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## NEW MILITARY TRANSGENDER POLICY

BY KATHLEEN GILBERD

At the end of June, Secretary of Defense Ashton Carter announced a change in military policy that will allow transgender individuals to serve openly in the military. Under previous policy, they were prohibited from enlisting in the service and subject to administrative discharge if they began gender transition or simply announced their desire to do so. With Directive-Type Memorandum (DTM) 16-005, “Military Service of Transgender Service Members” (<http://www.dtic.mil/whs/directives/corres/pdf/DTM-16-005.pdf>), and DoD Instruction 1300.28, “In-Service Transition for Transgender Service Members”, DoD has now established an initial policy for retention, service and, eventually, enlistment of transgender individuals. While the new policy has significant limitations, and places much control in the hands of doctors and commanders, it represents a real victory for those who fought against the old policy.

As of June 30, Service members may not be discharged, prevented from reenlisting, or otherwise denied continued service on the basis of their gender identity or their “expressed intent to transition genders,” according to the DTM. It states that transgender personnel will be held to the same standards as others of their gender and that “[a] Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to their gender identity 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.” (Attachment, Para. 1.C)

## **ENLISTMENT POLICY**

Enlistment and other accession standards are to be revised over a year’s period. No later than July 1 of 2017, DoD Instruction 6130.03 (<http://dtic.mil/whs/directives/corres/pdf/613003p.pdf>) will be changed to reflect new policies and procedures, which are framed in the negative in the Memorandum. A history of gender dysphoria will be disqualifying unless a licensed medical provider certifies that the applicant has been stable “without clinically significant distress or impairment in social, occupational, or other important areas of functioning” for a period of 18 months. A history of medical treatment associated with gender transition will be disqualifying unless a licensed medical provider certifies that (a) the applicant has finished all medical treatment associated with the transition; (b) the applicant has been stable in the preferred gender for 18 months; and (c) if receiving cross-sex hormone therapy after transition, the applicant has been stable on such hormones for 18 months. A history of sex reassignment or genital reconstructive surgery will be disqualifying unless a licensed medical provider certifies that 18 months has passed since the most recent surgery, no “functional limitations or complications persist,” and additional surgery is not required. (Attachment, Para. 2) The Service Secretaries may reduce or waive the 18 month periods in individual cases. Accession policy is to be reevaluated no later than 24 months from the date of the DTM to reflect changed understanding of medical practices, “ensure consistency with military readiness” and promote effectiveness in recruitment and retention policies.

## **TRANSITIONING IN THE SERVICE**

The DTM required DoD to establish policy by October 1, 2016, under which transgender Service members may transition gender while in the service. Also by that date, the Undersecretary of Defense for Personnel and Readiness was required to issue further guidance on provision of medical care and treatment of transgender Service members. Until then, requests for medical care and requests to transition were to be handled on a case-by-case basis “following the spirit and intent of this memorandum and DoDI 1300.28.”

The DTM states, in Paragraph 5, that discrimination based on gender identity is a form of sex discrimination, so that such discrimination would violate equal opportunity policy, and equal opportunity provisions would be used for discrimination complaints. DoD Directives on equal opportunity are to be revised to incorporate prohibition of such discrimination, and individual Service regulations must be updated to conform to those Directives.

The Memorandum also requires DoD to create training and educational materials designed for transgender personnel, commanders, medical professionals, and all Service members regarding the new policies. Training materials were to be provided to the Services by October 1, 2016, and the Services are to develop implementing plans for education no later than November 1, 2016. A Commander’s Training Handbook, as well as medical guidance were to be available no later than October 1, 2016. Also by that date, DoD was to issue guidance for changing a member’s gender marker in the Defense Enrollment Eligibility Reporting System (DEERS), which will be used to demark members’ ‘official’ gender. In the

interim, requests for gender transition from serving transgender members were to be handled on a case-by-case basis, again “following the spirit and intent of [the] memorandum and DoDI 1300.28.”

That DoD Instruction, which became effective on October 1, 2016, sets out a “construct” through which transgender personnel may transition gender in the service; specifies medical care for transgender members; creates procedures for changing DEERS gender markers; and implements other aspects of the DTM.

The Instruction states at Paragraph 1.2.c that “Service members with a diagnosis from a military medical provider indicating that gender transition is medically necessary, will be provided medical care and treatment for the diagnosed medical conditions. Recommendations of a military medical provider will address the severity of the Service member’s medical condition and the urgency of any proposed medical treatment. Medical advice to commanders will be provided in a manner consistent with processes used for other medical conditions that may limit the Service member’s performance of official duties.” Needless to say, this policy places considerable power in the hands of military doctors, and may create one of the areas where legal assistance to transgender personnel will be important.

### **COMMAND DECISIONMAKING ON MEDICAL TREATMENT**

Subparagraph d of Paragraph 1.2 mandates that care and treatment will be provided in the same manner as any other medical treatment and that “[n]othing in this issuance will be construed to authorize a commander to deny medically necessary treatment to a Service member.” However, the Instruction notes that the commander is responsible for the collective morale, readiness, good order and discipline of his or her command, at the same time ensuring that personnel are treated with dignity and respect. Accordingly, when a commander receives a request that entails a period of non-availability for duty (as for medical treatment during gender transition), “the commander must consider the individual need associated with the request and the needs of the command, in making a decision on that request.” (Para. 3.1.f) Thus, while a commander may not deny treatment, he or she may significantly affect the timing of the treatment and the status of the Service member.

The Instruction sets out a number of actions that the services may authorize commanders to take in balancing individual needs against command needs, including, for example, adjusting the date when the member’s transition will commence, transferring the member to another command (including the Individual Ready Reserve), adjusting local policies on berthing, etc., during gender transition, or referring personnel for a determination of fitness in the disability evaluation system. (Para. 3.2.d.(1)) The Instruction provides no specific guidance in these areas, though it is to be hoped that implementing regulations will limit the broad discretion given here. This, too, may be an area in which legal assistance for transgender personnel may be essential. The Instruction does require the Service Secretaries to establish Service Central Coordination Cells (SCCCs) to provide commanders with medical, legal and other advice and assistance on gender transition and service by transgender personnel, and to assist them in carrying out implementing regulations.

### **TRANSITION REQUESTS**

The Instruction repeats the existing requirement that active and reserve members notify military medical personnel and their commanders of significant health information, including whether they have or have had a condition that may limit their performance of duties. In this case, the notice to the command, presumably presented with the health care provider’s recommendation, triggers command action on the transition request. The member’s notification to the commander must “identify all

medically necessary care and treatment [in the member's] medical treatment plan and a projected schedule for such treatment, including an estimated date for a change in the member's gender marker in DEERS."

The commander must respond to a member's notification/request to transition within 90 days. The response must be in writing and must include notice of any actions the commander intends to take in keeping with the Instruction and implementing regulations. But the commander may make changes to a previously approved approach to or an exception to the gender transition at any time prior to the change to DEERS, if he or she determines the modification is necessary and appropriate. (Para. 3.3.) Implementing regulations are to include procedures allowing the member to request review by a senior officer of any subordinate commander's decision regarding any request under the Instruction or any modification. (Para. 3.3.d)

### **DEERS AND GENDER MARKERS**

Subpara. 1.2.g states that, when the medical provider determines that gender transition is complete, and at a time agreed to by the member and commander, DEERS gender markers will be changed and the member will be recognized in the preferred gender. Prior to the DEERS change, the member must meet all requirements of service of the initial gender; after the change, he or she must meet all requirements of service of the preferred gender, "and as to facilities subject to regulation by the military, will use those berthing, bathroom and shower facilities associated with the preferred gender." (Para. 3.1.b) While the Instruction allows for some flexibility in individual cases, this sets a fairly rigid standard.

Para. 3.1.c discusses Real Life Experience, "the phase in the gender transition process during which the individual commences living socially in the gender role consistent with the preferred gender." It notes that this must normally take place in off-duty status and away from the member's place of duty prior to the DEERS marker change. Per Para. 3.1.d, prior to the DEERS change, the member must meet all uniform and grooming standards, PRT, and other military standards consistent with the existing gender marker; similarly, berthing and other facilities use must conform to the existing marker.

If military medical providers determine that continued care, such as hormone treatment, is needed after the DEERS change, the gender marker change does not preclude the treatment.

The Instruction requires the Services to establish policies for changing DEERS markers based on the medical provider's determination that transition is complete, written approval from the commander issued in consultation with the member and production of documentation by the member showing gender change. That documentation must be a certified true copy of a State birth certificate showing the member's preferred gender; a certified copy of a court order reflecting that gender; or a US passport reflecting that gender.

### **FIRST TERM CONCERNS**

While not imposing a blanket prohibition on transition during a member's first term of service, the Instruction notes the need for readiness and availability during the first term, and allows commanders to take this "readiness model" into consideration in evaluating requests for transition. (Para. 3.5.a) Specific policies to carry this out are to be handled in the same manner as other medical conditions with a similar impact on ability to serve. Members are subject to entry level separation during initial training, (defined as 180 days of active service) if they have a medical condition that impairs ability to complete training. ROTC and service academy members are to be discharged if they have a medical condition that impairs ability to complete training or access into the military. The Instruction notes that ROTC and

academy cases are each unique and should be evaluated on the basis of individual circumstances, but that members must be able to meet accession medical standards to qualify for graduation and appointment.

## **RESERVE**

Reservists are subject to the same provisions, with a few exceptions. All reserve members (except Selected Reserve full-time support personnel, who will follow the active-duty approval process) must submit to their command a medical evaluation including a medical treatment plan for transition. An evaluation by a civilian medical provider is subject to “review and approval” by a military provider. The commander and member are to address periods of unavailability “with a view to mitigating unsatisfactory participation.” The Instruction suggests rescheduling training, alternate training, and authorized absences as strategies.

## **OTHER POLICIES**

Members are subject to discharge for fraudulent or erroneous enlistment if there is found to be a “deliberate material misrepresentation, omission, or concealment of a fact, including a medical condition, that if known at the time of enlistment, induction, or entry into a period of military service, might have resulted in rejection.” (Para. 3.5.b.(3))

Section 3.6 of the Instruction warns about protection of personally identifiable information and unwarranted invasions of personal privacy, citing DoD Directives 5400.11 (<http://dtic.mil/whs/directives/corres/pdf/540011r.pdf>) and DoD 6025.18-R (<http://dtic.mil/whs/directives/corres/pdf/602518r.pdf>). It states as well that commanders “may employ reasonable accommodations to respect the privacy interests of service members,” but provides no further detail.

## **CONCLUSION**

While much remains to be filled in on this policy, the DTM and Instruction give a good overview of it. It is clear to this writer that the military will retain a great deal of control over gender transition and the service of transgender personnel. Despite the language prohibiting discrimination, this broad control may lead to discriminatory treatment and the need for legal assistance for transgender personnel. ■

*Kathleen Gilberd is a legal worker in San Diego, California, and executive director of the Military Law Task Force.*

## 2016 NLG CONVENTION REPORT

BY JEFF LAKE

The 79th annual National Lawyers Guild Convention was held on August 3-7 in New York City.

The convention kicked off with a reception at the Center for Cuban Studies which was attended by MLTF members Matthew Rinaldi and me. The First Secretary of the Cuban Embassy in the U.S., Miguel Fraga, extended greetings to the NLG on behalf of the people of Cuba.

The annual MLTF meeting was held on August 4. The members present discussed the state of the NLG National Executive Committee (NEC) and proposals for reorganization. The priorities for the coming year were reaffirmed with a focus on veterans' issues and military sexual trauma. It was noted that the MLTF brochure on MST is due out soon and needs wide distribution.

Due to a lack of a quorum, the election of new MLTF Steering Committee members was not held at the convention. An online election took place in early November. Alison Carter was elected along with all the members up for reelection.

The MLTF works with the NLG International Committee. I participated in the committee meeting which was well attended. The IC members discussed work in 16 different countries, as well as working with domestic and international environmental justice organizations. The IC and the MLTF will continue to coordinate work in the coming year.

As mentioned above, the convention plenary was dominated by discussion concerning a number of proposals to restructure the NLG NEC. Almost all of these proposals were tabled due to procedural issues. One proposal is remaining and the MLTF is urging that this proposal be defeated. Voting online is now open.

Finally, the MLTF staffed a literature table throughout the convention with materials relating to Chelsea Manning and various aspects of military law. The table was well-received and increased the visibility of the MLTF to the NLG at large. Many thanks to Aaron Frishberg for his work in organizing this table. ■

## GI RIGHTS CONFERENCE 2016

SIRI MARGERIN

Over Memorial Day weekend it was the pleasure of the Bay Area GI Rights Network to host a rare assortment of GI Rights counselors, MLTF lawyers, friends and interested parties to discuss the trends and the tempests of the past year for the GI RIGHTS Network, and to reflect on our future and our community.

It was a beautiful weekend, sunny, breezy and blue. We met at Fort Mason, right on the San Francisco Bay.

These conferences take place annually and typically have revolved around critical skill building workshops. This year, in response to the political moment, and the continuing attrition in our ranks, we chose to experiment with a less skills based perspective and go for the big picture.

The needs of the service members who are our clients necessarily change along with the state of the world and the needs of the U.S. military. Our clients are understandably focused narrowly on their pressing issues, but as counselors we are privileged to see how those needs are multiplied across the services and change with the wider forces.

As the needs of the service members change so do the demands on the counselors. The Hotline began its work in the 1994 with the mandate of “helping out” GI’s in need of a route out of the military. A period, in the mid 2000’s, was spent largely working with GI’s broken by the wars in Iraq and Afghanistan, who were struggling against being sent home tarred with a characterization of “personality disorder,” in lieu of recognition of Post-Traumatic Stress Disorder, Traumatic Brain Injury and Military Sexual Trauma (PTSD, TBI, and MST). These conditions were naturally acquired during service and deserved LOD and retirement ratings. During these periods the work felt urgent and was compelling to many counselors from an activist perspective.

In 2011, in the cool down and the aftermath of the “end” of the (still ongoing, never-ending, re-escalating) war in Iraq, with the military experiencing a reduced need for troops to feed into deployments and pressure to reduce expenses, counselors saw many service members through involuntary discharges designed to prune units of “deadwood” soldiers, sailors, airmen and marines. Separated for infractions often overlooked during the hot war, these discharges again resulted in the loss of benefits for the service members. Counselors were being called upon to help members anxious not to get out but to stay in.

And, now, we are experiencing an era of “administrative separations.” As the Hotline has earned more widespread recognition, counselors are routinely called upon to help untangle administrative and Human Resource issues, once well outside our purview, for both active duty service members and for a swell of members of the Reserve Services and National Guard.

A number of counselors, entire nodes in some locations, have moved away from Hotline counseling due to factors ranging from general burnout, to a reduced sense of urgency about the work, or the persistent complaint that the work has become more “social work” than pointed anti-war activism.

It was hoped that this conference would prove a space conducive to thinking through these concerns. Whistleblowing and Moral Injury were the relevant lenses used to frame our thinking.

We hosted a public event: Moral Injury From the Personal to the Political. The event was meant to connect personal losses from moral injury and the potential for broad societal harm from the expanding drone program. The event highlighted the purposefully invisible but deeply harmful wounds suffered not only by service members but to the civilian side as well, as the USA wakes up to a changed narrative - no longer heroic upstarts we have been reborn as the storm troopers.

We heard from Joseph Bobrow, the author of *Waking Up from War*, and from Lisa Ling and Cian Westmoreland. Lisa and Cian are both former service members and participants in the Air Force drone program, both whistleblowers, both suffering from moral injury as a result, and both anxious to warn the oblivious of the threat posed by drone warfare and surveillance to the security of the world and to the individual.

Along with the public event, there was a practical workshop on Whistleblowers led by MLTF's James Klimaski meant to help counselors recognize callers who may be whistleblowers and need appropriate support and resources. We had a follow up discussion on Moral Injury with a four-person panel. A significant red flag that arose during the discussion was the concern that moral injury could be used as a wedge to complicate the ability of service members and veterans to get their VA ratings and retirements. There is no rating for moral injury or any established treatment. The military learned very well how to master public narratives after the public relations debacles of the Vietnam War era. It is critical that we prevent the meaning of Moral Injury from being coopted.

Moral Injury is increasingly on the radar within both military and activist circles, but it carries different connotations in different contexts. Moral Injury is a consequence of the US indiscriminately choosing to use military force as the go to problem solver. It must not become another means to disenfranchise service members seeking treatment and benefits for PTSD, TBI or MST. Moral Injury does not demand a cure, but an alternative. Just as drone warfare is not a cure for casualties in war. Follow up and further development of our thinking about these issues is necessary, we were barely able to scratch the surface with the time we had allotted at the conference.

We had a lively discussion about promoting Conscientious Objection within the military thanks to The Center on Conscience and War and CO Dallas Wisehaupt. A very timely workshop on National Guard issues was lead by Lisa Ling, a workshop addressing counseling people in crisis by Mary Lou Noble and Nicky Baltrushes of Civilian Medical Resource Network. Becca Von Behren, formerly of Swords to Plowshares, gave a great presentation on MEB/PEB issues. Kathy Gilberd presented on Non-Judicial Punishment along with Major Don Wolfe from the 75<sup>th</sup> LOD.

The yearly conference is a precious opportunity to spend quality time face to face with friends, local allies and colleagues. The GI Rights Hotline provides valuable and much-appreciated information, support and resources to service members in need. Providing support to CO's and whistleblowers and keeping pressure on the DOD in support of service members' rights feels like resistance to militarism to me. ■

*Siri Margerin is a GI rights counselor who is coordinator of Bay Area GI Rights, a member of MLTF, and on the board of directors of Iraq Veterans Against the War.*

# CHELSEA MANNING UPDATE

BY RENA GUAY

It's been a tough year for Chelsea Manning and her supporters. Her situation at Fort Leavenworth has become intolerable, as the Army has denied her proper health care and abused her with petty charges, solitary confinement, and constant indignities. She has [attempted suicide at least twice](#). She went on a [hunger strike](#) this summer to demand gender reassignment surgery – part of the recommended medical treatment for gender dysphoria -- which prompted a huge outcry across the world by her supporters, and as a result she did achieve a [victory](#) when the prison relented after five days and agreed to allow her to obtain the appropriate medical care, though no timetable was offered.

On the legal front, this fall her attorneys [filed for clemency](#) (which included a very personal and reflective statement from Chelsea) and a [petition was created on the White House website](#), which [reached the required 100,000 signatures](#) to trigger a response by the administration. Meanwhile a letter-writing and phone call campaign in conjunction with the clemency request has been widely promoted, and while we can't know how many participated, it's likely to be considerable.

And finally another major development in the advocacy work occurred when The Chelsea Manning Support Network, which has coordinated fundraising and activism on Chelsea's behalf since 2010, [announced that it was shutting down](#) and passing on the [chelseamanning.org](#) domain, with its archive and resources, to a group made up of Chelsea herself, her legal team, and others she designates. This transition will be finalized in the early part of 2017.

Chelsea continues her [Guardian column](#) and her [blog at Medium.com](#), as well as her Twitter account @ychelsea.

The NLG [MLTF sent the following letter](#) to President Obama on December 16.

## NLG Military Law Task Force to Obama: Pardon Chelsea Manning/Commute Sentence to Time Served

President Barack Obama  
The White House  
1600 Pennsylvania Avenue NW  
Washington, DC 20500

December 16, 2016

Dear President Obama:

The National Lawyers Guild [Military Law Task Force](#) joins more than [102,000 people](#) who have called on you to pardon Chelsea Manning or, at the very least, commute the remainder of her sentence. You are well aware of the fact that her actions revealed serious incidents and addressed important issues that, despite your administration's promises of transparency, were kept from the American public. Whatever one may think of her choice of means, there is no doubt that her actions were prompted by a deep moral sense that is all too often lacking in US policy and among US leaders.

As you should know, Ms. Manning's incarceration has been far more difficult than that of most prisoners because of her issues around her gender identity. Your administration has recently expressed its support for non-gender conforming members of our society. At least, Attorney General Lynch assured them that the Department of Justice has their backs.

No good can be served by extending Ms. Manning's confinement. There is no possibility that she will repeat her offense, her punishment has already been severe and sufficient to serve whatever preventive purpose could have been accomplished by her prosecution. All that is left is retribution.

Our criminal system places excessive emphasis on punishment and has done so in this case. Justice requires that punishment be tempered with mercy in appropriate circumstances. This is one such circumstance and you would be remiss not to exercise it.

The National Lawyers Guild is the country's oldest and largest human rights bar organization and was the first integrated national bar association. It has a proud history of defending and advancing human rights in the US and around the world. Its Military Law Task Force has defended the rights of our service members for decades and we stand in full support of PVT Manning.

Sincerely,

Kathleen Gilberd

Executive Director  
Military Law Task Force

## **ANNOUNCEMENTS**

### **GI RIGHTS PODCAST AND RADIO SHOW**

The Upwave Media project of the Center for Conscience in Action is producing a monthly podcast and radio show called GI Rights Radio. The show is hosted by James M. Branum and Serena Blaiz, long members and friends of MLTF, and can be found at [upwavemedia.com/girights](http://upwavemedia.com/girights). The program will cover GI Rights/military law issues, organizations, news and people. Other Upwave Media programming includes Peace Buzz, hosted by Serena Blaiz, and Red Town Radio with Brenda Golden.

## THE MILITARY LAW TASK FORCE of THE NATIONAL LAWYERS GUILD

**ON WATCH** is published quarterly by the Military Law Task Force of the National Lawyers Guild. Subscriptions are free with MLTF dues (\$25), or \$20 annually for non-members.

We welcome comments, criticism, assistance from Guild members, subscribers and others interested in military, draft or veterans law.

For membership info, see our website, or contact us using the info below.

Each issue is made available to the public on our website approximately one month after distribution to subscribers. A digital archive of back issues of this newsletter can be found on our website. See [nlgmtf.org/onwatch/](http://nlgmtf.org/onwatch/).

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*The National Lawyer's Guild's Military Law Task Force includes attorneys, legal workers, law students and "barracks lawyers" interested in draft, military and veterans issues. The Task Force publishes On Watch as well as a range of legal memoranda and other educational material; maintains a listserv for discussion among its members and a website for members, others in the legal community and the public; sponsors seminars and workshops on military law; and provides support for members on individual cases and projects.*

*The MLTF defends the rights of servicemembers in the United States and overseas. It supports dissent, anti-war efforts and resistance within the military, offering legal and political assistance to those who challenge oppressive military policies. Like its parent organization, the NLG, it is committed to the precept that human rights are more sacred than property rights.*

*To join, or for more information, contact us by email or phone, or visit our website or social media pages.*

[www.nlgmltf.org](http://www.nlgmltf.org) | [facebook.com/nlgmltf](https://facebook.com/nlgmltf) | [twitter.com/military\\_law](https://twitter.com/military_law)