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## BLUEPRINTS FOR SOUND PUBLIC POLICY

### UNDERSTANDING TRUMP'S MEMO ON TRANSGENDER SERVICE MEMBERS: WHAT IT MEANS, AND WHY IT IS CONTRARY TO FACT AND LAW

Professor Alan Bishop, U.S. Military Academy (Retired) \*  
Professor Martin L. Cook, U.S. Naval War College (Emeritus)\*  
Professor J. Carl Ficarrotta, U.S. Air Force Academy (Retired)\*  
Professor George R. Lucas, Naval Postgraduate School\*  
Professor Tammy S. Schultz, U.S. Marine Corps War College\*

On August 25, 2017, President Trump issued a Presidential Memorandum, *Military Service by Transgender Individuals*, directing the Pentagon to bar transgender Americans from military service. But the memo has been mischaracterized in media reports, and has generated considerable confusion among the public. In this policy summary, we clarify the President's memo, show that it is inconsistent with both fact and law, and explain that, contrary to media reports, it does not provide the Secretary of Defense with wide discretion. Rather, the memo mandates discrimination against transgender Americans while affording limited discretion to the Secretary only with respect to certain details of the implementation process. Below, we explain the discrimination that the President's memo requires; the limited discretion that the Defense Secretary is afforded concerning implementation; and the inaccuracies that inform the President's analysis.

#### **Mandatory discrimination**

- (1) *Accession ban*: Accession (enlistment) of transgender applicants was scheduled to begin July 1, 2017, but had already been postponed until January 1, 2018, by order of the Secretary of Defense. The initial six-month delay was intended as a study period in advance of a decision still to be made, but the Trump memo makes the accession decision. Until January 1, 2018, the original Secretary of Defense delay will remain in effect to prevent transgender citizens from enlisting. On January 1, 2018, the Trump memo takes over and continues the accession ban on an indefinite basis.
- (2) *Retention ban*: The Trump memo reinstates the retention policy existing prior to June 2016 that made transgender identity grounds for separation from military service: "I am directing the Secretary of Defense, and the Secretary of Homeland Security with respect to the U.S. Coast Guard, to return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016." That prior policy was an outright ban. The only transgender service members who may be permitted to continue serving, according to Trump's memo, are individuals who (as discussed below) may be provisionally retained by the Defense Secretary prior to March 23, 2018. Apart from these exceptions, all other transgender service members are subject to discharge if their gender identity is discovered.

- (3) *Presumption of unfitness*: The prior retention policy that the Trump memo reinstates was an outright ban that was premised on the general presumption that transgender Americans are unfit to serve in the armed forces. By reinstating the prior ban, the Trump memo restores the presumption that transgender personnel are unfit for duty.
- (4) *Separate standards*: If some transgender service members are provisionally retained despite the ban, they will serve under unique and more burdensome expectations and standards that apply only to them. They would have no protection based on generally applicable retention standards, and in fact would serve under a vague and shifting standard of whether, at any given time, their presence is deemed consistent with military effectiveness, lethality, and budget constraints. The discrimination would be ongoing for the rest of their military careers, and they would serve in a system in which there is a presumption that they are unfit for duty.
- (5) *Medical ban*: The Trump memo prohibits the military from providing medically necessary care to transgender service members after March 23, 2018, with rare exception. According to the memo, the Secretaries shall “halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.”
- (6) *Lying as a condition of service*: Because the accession ban will be continued indefinitely, the Trump memo will force transgender Americans to lie in order to join the military, as was the case with gays and lesbians under “don’t ask, don’t tell” (DADT). Because the retention ban will be reinstated, the Trump memo will also force transgender troops to lie as a condition of service, which was the case for gays and lesbians under DADT. This requirement to lie conjures former Chairman of the Joint Chiefs of Staff Admiral Mike Mullen’s 2010 observation about DADT: “I cannot escape being troubled by the fact that we have in place a policy which forces young men and women to lie about who they are in order to defend their fellow citizens.”

### **Limited implementation discretion**

- (1) *Currently serving transgender troops*: The Trump memo gives the Secretaries of Defense and Homeland Security a limited amount of discretion in “how to address” the status of currently serving transgender persons, who may or may not be granted permission to remain in service. The Secretaries have no discretion to re-write policy or create blanket exemptions for classes of service members. The most they can decide are the individual fates of currently serving transgender personnel, whose presence will be inconsistent with new military policy. This will be a case-by-case analysis based on vague factors of “lethality” or “budgetary constraints,” which may shift in weight or application over time, meaning that a retention decision for an individual is not necessarily a permanent decision. Thus, if some transgender service members are granted continuation of service despite the ban, they will serve under standards that apply only to them, in a system in

which there is a presumption that they are unfit for duty, and with no assurance that their permission to remain will endure.

- (2) *Timing*: The new Trump policy carries a delayed effective date, which has contributed to some confusion about what the policy means. The Secretaries have until February 21, 2018 to determine “how to address” currently serving members in the context of a reinstated ban, and the new implementing guidance will then take effect March 23, 2018. This does not mean, however, that the Secretaries have until February 21 to *decide* whether the ban should be reinstated. The next six months is not a decisional or study period, but an implementation period. It relates solely to the question of how to transition from current policy to a ban.
- (3) *Future input*: The Trump memo invites the Secretaries to recommend a different course in the future (that the President “find[s] convincing”), but this clause is effectively meaningless because military leaders always have the option of recommending a different course to the President at any time. Inclusion of this provision does not make either the accession or retention ban ordered by the Trump memo any less of a ban.

### **Inaccuracies in President Trump’s memo**

Several of the statements and directives in the Trump memo are misleading as to fact or dismissive as to law. The following four examples begin with a quote from President Trump’s memo and then supply a correction.

1. “President Obama . . . authoriz[ed] the use of the Department’s resources to fund sex-reassignment surgical procedures.”

*Congress* authorizes full medical care for transgender service members, just as it does for every person who serves in uniform. Under 10 U.S.C. § 1074(a)(1), every service member “is entitled to medical and dental care in any facility of any uniformed service.” Under 10 U.S.C. § 1071, Congress’s stated purpose is to “create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members.”

2. The Secretaries shall “halt all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel, except to the extent necessary to protect the health of an individual who has already begun a course of treatment to reassign his or her sex.”

Because of the above statutory entitlement to all medically necessary care, *President Trump does not have authority to deny medical care to anyone serving in uniform, including transgender service members*. Congress has spoken on whether members of the military have earned full medical care, determining that they do. All service members have a statutory entitlement to full doctor-recommended medical care.

3. “Shortly before President Obama left office, however, his Administration dismantled the Departments’ established framework.”

The process of formulating inclusive military policy began more than three years ago. On August 4, 2014, the Department of Defense issued a new medical evaluation standard (DODI 1332.18, *Disability Evaluation System*) that removed transgender identity as a DOD-wide basis for discharge. As of that date, DOD had no overall policy requiring discharge of transgender service members, and instead invited the Services to determine which conditions should be retention-disqualifying. In July 2015, DOD began a year-long study of transgender military policy, culminating in the June 2016 decision to adopt inclusive policy.

4. “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ longstanding policy and practice would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed.”

The transgender ban first appeared in the 1980s, and had not been updated or even reviewed until the Pentagon’s Working Group began study in 2015. This 30-year-out-of-date policy was medically obsolete and useless to commanders in managing and supporting their personnel. It is not accurate to claim that the Pentagon failed to identify a sufficient basis when it acted after a full year of study and considered the expertise of senior defense officials, both military and civilian, medical experts, the experiences of 18 foreign militaries that permit transgender service and have not experienced a negative impact, and a RAND report finding that inclusive policy would not affect readiness or generate significant cost.

### **Conclusion**

Assertions that the President has given the Defense Secretary “wide discretion” over the transgender ban (such as seen in an August 26 *New York Times* headline reading, “Trump Gives Mattis Wide Discretion Over Transgender Ban”) are misleading. The Secretaries do not have discretion over whether there will be a ban because the Trump memo has decided that question. Per that memo, the ban will be reinstated and again take full effect by March 23, 2018. The Secretaries only have a narrow window of discretion to decide the individual fates of currently serving transgender personnel, who in the best case would be permitted to serve under separate standards that apply only to them, under a general presumption that they are unfit to serve, and with no assurance that their permission to remain will endure. Following the recent tragedy in Charlottesville, the Chiefs issued statements that intolerance is “against our values,” that the military is “stronger together,” and that “diversity is our strength.” We could not agree more.

\*The views expressed by faculty at US Government Agencies are those of the individuals and do not necessarily reflect the official policy or position of their respective Universities, their Service Branches, the Department of Defense or the US Government.