UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JANE DOE 2, et al.,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia, No. 1:17-cv-01597-CKK,
Before the Honorable Colleen Kollar-Kotelly

PLAINTIFFS-APPELLEES' OPPOSITION TO GOVERNMENT'S EMERGENCY MOTION FOR CLARIFICATION OF THIS COURT'S JANUARY 4, 2019 JUDGMENT OR, IN THE ALTERNATIVE, FOR A STAY OF ANY INJUNCTION OR FOR ISSUANCE OF THE MANDATE FORTHWITH

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INTRODUCTION

The government asks this Court either to "clarify that its judgment vacated the preliminary injunction effective immediately," or to "stay the preliminary injunction pending issuance of the Court's mandate." Gov't Mot. 2-3. Those requests are unnecessary and premature, respectively. This Court has set a clear timetable for the orderly resolution of this case—a timetable on which Plaintiffs have relied. Rather than respect that schedule, the government seeks resolution of an emergency of its own making. Had the government returned to this Court at any point in the past two and a half months, or had it waited to issue the new Directive-type Memorandum ("DTM") implementing the Mattis Plan until "seven days after resolution of any timely petition for rehearing or petition for rehearing en banc," as Federal Rule of Appellate Procedure 41 and this Court's decision in this case provide, it would not now be before the Court requesting extraordinary relief.

The government has failed to show that the extraordinary relief it seeks is warranted at this time. Plaintiffs' constitutional interests in this case are weighty. The government has made no showing that the injunction should not remain in place to preserve the status quo and to protect Plaintiffs' rights and livelihoods while they determine whether to file a petition for rehearing. If Plaintiffs do not seek rehearing en banc, the mandate will issue on April 5, well before the April 12

date upon which the government has stated that it wishes to begin enforcing its ban. If Plaintiffs do seek rehearing en banc, the government can make its case for lifting the stay at that time. In the meantime, however, its request for a stay is premature.

BACKGROUND

On October 30, 2017, the district court issued a preliminary injunction directing the government "to revert to the *status quo* with regard to accession and retention that existed before the issuance of the Presidential Memorandum." *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 177 (D.D.C. 2017). The court found that (1) Plaintiffs are likely to succeed on their claim that the ban on military service by transgender persons violates the Fifth Amendment, (2) Plaintiffs would suffer irreparable injury in the absence of an injunction, and (3) the balance of equities and the public interest favor granting injunctive relief. *Id*. at 207-217. To comply with the injunction, the government was required to leave in place the policies established in June 2016, which allow for the accession and retention of transgender persons in the military.

On January 4, 2019, this Court issued a *per curiam* opinion vacating the district court's preliminary injunction without prejudice and directing the Clerk of the Court "to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc."

See Doe 2 v. Shanahan, No. 18-5257, 2019 WL 102309, at *1, *3 (D.C. Cir. Jan. 4, 2019). Nothing in that opinion indicated that the panel intended to depart from the ordinary rule that the mandate does not issue until seven days after the time for rehearing has expired or after the disposition of a timely petition. *See* Fed. R. App. P. 41.

On January 22, the Supreme Court denied the government's request to stay the injunction in this case, even though it granted parallel requests in *Karnoski v. Trump*, No. 18A625 (U.S. Jan. 22, 2019), and *Stockman v. Trump*, No. 18A627 (U.S. Jan. 22, 2019). Nine days later, this Court ordered that the time for filing any petition for rehearing or petition for rehearing en banc be extended to 21 days after the issuance of the Court's separate opinions. *Jane Doe 2*, No. 18-5257, Jan. 31, 2019 Order. Those opinions issued on March 8, 2019. *See Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 1086495, at *1 (D.C. Cir. Mar. 8, 2019). As a result, any petition for rehearing or rehearing en banc is not due until March 29, 2019, and under Federal Rule of Appellate Procedure 41, the mandate ordinarily will issue on April 5, if Plaintiffs do not seek rehearing, or, if plaintiffs do seek rehearing, seven days after the resolution of the petition.

Fully apprised of the weighty issues in this case, this Court has charted the timetable for their orderly resolution. Plaintiffs, and the district court, have proceeded in reliance on this timetable.

Nevertheless, on March 8, 2019—the same day this Court issued its opinions—the government notified the district court that the Department of Defense intended, contrary to the terms of the injunction, to issue a directive implementing the Mattis Plan "in the near future." Ex. A at 1. Offering scant explanation, the government asserted that the preliminary injunction is "no longer any impediment," even though this Court had not issued its mandate and no court has stayed the injunction. *Id*. Four days later, without waiting for the district court's response, the government issued Directive-type Memorandum (DTM)-19-004 (the "DTM"), ordering the Department of Defense to "implement" the Mattis Plan and stating that enforcement would commence on April 12, 2109. Ex. B.

After Plaintiffs responded to the government's notice, the district court ordered the government to file a reply in support of its notice by March 15, 2019. Minute Order, No. 1:17-cv-1597-CKK (D.D.C. Mar. 12, 2019). In that reply, for the first time, the government requested in the alternative that the district court stay the injunction so that it could implement the DTM. Dkt. 193. That "request" was not made as a motion to which Plaintiffs would have the opportunity to respond, as the Federal Rules of Civil Procedure require. The district court then held that, until this Court issues its mandate, "Defendants remain bound by this Court's preliminary injunction to maintain the status quo." Dkt. 195 at 3.

On March 20, 2019, the government filed in the district court a formal motion to stay the preliminary injunction and a request for expedited ruling. Dkt. 196. Plaintiffs have responded, and that motion remains pending.

ARGUMENT

This Court should maintain the status quo it established in its opinion of January 4, on which the Plaintiffs and the district court have relied, and which provides for the orderly resolution of this case without prejudice to any party. The constitutional interests of the parties involved are significant and the panel's decision and concurring opinions raise serious issues. Plaintiffs should have the full time provided for by the Federal Rules and by order of this Court to evaluate whether to seek rehearing en banc.

I. THIS COURT'S OPINION AND ORDERS MAKE CLEAR THAT THE PRELIMINARY INJUNCTION REMAINS IN PLACE

The government's request for "clarification" contravenes this Court's orders and well-settled law. This Court's orders and the Federal Rules of Appellate Procedure establish that (1) this Court's judgment is not final until it issues its mandate, (2) that mandate will not issue until seven days after the time for rehearing has expired or after the disposition of a petition for rehearing, and (3) until that judgment is final, the injunction remains in place. Where the Court's rulings and procedural history of the case are already clear, clarification is unnecessary. *See In re Fed. Nat. Mortg. Ass'n Sec., Derivative, ERISA Litig.*, 725

F. Supp. 2d 147, 157 (D.D.C. 2010); *cf. Consolidated Rail Corp. v. Surface Transp. Bd.*, 93 F.3d 793, 800 (D.C. Cir. 1996).

First, this Court's judgment is not final until it issues its mandate. Federal Rule of Appellate Procedure 41(c) provides: "The mandate is effective when issued." As the advisory committee notes to that rule make clear, "[a] court of appeals' judgment or order is not final until issuance of the mandate; *at that time* the parties' obligations become fixed." Fed. R. App. P. 41(c) advisory committee's note (1998) (emphasis added). Courts have consistently recognized that "[a]n appellate court's decision is not final until its mandate issues." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 97 (3d Cir. 1988); *see United States v. DeFries*, 129 F.3d 1293, 1302-1304 (D.C. Cir. 1997); *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1203 (9th Cir. 2013) ("No opinion of this circuit becomes final until the mandate issues[.]" (alteration in original) (internal quotation marks omitted)); *United States v. Jackson*, 549 F.3d 963, 980 (5th Cir. 2008) ("This court's decisions are not final until we issue a mandate." (internal quotation marks omitted)); *Flagship Marine Servs., Inc. v. Belcher Towing Co.*, 23 F.3d 341, 342 (11th Cir. 1994) ("Until the mandate issues, an appellate judgment is not final; the decision reached in the opinion may be revised by the panel, or reconsidered by the en banc court[.]").

Second, this Court has made clear that any mandate vacating the preliminary injunction should not issue until April 5, 2019 at the earliest. When this Court issued its January 4, 2019 order—vacating the preliminary injunction without prejudice and denying the government's motion to stay the injunction as moot—it withheld issuance of the mandate until seven days after the resolution of any timely petition for rehearing—the usual rule applicable under Fed. R. App. P. 41. *See Doe 2*, 2019 WL 102309, at *1 & *3. Then, on its own motion, the Court—anticipating that the concurring opinions to be filed would raise significant issues that Plaintiffs should have the opportunity to consider in determining whether to seek rehearing—extended the time for such a petition to 21 days after issuance of the separate opinions. Jan. 31, 2019 Order. Those opinions issued on March 8, 2019. *See Doe 2 v. Shanahan*, 2019 WL 1086495, at *1. As a result, Plaintiffs have until March 29 to file a petition for rehearing or rehearing en banc.

Third, until this Court's judgment is final, the injunction remains in place. As the government points out (at 7), the Court has the authority to enter a judgment with immediate effect, without remanding to the district court. *See* 28 U.S.C. § 2106. It did not do so here. The panel also did not direct immediate issuance of the mandate, as it would have done had it intended its decision to take immediate effect. The government contends that the panel's denial of the government's stay motion as moot necessarily assumed that the panel's decision would take

immediate effect, but there is no basis for that speculation, especially in light of the panel's order directing the mandate to be withheld. The panel may have denied the motion because that motion sought a stay pending the court's decision; once the decision was issued, the stay request no longer needed to be decided. But nothing in the panel's decision indicates that it intended to deviate from the usual course set forth by Rule 41.

Even if, as the government suggests, the panel intended—despite its orders and despite the appellate rules to the contrary—to make its judgment effective immediately, and that the delayed issuance of the mandate had no bearing on the effective date of its judgment, Plaintiffs have justifiably relied on the Court's clearly articulated schedule. If the government wanted clarification it could have sought it months ago, well before issuing the DTM, which would have obviated the emergency request for clarification that it now seeks. Neither Plaintiffs, nor the government, nor the public would benefit from permitting the government to bypass the normal judicial process, potentially resulting in a scenario where the government proceeds as if the injunction has been dissolved, but subsequent proceedings result in its reinstatement. The government proceeded at its own risk. Plaintiffs should not be made to bear the costs of the government's presumption.

II. THE PRELIMINARY INJUNCTION SHOULD NOT BE STAYED NOR THE MANDATE ISSUED BEFORE PLAINTIFFS HAVE HAD AN OPPORTUNITY TO SEEK REHEARING

The government contends that the Court should issue the mandate immediately—or now stay the preliminary injunction, which amounts to the same thing—even though Plaintiffs' time for deciding whether to seek rehearing has not expired. The government fails to demonstrate good cause for such an action or to show that adhering to the current schedule established by this Court will harm the government in any way. *See EDCO Waste & Recycling Servs., Inc. v. NLRB*, 26 F. App'x 3, 5 (D.C. Cir. 2001). In light of the importance of the issues presented and the lengthy discussion of those issues in the *per curiam* opinion and the concurring opinions, Plaintiffs should have a full opportunity to consider whether to address those issues, as well as the *per curiam* order's and the concurring judges' reasoning, in a petition for rehearing.

Although the Supreme Court stayed the preliminary injunctions in *Karnoski* and *Stockman*, Chief Justice Roberts *denied* the government's motion for a stay in this case. The government contends that the Chief Justice likely assumed that this Court's decision vacating the preliminary injunction had already taken effect, but there is no basis for that speculation. This Court's opinion on its face indicated that the mandate was *not* to issue until after the expiration of the time for filing a petition for rehearing or the resolution of any timely petition. Nothing in the

Court's opinion would have suggested to Chief Justice Roberts that this Court had deviated, or intended to deviate, from its ordinary procedures.

The government cannot show that it will be harmed at all, much less irreparably harmed, absent a stay. To the contrary, if Plaintiffs do not seek rehearing, the mandate will issue on April 5, well before the government's self-proclaimed target date of April 12 for enforcing the Mattis Plan. If Plaintiffs do seek rehearing, this Court's existing orders correctly presume that the harm caused by dissolving the injunction, only to have it potentially reinstated at a later date, outweighs any harm caused by a temporary delay in the government's ability to enforce the Mattis Plan. Nonetheless, the government would be free to seek a stay at that time and could seek to show that it would be irreparably harmed even by a temporary delay in implementing the Mattis Plan while this Court resolves that petition. But the government cannot show any harm warranting a stay now. The government's request for a stay is premature and unnecessary, and it should be denied.

III. AN ADMINISTRATIVE STAY IS UNWARRANTED

Finally, an administrative stay in this case is unwarranted. As this Court's Handbook of Practice and Internal Procedures makes clear, an administrative stay is appropriate only in extremely limited circumstances. A panel may grant an administrative stay of very short duration "before receiving a response to give the

Court more time to consider the matter. The administrative stay order will usually direct that responses to the motion be expedited." D.C. Cir. Handbook of Practice and Internal Procedures 33. Here, however, Plaintiffs are already filing an expedited response to the government's motion, which will be fully briefed by March 26. The motion is already being considered on an expedited schedule; there is no added need for an administrative stay.

At stake here are the constitutional rights and livelihoods of thousands of prospective and current transgender servicemembers. Those interests should be given due consideration as the Federal Rules of Appellate Procedure and this Court's orders provide. There is no need to cut short an already accelerated process. This Court should maintain the procedural status quo, which it set, and on which Plaintiffs and the district court have justifiably relied.

CONCLUSION

The government's motion for clarification, for stay, or for issuance of the mandate should be denied.

Respectfully submitted.

/s/ Paul R.Q. Wolfson

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March 25, 2019

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,570 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

March 25, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Paul R.Q. Wolfson
PAUL R.Q. WOLFSON

Addendum

Ex. A

Notice, Dkt. No. 190 (Mar. 8, 2019)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JANE DOE 2, *et al.*, Plaintiffs, v. PATRICK SHANAHAN, in his official capacity as Secretary of the Department of Defense, *et al.*, Defendants.	Civil Action No. 17-cv-1597 (CKK)

NOTICE

In light of the district court's decision yesterday to stay the preliminary injunction in *Stone v. Trump*, No 1:17-cv-02459-GLR (D. Md. Mar. 7, 2019) (ECF No. 249), there is no longer any impediment to the military's implementation of the Mattis policy. Defendants therefore respectfully provide notice to the Court that the Acting Secretary of Defense plans to release a Directive-Type Memorandum (DTM) formally implementing the new policy in the near future. That DTM will not take effect until 30 days after its release.

Because the time for Plaintiffs to seek rehearing has not yet run, the D.C. Circuit has not issued the mandate in *Doe 2 v. Shanahan*, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019) (per curiam). Nevertheless, the D.C. Circuit's judgment vacating this Court's preliminary injunction took effect when entered. In confirmation of this fact, the D.C. Circuit denied Defendant's stay motion "as moot," *id.* at *1, a ruling that necessarily presumes that this Court's injunction does not remain in effect.

March 8, 2019

Respectfully submitted,

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Ex. B

Directive-type Memorandum (DTM)-19-004 (Mar. 12, 2019)

OFFICE OF THE DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON DC 20301-1010

March 12, 2019

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
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CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR, NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM)-19-004 - Military Service by Transgender Persons and Persons with Gender Dysphoria

References: See Attachment 1.

Purpose. This DTM:

- Implements the policy in the February 22, 2018 Secretary of Defense Memorandum and the February 2018 DoD Report and Recommendations on Military Service by Transgender Persons, assigns responsibilities, and prescribes procedures regarding the standards for accession, retention, separation, in-service transition, and medical care for Service members and applicants with gender dysphoria, as applicable.

- Approves updates to the separation processing guidance in DoD Instructions (DoDIs) 1332.14 and 1332.30. These DoDIs will be administratively changed in accordance with Attachment 4 of this DTM; the changes will be effective 30 days after publication of this DTM.

- Is effective April 12, 2019. This DTM will be incorporated into DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, and supersedes any contradictory

guidance in those publications. This DTM will expire effective March 12, 2020.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Definitions. See Glossary.

Policy. It is DoD policy that:

- Service in the Military Services is open to all persons who can meet the high standards for military service and readiness without special accommodations.

- All Service members and applicants for accession to the Military Services must be treated with dignity and respect. No person, solely on the basis of his or her gender identity, will be:

    - Denied accession into the Military Services;

    - Involuntarily separated or discharged from the Military Services;

    - Denied reenlistment or continuation of service in the Military Services; or

    - Subjected to adverse action or mistreatment.

- Except where a provision of policy has granted an exception, transgender Service members or applicants for accession to the Military Services must be subject to the same standards as all other persons.

    - When a standard, requirement, or policy depends on whether the individual is a male or a female (e.g., medical fitness for duty; physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards), all persons will be subject to the standard, requirement, or policy associated with their biological sex.

    - Transgender persons may seek waivers or exceptions to these or any other standards, requirements, or policies on the same terms as any other person.

- Service members who access in their preferred gender or received a diagnosis of gender dysphoria from, or had such diagnosis confirmed by, a military

medical provider before the effective date of this DTM will be allowed to continue serving in the military pursuant to the policies and procedures in effect before the effective date of this DTM.

- Accession and retention standards for gender dysphoria and the treatment of gender dysphoria will be aligned with analogous conditions and treatments, including stability periods and surgical procedures.

Responsibilities. See Attachment 2.

Procedures. See Attachment 3.

Information Collections. The requests for medical reports and history referred to in Paragraph 2.b. of Attachment 3 do not require licensing with a report control symbol in accordance with Paragraph 1.b.(13) in Enclosure 3 of Volume 1 of DoD Manual 8910.01.

Releasability. **Cleared for public release**. Available on the DoD Issuances Website at https://www.esd.whs.mil/DD/.

David L. Norquist
Performing the Duties of the
Deputy Secretary of Defense

Attachments:
As stated

cc:
Secretary of Homeland Security
Commandant, U.S. Coast Guard

ATTACHMENT 1

REFERENCES

Assistant Secretary of Defense for Health Affairs Memorandum, "Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members," July 29, 2016
Commandant Instruction M1850.2 (series), "Physical Disability Evaluation System," May 19, 2006
Department of Defense, "Department of Defense Report and Recommendations on Military Service by Transgender Persons," February 2018
Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016
Directive-type Memorandum 16-005, "Military Service of Transgender Service Members," June 30, 2016
DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003
DoD Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019
DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members," June 30, 2016
DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended
DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014, as amended
DoD Instruction 1332.30, "Commissioned Officer Administrative Separations," May 11, 2018
DoD Instruction 1332.45, "Retention Determinations For Non-Deployable Service Members," July 30, 2018
DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," May 6, 2018
DoD Instruction 6490.10, "Continuity of Behavioral Health Care for Transferring and Transitioning Service Members," March 26, 2012, as amended
DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended
Secretary of Defense Memorandum, "Military Service by Transgender Individuals," February 22, 2018
United States Code, Title 10, Section 1074
United States Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016

ATTACHMENT 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R):

a. Will revise DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, consistent with this DTM. Unless otherwise specified in this DTM, if these issuances are inconsistent with this DTM, this DTM will govern.

b. Will revise the U.S. DoD Transgender Service in the U.S. Military Implementation Handbook, consistent with this DTM.

c. Will disseminate the revised handbook to all Military Departments and the United States Coast Guard (USCG).

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS. Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs will issue medical guidance as appropriate.

3. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. As necessary and appropriate, will develop implementing guidance for their respective Departments and Services consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may be delegated, in writing, no lower than the Military Service Personnel Chiefs. All other waiver authority remains with the Service-designated waiver authority.

4. COMMANDANT, USCG. The Commandant, USCG:

a. As necessary and appropriate, will develop implementing guidance for the USCG consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may

not be delegated lower than the Assistant Commandant for Human Resources. All other waiver authority remains with the Service-designated waiver authority.

ATTACHMENT 3

PROCEDURES

1. SECTION I: EXEMPT INDIVIDUALS.

a. Applicability. Individuals are exempt from Paragraph 2 of this attachment if they, before the effective date of this DTM:

(1) Entered into a contract for enlistment into the Military Services using DD Form 4, "Enlistment/Reenlistment Document Armed Forces of the United States," available on the DoD Forms Management Program website at https://www.esd.whs.mil/Directives/forms/, or an equivalent, or were selected for entrance into an officer commissioning program through a selection board or similar process; and

(2) Either:

(a) Were medically qualified for Military Service or selected for entrance into an officer commissioning program in their preferred gender in accordance with DTM-16-005; or

(b) As a Service member, received a diagnosis of gender dysphoria from, or had such diagnosis confirmed, by a military medical provider.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed mental health provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:

(a) The applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) The applicant has been stable in the preferred gender for 18 months; and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:

(a) A period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) No functional limitations or complications persist and any additional surgery is not required.

c. In-Service Transition. Service members who are exempt may continue to receive all medically necessary treatment, as defined in DoDI 1300.28, to protect the health of the individual, obtain a gender marker change in the Defense Enrollment Eligibility Reporting System (DEERS) in accordance with DoDI 1300.28; and serve in their preferred gender.

d. Separation And Retention. Service members who are exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely on the basis of gender identity.

(2) May be retained without a waiver pursuant to this DTM. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to his or her gender identity or gender transition should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

2. SECTION II: NONEXEMPT INDIVIDUALS.

a. Applicability. Individuals are not exempt if they do not meet the criteria in Paragraph 1.a. of this attachment.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are not exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history or diagnosis of gender dysphoria is disqualifying unless:

(a) As certified by a licensed mental health provider, the applicant demonstrates 36 consecutive months of stability in the applicant's biological sex immediately preceding submission of the application without clinically significant distress or impairment in social, occupational, or other important areas of functioning; and

(b) The applicant demonstrates that the applicant has not transitioned to his or her preferred gender and a licensed medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and

(c) The applicant is willing and able to adhere to all applicable standards, including the standards associated with the applicant's biological sex.

(2) A history of cross-sex hormone therapy or a history of sex reassignment or genital reconstruction surgery is disqualifying.

(3) The accession standards will be reviewed no later than 24 months from the effective date of this DTM, and every 24 months thereafter, and may be maintained or changed, as appropriate, to ensure:

(a) Consistency with applicable medical standards and clinical practices; and

(b) The readiness and combat effectiveness of the Military Services.

c. In-Service Transition. Individuals who are not exempt must adhere, like all other Service members, to the standards associated with their biological sex. These nonexempt Service members may consult with a military medical provider, receive a diagnosis of gender dysphoria, and receive mental health counseling, but may not obtain a gender marker change in DEERS or serve in their preferred gender.

d. Retention. Service members who are not exempt may be retained without a waiver if they receive a diagnosis of gender dysphoria on or after the effective date of this DTM, provided that:

(1) A military medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and,

(2) The Service member is willing and able to adhere to all applicable standards, including the standards associated with his or her biological sex.

e. Separation. Service members who are not exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely based on gender identity.

(2) May not be separated solely based on a diagnosis of gender dysphoria without first being medically evaluated for possible referral to the Disability Evaluation System (DES) pursuant to DoDI 1332.18 or the USCG Physical Disability Evaluation System (PDES), pursuant to Commandant Instruction (COMDTINST) M1850.2 (series).

(3) If referral to the DES is not appropriate in accordance with DoDI 1332.18 or the USCG PDES, in accordance with COMDTINST M1850.2 (series), may be subject to processing for administration separation in accordance with Attachment 4 and the following guidance:

(a) The Secretary of the Military Department concerned or the Commandant, USCG, may authorize separation based on conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty.

1. Service members are ineligible for referral to the DES or USCG PDES when they have a condition not constituting a physical disability as described in DoDI 1332.18 or COMDTINST M1850.2 (series).

2. Service members may be referred to the DES or USCG PDES if they have a diagnosis of gender dysphoria and of co-morbidities that are appropriate for disability evaluation processing in accordance with DoDI 1332.18 or COMDTINST M1850.2 (series), before processing for administrative separation.

(b) Service members with a diagnosis of gender dysphoria may be subject to the initiation of administrative separation processing in accordance with Paragraph 2.e. of this attachment if they are unable or unwilling to adhere to all applicable standards, including the standards associated with their biological sex.

(c) Nothing in this guidance precludes appropriate disciplinary action for Service members who refuse orders from lawful authority to comply with applicable standards.

3. SECTION III. ADDITIONAL POLICY GUIDANCE.

a. Waivers.

(1) The Military Departments and the USCG may grant waivers, in whole or in part, to the requirements in this attachment in individual cases.

(2) If a waiver is granted permitting an applicant or Service member, who is not exempt under Paragraph 1 of this attachment, to serve in his or her preferred gender, such an individual will be considered from that point forward to be exempt in accordance with Paragraph 1.

(3) The provisions concerning who may qualify as exempt under Paragraph 1.a. of this attachment may not be waived; a person who is exempt under Paragraph 1.a. may not have his or her exempt status revoked.

b. Medical Policy.

(1) For Service members who have been diagnosed with gender dysphoria and are exempt, the Military Departments and Services will handle requests for medical care and treatment in accordance with DoDI 1300.28 and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum.

(2) For Service members who have been diagnosed with gender dysphoria and are not exempt, the Military Departments and the USCG:

(a) Will provide necessary care consistent with Section 1074 of Title 10, United States Code and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum for as long as the individual remains a Service member as set forth in a medical treatment plan developed with the military medical provider and provided to the commander.

(b) Will take appropriate action to facilitate the continuity of health care consistent with DoDI 6490.10 if the Service member is to be separated from military service.

c. Equal Opportunity. The DoD and the USCG provide equal opportunity to all Service members, in an environment free from harassment and discrimination on the basis of race, color, national origin, religion, sex, gender identity, or sexual orientation.

d. Protection of Personally Identifiable Information (PII) and Protected Health Information.

(1) The Military Departments and the USCG will:

(a) In accordance with DoDI 5400.11, in cases where there is a need to collect, use, maintain, or disseminate PII in accordance with this issuance or Military Department and Service regulations, policies, or guidance, protect against unwarranted invasions of personal privacy and the unauthorized disclosure of such PII.

(b) Maintain such PII so as to protect the individual's rights, consistent with federal law and policy.

(2) Disclosure of protected health information will be consistent with DoD 6025.18-R.

e. Education And Training. Revised training will occur at the Military Department's and USCG's discretion.

f. Other. The Military Departments and Military Services recognize a Service member's status as male or female by the member's gender marker in the DEERS.

(1) The Military Services apply all standards that involve consideration of the Service member's status as male or female on the basis of the member's gender marker in DEERS such as:

(a) Uniforms and grooming.

(b) Body composition assessment.

(c) Physical readiness testing.

(d) Military Personnel Drug Abuse Testing Program participation.

(2) As to facilities subject to regulation by the Military Departments and the USCG, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

ATTACHMENT 4

PROCESSING CHANGES TO DoDIs 1332.14 AND 1332.30

1. The following will be added to DoD Instruction 1332.14, Enclosure 3, Paragraph 3.a.(8):

"(h) The Secretary concerned may authorize separation on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the Service member is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

1. Separation processing will not be initiated until the enlisted Service member has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

2. Separation processing will not be initiated until the enlisted Service member has been counseled in writing that the condition does not qualify as a disability."

2. The following will be added to DoD Instruction 1332.30, Paragraph 9.2.d.:

"d. The Secretary concerned may authorize separation of a commissioned officer on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the commissioned officer is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

(1) Separation processing will not be initiated until the commissioned officer has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

(2) Separation processing will not be initiated until the commissioned officer has been counseled in writing that the condition does not qualify as a disability."

GLOSSARY

PART I. ABBREVIATIONS AND ACRONYMS

DEERS	Defense Enrollment Eligibility Reporting System
DES	Disability Evaluation System
DoDI	DoD instruction
DTM	directive-type memorandum
PDES	Physical Disability Evaluation System
PII	personally identifiable information
USCG	United States Coast Guard
USD(P&R)	Under Secretary of Defense for Personnel and Readiness

PART II. DEFINITIONS

These terms and their definitions are for the purpose of this issuance.

biological sex. A person's biological status as male or female based on chromosomes, gonads, hormones, and genitals.

cross-sex hormone therapy. The use of feminizing hormones in an individual with a biological sex of male or the use of masculinizing hormones in an individual with a biological sex of female.

gender identity. An individual's internal or personal sense of gender, which may or may not match the individual's biological sex.

gender marker. Data element in DEERS that identifies a Service member's status as male or female.

gender transition. A form of treatment for the medical condition of gender dysphoria may involve:

Social transition, also known as "real life experience," to allow the patient to live and work in his or her preferred gender without any cross-sex hormone treatment or surgery and may also include a legal change of gender, including changing gender on a passport, birth certificate, or through a court order; or

Medical transition to align secondary sex characteristics with the patient's preferred gender using any combination of cross sex hormone therapy or surgical and cosmetic procedures; or

Surgical transition, also known as sex reassignment surgery, to make the physical body, both primary and secondary sex characteristics, resemble as closely as possible the patient's preferred gender.

PII. Information used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information. PII includes any information that is linked or linkable to a specified individual, alone, or when combined with other personal or identifying information.

preferred gender. The gender with which an individual identifies.

stable or stability. The absence of clinically significant distress or impairment in social, occupational, or other important areas of functioning associated with a marked incongruence between an individual's experienced or expressed gender and the individual's biological sex.

transgender. Individuals who identify with a gender that differs from their biological sex.