

# Congress of the United States

House of Representatives

Washington, DC 20515

August 4, 2017

The Honorable James Mattis  
Secretary of Defense  
1000 Defense Pentagon  
Washington, DC 20301

General Joseph F. Dunford, Jr.  
Chairman of the Joint Chiefs of Staff  
9999 Joint Staff Pentagon  
Washington, DC 20318

Dear Secretary Mattis and Chairman Dunford:

As Members of Congress with an abiding interest in our nation's military and its policies towards the LGBTQ community, we write to not only express our strong opposition to President Trump's recent tweets seeking to ban transgender individuals from the military, but to remind you not to comply with any unconstitutional directive which may ultimately be issued. We reject the premise that the presence of transgender troops interferes with the morale or combat readiness of our Armed Forces. We also echo the request made by our Senate colleagues in their letter to Secretary Mattis that "at a minimum" the Department of Defense not separate any transgender troops until the Department has completed its recently announced policy review and reports its finding back to Congress.<sup>1</sup>

On July 26, President Trump issued a three-tweet pronouncement that "the United States Government will not accept or allow transgender individuals to serve in any capacity in the U.S. Military," in contravention of the 2016 decision by the Obama Administration to allow transgender individuals to openly serve.<sup>2</sup> In response, General Dunford stated "there will be no modifications to the current policy until the President's direction has been received by the Secretary of Defense and the Secretary has issued implementation guidance," and the Defense Department emphasized that while it awaits formal guidance from the White House, "the Department will continue ... ensuring all service members are treated with respect."<sup>3</sup> This week at a public forum, U.S. Coast Guard Commandant Paul Zukunft reiterated his support for

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<sup>1</sup> Letter from Sen. Kristen Gillibrand (D-NY) and 44 Senators to the Honorable Jim Mattis, Secretary of Defense (Jul. 28, 2017).

<sup>2</sup> Donald Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 5:55 AM); Donald Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 6:04 AM); Donald Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 6:08 AM).

<sup>3</sup> Bryan Bender and Jacqueline Kilmas, *Pentagon takes no steps to enforce Trump's transgender ban*, Politico (Jul. 27, 2017), available at <http://www.politico.com/story/2017/07/27/trump-transgender-military-ban-no-modification-241029>.

transgender servicemembers stating “We have made an investment in you and you have made an investment in the Coast Guard, and I will not break faith.”<sup>4</sup>

We commend the professionalism displayed by the military’s leadership in their initial response to President Trump’s ill-conceived pronouncement. But as you are no doubt aware, federal court decisions have recognized that under our Constitution transgender people are protected against discrimination on the basis of sex – like everyone else – as well as on the basis of their transgender status.<sup>5</sup> The Supreme Court has also previously observed that the government is subject to constitutional limits even “in the area of military affairs.”<sup>6</sup> Moreover, any discriminatory military policy is particularly problematic when it does not draw “on the combined wisdom of [an] exhaustive examination in the Executive and Legislative Branches.”<sup>7</sup>

In the present instance, it is abundantly clear that any effort by President Trump to ban military service by transgender individuals would not only constitute poor policy, but would be unconstitutional on its face. This is true for a number of reasons:

- Instead of being grounded in a thoughtful deliberative process, the President’s policy was derived from a series of arbitrary and capriciously issued tweets.
- By contrast, the existing policy was developed in conjunction with the full leadership of the Armed Services, based on a review of all available data, including a comprehensive RAND Corporation study and input from independent experts, the transgender community, and medical professionals.
- It is not possible to justify the proposed ban based on the purported costs of health care. The RAND study estimated health care coverage for transgender service members would cost the military between \$2.4 million and \$8.4 million per year, less than 1/10 of 1% of the military’s annual budget.
- Instead of being developed based on any new quantitative data or policy input, the President’s proposal appears to be based on a raw political calculation, with a Trump administration official claiming the President’s tweets “forces Democrats in Rust Belt states like Ohio, Michigan, and Wisconsin, to take complete ownership of this issue.”<sup>8</sup>

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<sup>4</sup> Gregory Hellman, *Coast Guard chief to transgender personnel: ‘I will not turn my back’*, Politico (Aug. 1, 2017) available at <http://www.politico.com/story/2017/08/01/transgender-military-ban-trump-coast-guard-chief-react-241206>.

<sup>5</sup> See, e.g., *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1047-50 (7th Cir. 2017) (high school’s policy barring transgender student from using the boys’ bathroom violated Title IX and the Equal Protection Clause of the Fourteenth Amendment); *Glenn v. Brumby*, 663 F.3d 1312, 1318-19 (11th Cir. 2011) (supervisor’s purported concern that other women might object to transgender employee’s restroom use was not a sufficiently important governmental interest to justify termination under the Fourteenth Amendment); *Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004) (transgender fire department employee’s allegation of discrimination based on gender non-conforming behavior and appearance sufficient to support claim of sex discrimination under the Fourteenth Amendment and Title VII).

<sup>6</sup> *Weiss v. United States*, 510 U.S. 163 (1994).

<sup>7</sup> Michael Paradis, *Why Transgender Service Members Will Win in Court*, Lawfare Blog (Jul. 28, 2017, 12:06 PM), <https://lawfareblog.com/why-transgender-service-members-will-win-court> (Internal quotations omitted).

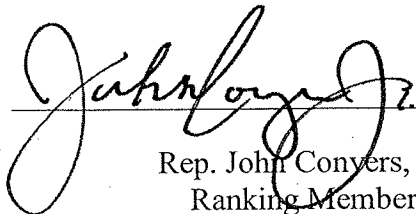
<sup>8</sup> *Trump will ban transgender people from U.S. military*, Axios Blog (Jul. 26, 2017), <https://www.axios.com/military-will-deny-transgender-troops-in-any-capacity-trump-tweets-2465743543.html>

- Instead of being developed in consultation with Congress, the proposal is strongly opposed by Congressional leaders. House Armed Services Committee Ranking Member Adam Smith (D-WA) noted that transgender servicemembers “are defending the United States around the world as we speak, and they have long done so with distinction” and “to push out those who have devoted their lives to this country would be ugly and discriminatory in the extreme.” John McCain (R-AZ), the Chairman of the Senate Armed Services Committee and Vietnam War veteran criticized the action, stating “We should all be guided by the principle that any American who wants to serve our country and is able to meet the standards should have the opportunity to do so—and should be treated as the patriots they are.” Similarly, Jack Reed (D-RI), the Ranking Democrat on the Armed Services Committee and another veteran observed, “Today, on the anniversary of President Harry Truman's order desegregating the United States Armed Forces, President Trump is choosing to retreat in the march toward equality.” Numerous additional Members on both sides of the aisle from the House and Senate have echoed these concerns, and the House recently rejected on a bipartisan basis an amendment to the Defense bill that would have prohibited the Department of Defense from paying for appropriate and medically necessary transition-related health care.
- The proposed ban categorically excludes an entire group of people from military service on the basis of a characteristic that has no relevance to their capacity to serve.

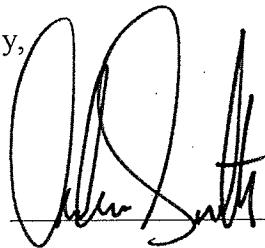
As the respected leaders of our brave armed service members, you have no obligation to implement a hastily considered tweet designed to serve as a “wedge” political issue; but rather you should honor your own independent duty to support and defend the Constitution of the United States. We believe any serious or credible review of the law and the facts in the present case make it clear that the President’s proposed ban on transgender people serving in the Armed Forces will weaken, not strengthen our military, and is blatantly unconstitutional.

We would welcome the opportunity to discuss these matters with you at your earliest convenience.

Sincerely,



Rep. John Conyers, Jr.  
Ranking Member  
House Judiciary Committee



Rep. Adam Smith  
Ranking Member  
House Armed Services Committee

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(“Quote from a Trump administration official: ‘This forces Democrats in Rust Belt states like Ohio, Michigan, and Wisconsin, to take complete ownership of this issue. How will the blue collar voters in these states respond when senators up for re-election in 2018 like Debbie Stabenow are forced to make their opposition to this a key plank of their campaigns?’”).



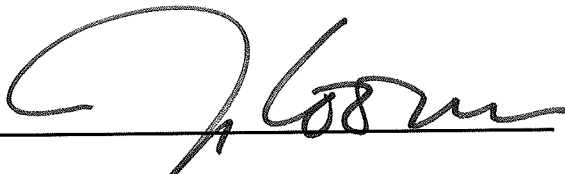
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Rep. Jerrold Nadler  
Ranking Member  
Subcommittee on Courts, Intellectual  
Property, and the Internet  
House Judiciary Committee  
Vice-Chair  
LGBT Equality Caucus



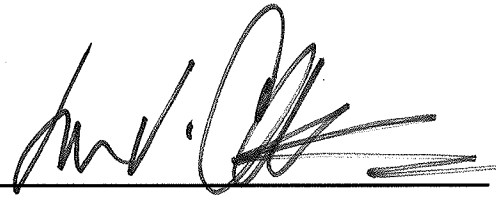
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Rep. David N. Cicilline  
Ranking Member  
Subcommittee on Regulatory Reform,  
Commercial and Antitrust Law  
House Judiciary Committee  
Co-Chair  
LGBT Equality Caucus



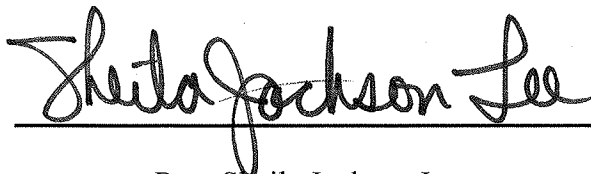
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Rep. Jim Cooper  
Ranking Member  
Subcommittee on Strategic Forces  
House Armed Services Committee



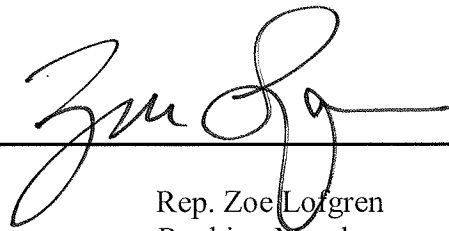
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Rep. Luis Gutiérrez  
Member  
House Judiciary Committee



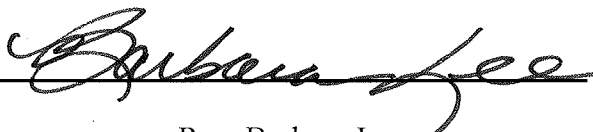
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Rep. Sheila Jackson Lee  
Ranking Member  
Subcommittee on Crime, Terrorism,  
Homeland Security, and Investigations  
House Judiciary Committee



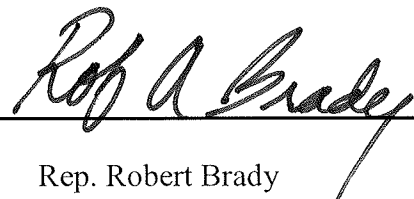
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Rep. Zoe Lofgren  
Ranking Member  
Subcommittee on Immigration and Border  
Security  
House Judiciary Committee



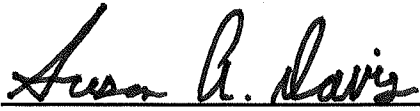
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Rep. Barbara Lee  
Vice-Chair  
LGBT Equality Caucus



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Rep. Robert Brady  
Member  
House Armed Services Committee



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Rep. Susan Davis  
Member  
House Armed Services Committee



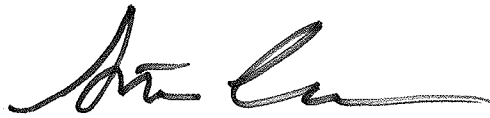
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Rep. James R. Langevin  
Ranking Member  
Subcommittee on Emerging Threats and  
Capabilities  
House Armed Services Committee



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Rep. Rick Larsen  
Member  
House Armed Services Committee



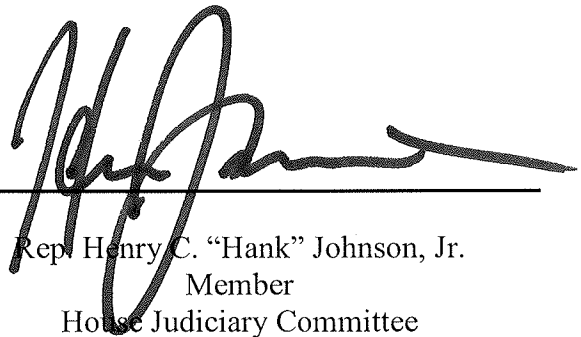
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Rep. Steve Cohen  
Ranking Member  
Subcommittee on the Constitution and Civil  
Justice  
House Judiciary Committee



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Rep. Joe Courtney  
Ranking Member  
Subcommittee on Seapower and Projection  
Forces  
House Armed Services Committee



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Rep. Henry C. "Hank" Johnson, Jr.  
Member  
House Judiciary Committee



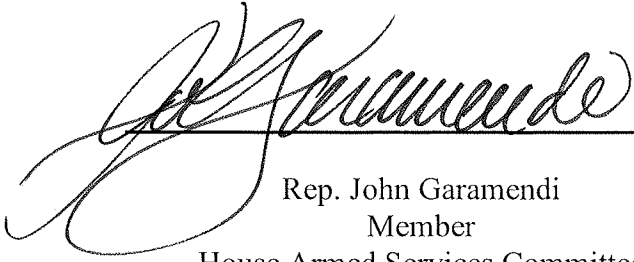
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Rep. Niki Tsongas  
Ranking Member  
Subcommittee on Tactical Air and Land  
Forces  
House Armed Services Committee



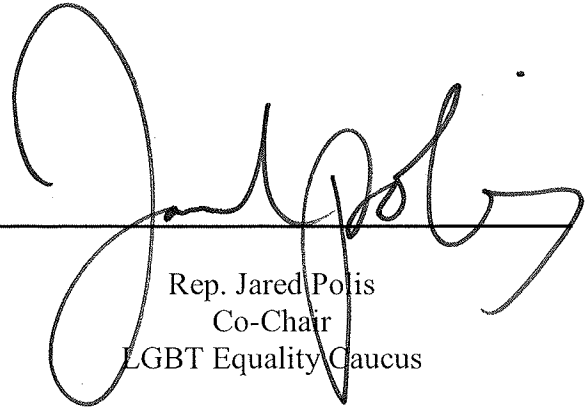
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Rep. Jackie Speier  
Ranking Member  
Subcommittee on Military Personnel  
House Armed Services Committee



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Rep. John Garamendi  
Member  
House Armed Services Committee



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Rep. Jared Polis  
Co-Chair  
LGBT Equality Caucus



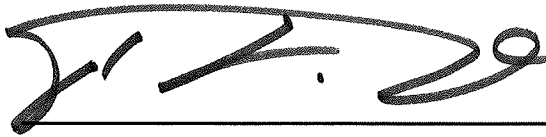
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Rep. Ted Deutch  
Member  
House Judiciary Committee  
Vice-Chair  
LGBT Equality Caucus



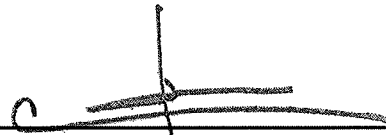
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Rep. Karen Bass  
Member  
House Judiciary Committee



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Rep. Cedric Richmond  
Member  
House Judiciary Committee



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Rep. Colleen Hanabusa  
Member  
House Armed Services Committee



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Rep. Carol Shea-Porter  
Member  
House Armed Services Committee



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Rep. Hakeem Jeffries  
Member  
House Judiciary Committee



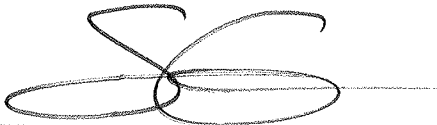
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Rep. Joseph P. Kennedy III  
Vice-Chair  
LGBT Equality Caucus



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Rep. Alan Lowenthal  
Vice-Chair  
LGBT Equality Caucus



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Rep. Sean Patrick Maloney  
Co-Chair  
LGBT Equality Caucus



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Rep. Beto O'Rourke  
Vice Ranking Member  
House Armed Services Committee



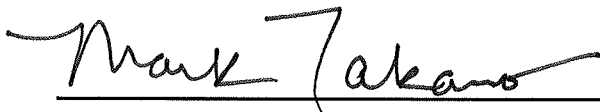
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Rep. Mark Pocan  
Co-Chair  
LGBT Equality Caucus



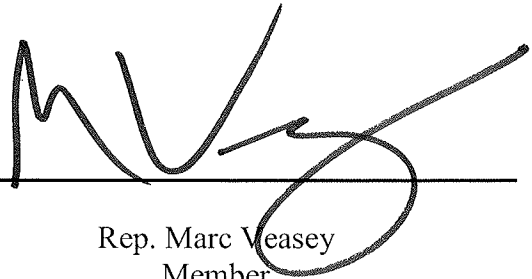
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Rep. Eric Swalwell  
Member  
House Judiciary Committee



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Rep. Mark Takano  
Co-Chair  
LGBT Equality Caucus

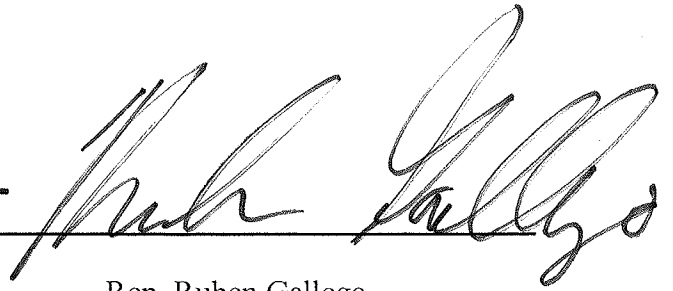


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Rep. Marc Veasey  
Member  
House Armed Services Committee



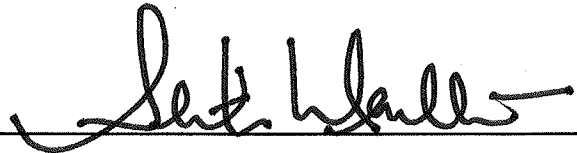
Rep. Donald Norcross  
Member  
House Armed Services Committee



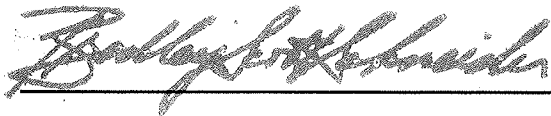
Rep. Ruben Gallego  
Member  
House Armed Services Committee  
Vice-Chair  
LGBT Equality Caucus



Rep. Ted Lieu  
Member  
House Judiciary Committee  
Vice-Chair  
LGBT Equality Caucus



Rep. Seth Moulton  
Ranking Member  
Subcommittee on Oversight and  
Investigations  
House Armed Services Committee



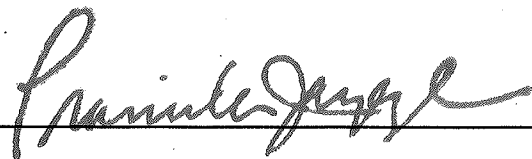
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Member  
House Judiciary Committee



Rep. Anthony Brown  
Member  
House Armed Services Committee



Rep. Salud Carbajal  
Member  
House Armed Services Committee



Rep. Pramila Jayapal  
Member  
House Judiciary Committee





Rep. Ro Khanna  
Member  
House Armed Services Committee



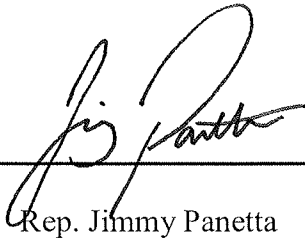
Rep. A. Donald McEachin  
Member  
House Armed Services Committee



Rep. Stephanie Murphy  
Member  
House Armed Services Committee



Rep. Tom O'Halleran  
Member  
House Armed Services Committee



Rep. Jimmy Panetta  
Member  
House Armed Services Committee



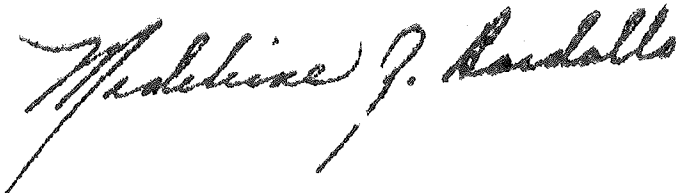
Rep. Jamie Raskin  
Vice Ranking Member  
House Judiciary Committee



Rep. Jacky Rosen  
Member  
House Armed Services Committee



Rep. Thomas Suozzi  
Member  
House Armed Services Committee



Rep. Madeleine Bordallo  
Ranking Member  
Subcommittee on Readiness  
House Armed Services Committee



Rep. Dan Kildee  
Vice-Chair  
LGBT Equality Caucus

*Linda J. Sánchez*

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Rep. Linda Sánchez  
Vice-Chair  
LGBT Equality Caucus