review of key cases in the area of gender equality is helpful to understand why the military should consider allowing transgender servicemembers to serve in the U.S. military.

A. *Price Waterhouse v. Hopkins*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, and national origin.⁹² In 1989, the U.S. Supreme Court, in *Price Waterhouse v. Hopkins*, found that "sex" does include gender, and when gender stereotyping is used to make employment decisions, those decisions are viewed as sex-based discrimination.⁹³ As a result, lower courts rely on *Price Waterhouse* for

opportunities, support members and local chapters, communicate effectively, and work towards equality for all." See <http://www.sldn.org/pages/about-sldn-vision-mission-and-goals>.

⁸⁹ Chris Johnson, *Hagel Addresses LGBT Service Members at Pride Event*, WASH. BLADE (June 25, 2013), <http://www.washingtonblade.com/2013/06/25/hagel-says-gay-troops-integral-to-u-s-military/>.

⁹⁰ *Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, OPM.GOV, <http://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance/> (last visited Feb. 10, 2014).

⁹¹ *Id.*

⁹² Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000 (LexisNexis 2014).

⁹³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989). *Price Waterhouse v. Hopkins* is a non-transgender case that involved Hopkins, an employee at a large

Title VII purposes and expand the gender stereotyping laws to apply to transgender individuals. In 2011, following the precedent set in *Price Waterhouse*, the U.S. Court of Appeals for the Eleventh Circuit decided *Glenn v. Brumby*,⁹⁴ the case of a transgender employee who lost her job when she began to transition from male to female and did not fit within the gender stereotype expected by her boss.

B. *Glenn v. Brumby*

In *Glenn*, a former U.S. Naval officer was employed as an editor in the Georgia General Assembly's Office of Legislative Counsel (OLC).⁹⁵ Her employment was terminated when she informed her boss of her intent to transition.⁹⁶ Glenn sought relief from the courts under the Equal Protection Clause of the Fourteenth Amendment for being discriminated against based on her sex and her failure to conform to the gender roles that Brumby, head of the Georgia General Assembly's OLC and responsible for personnel decisions, perceived were appropriate.⁹⁷ After citing *Price Waterhouse* and a number of other circuit decisions that followed, the court found that Brumby, the defendant, did not provide a sufficient purpose for terminating an employee other than "gender non-conformity."⁹⁸ As a result, the court held that Brumby violated Glenn's Fourteenth Amendment rights.⁹⁹ This decision illustrates the absence of federal law prohibiting discrimination against transgender employees is an impediment to employment-free from discrimination. *Price Waterhouse v. Hopkins* and *Glenn v. Brumby* are cases that provide a legal foundation for future legislation; however, those cases had limited effect on the widespread expansion of the implementation of transgender rights. The Equal Employment Opportunity Commission (EEOC) increased the impact of those decisions by expanding transgender rights

accounting firm, who was nominated for partnership. She was ultimately denied that partnership because the firm determined that her behavior was not in line with her gender. The court found that gender-stereotyping by the accounting firm was in violation of Title VII's anti-discrimination sex statute. Hopkins was advised to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to be more competitive for a partnership position. *Id.* at 235 (citing 618 F. Supp. 1109, 117 (D.D.C. 1985)).

⁹⁴ *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

⁹⁵ *Id.* at 1314.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 1321.

⁹⁹ *Id.*

in its seminal case involving transgender employees.

C. *Macy v. Holder*

On April 20, 2012, the EEOC issued a decision that transgender employees are protected from discrimination under Title VII of the Civil Rights Act of 1964.¹⁰⁰ The impact of this decision is far-reaching, as the EEOC is the independent federal agency in charge of investigating allegations of discrimination against employers.¹⁰¹ This ruling issued a legal remedy for transgender employees in the public and private sector claiming sex and gender nonconforming-based employment discrimination.¹⁰² As a result of the EEOC decision in *Macy*, transgender individuals who experiences employment discrimination because of their transgender status will now have access to legal protection through the EEOC under a sex discrimination claim.

The EEOC decision, as well as the *Price Waterhouse* precedent, places the transgender community on equal footing with other protected classes. Despite the expansive interpretation of Title VII by the courts and the EEOC, federal law does not support employment rights of those in the transgender community. To fill the legislative void, U.S. Senator Jeff Merkley (D-Or.) introduced the Employment Non-Discrimination

¹⁰⁰ *Macy v. Holder*, EEOC No. 0120120821 (Apr. 20, 2012). Mia Macy was a military veteran and police detective when she applied for a position as a ballistics technician with the Bureau of Alcohol, Tobacco, Firearms and Explosives. During the interview process she presented herself as a man and was in the early stages of transitioning. She had not legally changed her name or presented herself as a woman. She was notified that she had earned the job pending a background check. During the background check process, Macy informed the party responsible for filling the position that she was in transition. Five days later, Macy was informed the position was no longer hers due to federal budget reduction eliminating the position. In reality, the agency had hired someone else for the position. Shortly thereafter, Macy filed an Equal Employment Opportunity (EEO) complaint citing discrimination based on sex, gender identity, and sex stereotyping. *Id.* While a decision from the EEOC is not binding on courts because it is an Executive Branch agency, it can be influential in the judicial and legislative process. A dissatisfied party to an EEOC decision may file a civil action in U.S. District Court. *Frequently Asked Questions About the Federal Sector Hearing Process*, http://eeoc.gov/federal/fed_employees/faq_hearing.cfm#q38 (last visited Mar. 13, 2014). *See also* DANA BEYER & JILLIAN T. WEISS WITH RIKI WILCHINS, *NEW TITLE VII AND EEOC RULINGS PROTECT TRANSGENDER EMPLOYEES 3* (2014), <http://transgenderlawcenter.org/wp-content/uploads/2014/01/TitleVII-Report-Final012414.pdf>.

¹⁰¹ EQUAL EMP'T OPPORTUNITY COMMISSION, *Overview, Authority and Role*, available at <http://www.eeoc.gov/eeoc/index.cfm>.

¹⁰² *Macy v. Holder*, EEOC No. 0120120821.

Act (ENDA), which seeks to protect the employment rights not only of the transgender community, but also of the lesbian, gay, and bisexual community.¹⁰³

D. Employment Non-Discrimination Act

In November 2013, the U.S. Senate passed the ENDA,¹⁰⁴ which the LGBT community viewed as “historic.”¹⁰⁵ Some form or variation of the ENDA was introduced in every Congress for twenty years,¹⁰⁶ but November 2013 was the first time it successfully passed in either chamber of Congress. Passage of the ENDA in the current U.S. House of Representatives will likely be challenging,¹⁰⁷ however President Obama has already indicated his support.¹⁰⁸ If signed into law by the President, ENDA will prohibit discrimination based on an individual’s actual or perceived sexual orientation, or gender identity, by public and private employers in hiring, discharge, compensation, and other terms and conditions of employment.¹⁰⁹ Passage of the ENDA will result in better workplace protection for the entire LGBT community.

If passed, the ENDA’s impact on the armed forces will not be determinative, as there is a military exception.¹¹⁰ However, ENDA does

¹⁰³ Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013).

¹⁰⁴ *Id.*

¹⁰⁵ Press Release, Transgender Law Ctr., Historic! ENDA Passes in Senate (Nov. 7, 2013), available at <http://transgenderlawcenter.org/archives/9396>. See also Press Release, Human Rights Campaign, ENDA Passes Senate 64-32 (Nov. 7, 2013), available at <http://www.hrc.org/press-releases/entry/enda-passes-senate-64-32>. See also The Journey to Passing ENDA in the Senate, Human Rights Campaign, available at http://www.hrc.org/files/assets/resources/ENDA_Accomplishments-HRC.pdf.

¹⁰⁶ JODY FEDER & CYNTHIA BROUGH, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 1 (2013).

¹⁰⁷ Chris Johnson, *Boehner Tells LGBT Caucus ‘No Way’ ENDA Will Pass*, WASH. BLADE (Jan. 29, 2014), <http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/> (reporting on a closed-door meeting between U.S. House of Representatives Speaker John Boehner (R-Ohio) and the LGBT Equality Caucus).

¹⁰⁸ Presidential Statement on Senate Passage of Legislation to Prevent Employment Discrimination Against Lesbian, Gay, Bisexual, and Transgender Persons, DAILY COMP. PRES. DOC. (Nov. 8, 2013).

¹⁰⁹ FEDER & BROUGH, *supra* note 106.

¹¹⁰ Employment Non-Discrimination Act (ENDA) of 2013, S. 815, 113th Cong. § 7 (as passed by Senate, Nov. 7, 2013). The ENDA has an exception written into it that it will

symbolize a new level of tolerance and acceptance in U.S. society that may prompt a move toward similar changes in the military.

E. *Kosilek v. Spencer*

In January 2014, the Massachusetts Department of Corrections (MDOC) found that it too had to recognize the rights of transgender individuals when the Commonwealth of Massachusetts was told it had to fund gender reassignment surgery for a convicted murderer. Michelle Kosilek, formerly known as Robert Kosilek, is still anatomically male but presents as a female and has done so most of her life.¹¹¹ She was convicted of killing her wife in 1992 and during her incarceration was diagnosed with GID.¹¹² She sued the MDOC, seeking gender reassignment surgery.¹¹³ The court found that the state's decision to withhold her treatment was cruel and unusual punishment in violation of the Eighth Amendment.¹¹⁴ Despite the initial ruling in favor of Kosilek, Massachusetts withheld providing sex reassignment surgery, claiming security concerns, and Kosilek subsequently prevailed on appeal.¹¹⁵ The MDOC appealed the three-member panel decision and the First Circuit Court of Appeals voted to rehear the case en banc.¹¹⁶ While Kosilek's case is on the fringe of elevating transgender rights, the decision recognizes that withholding a prisoner's treatment for GID may be a violation of a constitutional right and providing treatment for GID or GD, to include gender reassignment surgery, can be made the responsibility of a state government. Whether the appellant wins or loses, the *Kosilek* decision and appeal has increased awareness of treatment rights of transgender prisoners not only in state facilities, but

not apply to the relationship between the United States and uniformed members of the Armed Forces.

¹¹¹ *Kosilek v. Spencer*, No. 12-1294, at 5 (1st Cir. Jan. 17, 2014).

¹¹² *Id.* at 12.

¹¹³ *Id.* at 7.

¹¹⁴ *Kosilek v. Spencer*, 889 F. Supp. 2d 190 (D. Mass. 2012).

¹¹⁵ *Kosilek*, No. 12-2194, at 90. *But see* Press Release, Mass. Dep't. of Correction(MDOC), Department of Correction Statement on Kosilek Appeal, (Jan. 31, 2014) (on file with author). The MDOC filed a petition for rehearing the Jan. 17, 2014, decision and requested a hearing by the full bench of the First Circuit Court of Appeals. The original decision was made by a three-judge panel.

¹¹⁶ *Kosilek v. Spencer*, No. 12-2194 (1st Cir. Feb. 12, 2014) (granting rehearing of the case en banc on May 8, 2014). At the date of publication of this article, the opinion was not published.

also in federal prisons.¹¹⁷

F. Inmate Manning

At the federal level, the DoD is attempting to balance the medical needs of Inmate Chelsea Manning with the obligation it has to keep Inmate Manning incarcerated.¹¹⁸ In May 2014, while traveling with the SecDef in Saudi Arabia, Rear Admiral John F. Kirby, the Pentagon spokesman, stated that SecDef Hagel approved a request from the Army to “evaluate potential treatment options for inmates diagnosed with gender dysphoria.”¹¹⁹ This review may lead to Inmate Manning, who is currently incarcerated at the U.S. Disciplinary Barracks at Fort Leavenworth, Kansas, being transferred to a federal prison to serve out her sentence and receive treatment from the federal prison system. However, Manning’s attorney, David E. Coombs, argues that this is an attempt to force Manning to drop the request for hormone replacement therapy (HRT) so that she can remain at the Disciplinary Barracks.¹²⁰

Coombs alleges that the military’s refusal to treat Manning is “flatout transphobia” since the U.S. military must provide medical treatment to its soldiers and that a transfer to a federal prison would jeopardize Manning’s personal safety.¹²¹ Coombs believes the military

¹¹⁷ Steve Contorno, *Army Won't Pay for Bradley Manning's Sex Change Therapy*, WASH. EXAM. (Aug. 22, 2013), <http://washingtonexaminer.com/army-wont-pay-for-bradley-mannings-sex-change-therapy/article/2534581#null>. It is unknown whether the *Kosilek* decision will clear the way for the transgender treatment requested by former Army Soldier Chelsea Manning. Private First Class Bradley Edward Manning, a U.S. Soldier, was convicted in July 2013 of violating the Espionage Act, as well as copying and disseminating classified information. Julie Tate, *Judge Sentences Bradley Manning to 35 Years*, WASH. POST, Aug. 21, 2013, http://www.washingtonpost.com/world/national-security/judge-to-sentence-bradley-manning-today/2013/08/20/85bee184-09d0-11e3-b87c-476db8ac34cd_story.html. Shortly after sentencing, he publicly identified as a female and wanted to be addressed as Chelsea Manning. *Today: Bradley Manning: I Want to Live as a Woman* (NBC television broadcast Aug. 22, 2013).

¹¹⁸ Missy Ryan, *Pentagon Considers Options for Chelsea Manning Detention*, REUTERS, May 14, 2014, <http://www.reuters.com/article/2014/05/14/us-usa-military-idUSBREA4D09220140514>.

¹¹⁹ Helene Cooper, *Pentagon Weighs Transfer of Chelsea Manning to Civilian Facility*, N.Y. TIMES, May 14, 2014, <http://nyti.ms/1qC9a5A>.

¹²⁰ Press Release, Statement Re: Chelsea Manning’s Potential Transfer to Federal Prison from David E. Coombs (May 14, 2014) (on file with author).

¹²¹ *Id.*

policy prohibiting transgender service is archaic and unsupported.¹²² He cites the March 2014 Transgender Service study by the Palm Center that concluded there is no compelling medical rationale for prohibiting transgender service and that Fort Leavenworth does have the ability to provide HRT.¹²³

G. U.S. Department of Veterans Affairs, States, and Cost of Care

Judicial and administrative decisions are not the only reasons for transgender rights advancement. The Veterans Affairs (VA) and individual states are unilaterally promoting transgender rights. Veterans Affairs policy allows transgender U.S. military veterans to receive government-supported healthcare.¹²⁴ The health care includes hormonal therapy, mental health care, preoperative evaluation, and medically necessary post-operative and long-term care following sex reassignment surgery.¹²⁵ While the VA does not provide sex reassignment surgery or plastic reconstructive surgery for strictly cosmetic purposes, it does provide transgender-related care for veterans.¹²⁶

Not only has there been more than an indicia of acceptance at the federal level for transgender rights, actions at the state level have also begun to elevate the health care rights, employment, and equality of transgender individuals. In 2011, Connecticut passed Public Act 11-55, which added gender identity and expression to Connecticut's anti-discrimination laws and later expanded that protection to include Connecticut insurance providers.¹²⁷ Seventeen states and the District of

¹²² *Id.*

¹²³ *Id.*

¹²⁴ U.S. DEP'T OF VETERANS AFFAIRS, DIR. 2013-003, PROVIDING HEALTH CARE FOR TRANSGENDER AND INTERSEX VETERANS para. 1 (Feb. 8, 2013).

¹²⁵ *Id.* para. 4b(1).

¹²⁶ *Id.* para. 2b.

¹²⁷ 2011 Conn. Acts 55. (Reg. Sess.). *See also* CONN. INS. COMM'R. BULL., GENDER IDENTITY NONDISCRIMINATION REQUIREMENTS (Dec. 19, 2013) [hereinafter CONN. GENDER IDENTITY NONDISCRIMINATION REQ'S], *available at* http://www.ct.gov/cid/lib/cid/Bulletin_IC-37_Gender_Identity_Nondiscrimination_Requirements.pdf. Also, any medically necessary services to include gender reassignment surgery cannot be handled any differently from other medical or mental health conditions. *See also* MD. INS. COMM'R BULL. 14-02, CLARIFICATION OF COVERAGE FOR TRANSGENDER INDIVIDUALS (Jan. 27, 2014), *available at* <http://www.mdinsurance.state.md.us/sa/docs/documents/insurer/bulletins/bulletin-1402-transgender.pdf>. Maryland does not allow insurance providers to discriminate based on gender identity or being transgender. *Id.*

Columbia have codified anti-discrimination statutes in their state constitutions.¹²⁸ In Virginia, Governor Terry McCauliffe signed his first Executive Order calling for equal opportunity for all by prohibiting discrimination based on gender identity.¹²⁹ In Maine, after litigation revealed a conflict between the Maine Human Rights Act and a Maine statute regarding sanitary facilities in schools, the state supreme court held that an elementary school student diagnosed with GD has the right to use the bathroom of her expressed gender.¹³⁰ All of these decisions and actions are promising movement toward the U.S. military allowing transgenders to join the service. In making those policy changes, the DoD should continue to study the issue and work toward the goal of gender equality in the military to keep in step with changing social values and trends in the United States.

Recently, a commission co-led by former U.S. Surgeon General Dr. Joycelyn Elders, argued the cost of health care for transgender servicemembers would be minimal,¹³¹ complications from gender-confirming surgeries would have limited impact,¹³² and the number of soldiers requiring medication would likely not impact readiness.¹³³ However, there are recruits with medical conditions that the military does not enlist, such as those diagnosed with certain learning, psychiatric, and behavioral disorders,¹³⁴ hearing defects,¹³⁵ and vision loss.¹³⁶ The military may, on its own accord, determine what medical conditions are not compatible with service and what costs it does or does not want to incur; however, other branches of the government may also initiate change. The report co-led by Dr. Elders, and cited by the attorney for Inmate Manning, does provide a health care cost estimate,¹³⁷ but the military should examine the expected number of individuals who would need that care and the long-term cost associated with their care.

¹²⁸ HOWELL, *supra* note 1, at 39, 137–38.

¹²⁹ Exec. Order No. 1 (2014), *available at* <https://governor.virginia.gov/policy/executive-orders/eo-1-equal-opportunity/>.

¹³⁰ John Doe et al. v. Reg'l. Sch. Unit 26 (Me. S. Ct., Jan. 30, 2014).

¹³¹ REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION, *supra* note 57, at 14–15.

¹³² *Id.* at 15.

¹³³ *Id.* at 11.

¹³⁴ DoDI 6130.03, *supra* note 11, enclosure 4, para. 29.

¹³⁵ *Id.* enclosure 4, para. 7.

¹³⁶ *Id.* enclosure 4, para. 5.

¹³⁷ REPORT OF THE TRANSGENDER MILITARY SERVICE COMMISSION, *supra* note 57, at 15 (citing a report that the average cost of transition-related health care is \$29,929 per person, not including any related follow-on medical issues).

Regardless, health care cost concerns should not be determinative. The costs alone will not be a valid justification to limit recruits who can fulfill and excel in DoD personnel requirements.

VII. Recommended Changes

The new diagnosis of GD is not currently in the military's regulatory lexicon, nor are the most recent changes from the DSM-5 reflected in the military's regulatory materials. The current governing DoD instruction, DoDI 6031.03, and Army regulations, specifically, AR 40-501, need to be updated.

First, the DoD must note and adhere to SecDef Hagel's recent statement that the prohibition of transgender service, more specifically its medical component, should be reviewed so that every qualified American has the opportunity to serve.¹³⁸ Second, if a diagnosis of GD is compatible with military service, a determination should be made as to what, if any, evaluation boards will be required. In making these determinations, the DoD should announce its willingness to accept transgender personnel for military service. Third, the DoD and the military services must begin the evaluation process of the DSM-5 to determine how to apply the publication and its changes. Fourth, existing regulations must be updated to include the new diagnosis of GD and other changes published in the DSM-5.

Before the Pentagon makes a decision, it should examine the state of the transgender movement and transgender acceptance in the United States and around the world in both military and non-military settings. Allowing gays to openly serve in the military was thought at one time to be insurmountable.¹³⁹ Years of grassroots lobbying, congressional pressure, and senior leadership attitudes reflected a seismic shift in

¹³⁸ Interview by Martha Raddatz, American Broadcasting Co. (ABC) News, Host of This Week, with SecDef Hagel (May 11, 2014), <http://abcnews.go.com/ThisWeek/week-transcript-defense-secretary-chuck-hagel-sen-marco/story?id=23667691>.

¹³⁹ The Flag & General Officers for the Military, *Statement to President Barack Obama and Members of Congress* (Mar. 31, 2009) available at <http://www.flagandgeneralofficersforthemilitary.com/>. See also [http://cmrlink.org/data/sites/85/CMRDocuments/FGOM-SigList\(1087\)-033109.pdf](http://cmrlink.org/data/sites/85/CMRDocuments/FGOM-SigList(1087)-033109.pdf) (an open letter to President Obama and Congress signed by more than 1,050 retired military leaders from all branches urging the continued support for "Don't Ask, Don't Tell" arguing that the repeal would break the all-volunteer force).

tolerance, leading to the repeal of DADT. The challenges facing transgenders are similar to those previously faced by women, minorities, and homosexuals in terms of acceptance. The DoD should follow its own approach to the repeal of DADT by examining the current reasons for not allowing transgender service and determining if any changes should be made. By conducting research on the feasibility of service and seeking input from servicemembers, Congress, and the public, and by looking to the militaries of U.S. allies, the DoD will be able to decide what is and what is not possible.

In the near term, the Palm Center will continue to publish reports from its Transgender Military Service Initiative, the DoD will review the DSM-5, and the idea of military service by transgenders will continue to grow. The DoD should be open to the findings of the Transgender Military Service Initiative and be proactive in addressing the expanding recruitment and retention pools. In the long term, it is likely the current prohibition against transgender service will end. The “administratively unfit” classification that leads to an automatic separation from the Army will cease and those diagnosed with GD and other similar diagnoses will receive the same physical and medical review that is afforded to all servicemembers.

VIII. Conclusion

The DoD is currently in the position to make changes to allow transgender recruits and transgender servicemembers in the military. While the option of doing nothing is a potential course of action, that is not the most viable way forward, in light of trends in foreign militaries, and the ever-growing acceptance of transgender culture, both in the medical community and in U.S. society as a whole.

Any inclusion of transgender service will likely raise concerns—cost of health care, recruitment, benefits, retention, unit cohesion, and unit readiness are always at issue just as they were factors in the decision to repeal DADT. The provision of health care for transgender personnel should be evaluated to ensure the same standard of care currently provided to all servicemembers will be available for transgender. The medical corps of the military will require time and resources to implement training and care protocols. Any issues addressing transgender deployment and hormone therapy must also be examined. But federal courts are starting to address these concerns in the civilian

sector and states are beginning to mandate insurance providers cover those surgeries.¹⁴⁰ The military would be wise to follow their lead. The concerns of recruitment, retention, benefits, unit cohesion, and unit readiness are all legitimate concerns, and were the same concerns echoed before the repeal of DADT. However, since the repeal of DADT, those concerns have proven to be of little merit.¹⁴¹

The United States is deliberately moving toward acceptance of transgender individuals in the workplace and our communities. The recent repeal of “Don’t Ask, Don’t Tell”; changes in the DSM; and the cultural shift in the United States and overseas should lead the DoD to carefully review its current policies prohibiting service by transgender personnel. Acceptance and tolerance will always ultimately be a force multiplier in any workplace and the U.S. Army would do well to foster an atmosphere of inclusion within its ranks.

¹⁴⁰ CONN. GENDER IDENTITY NONDISCRIMINATION REQ’S, *supra* note 127, para. 2.

¹⁴¹ AARON BELKIN ET AL., ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL’S IMPACT ON MILITARY READINESS 4 (Sept. 20, 2012), *available at* http://www.palmcenter.org/files/One%20Year%20Out_0.pdf.