I. INTRODUCTION

Christine Jorgensen, born George William Jorgensen Jr., was drafted into the Army in 1944 and honorably discharged two years later. In the early 1950s, Jorgensen left the United States for Denmark to undergo sex reassignment surgery. The U.S. Ambassador to Denmark had Jorgensen’s Army and Veteran Affairs records amended to reflect her new gender identity. While Jorgensen did not serve openly as a transwoman, she was the first prominently known individual to undergo a procedure for gender reassignment.

* © 2020 Victoria Manuel, J.D. candidate 2020, Rutgers Law School; B.A. Political Science 2017, Louisiana State University; United States Army veteran, 2011-2014. The author would like to thank her family and friends for their support, Professor Carlos Ball for his guidance and support, the editors of the Tulane Journal of Law & Sexuality, and all the brave transgender service members who have served or are serving today, both openly and in hiding.

2. Id.
3. Id.
While it is difficult to quantify how many transgender Americans there are, the Williams Institute estimates there are nearly 1.4 million transgender individuals in the country.\(^4\) The National Center for Transgender Equality estimates there to be 134,000 veterans and around 15,000 individuals actively serving who are transgender, whether out or closeted.\(^5\) A strength figures chart by the Department of Defense on November 30, 2018, listed over 1,300,000 individuals in the armed forces.\(^6\)

In 2017, President Trump announced on Twitter that transgender personnel would not be permitted “to serve in any capacity in the U.S. Military.”\(^7\) This marked the Trump administration’s reinstatement of the ban that had been lifted in 2016.\(^8\) This Review discusses the history of lesbian, gay, bisexual, and transgender (LGBTQ+) involvement in the United States military, Trump’s transgender military ban and the ensuing litigation, recent developments regarding the ban and its enforcement, the standards of review in cases regarding transgender rights, and a prediction of the future of the ban.

II. HISTORY OF LGBTQ+ AMERICANS IN THE UNITED STATES

ARMED FORCES AND GOVERNMENT EXCLUSION POLICIES

Despite their ability and desire to serve, LGBTQ+ Americans wanting to enlist in the armed forces have had to face many barriers and hardships that straight and cisgendered troops have not.\(^9\)

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8. Id.

A. The Lesbian, Gay, and Bisexual Military Ban

While “‘homosexual acts’ were grounds for discharge” from service in the armed forces during the American Revolution, exclusion of LGBTQ+ individuals became official military policy in the mid-1900s. After the end of the First World War, the military made sodomy a crime punishable by court martial, which was later codified into the Uniform Code of Military Justice under article 125. Beginning in 1942, homosexuality became an explicit bar to service; classified as a mental disorder, servicemen were subjected to psychiatric screening to detect those who may be homosexual.

Technical Sergeant Leonard Matlovich of the United States Air Force was discharged from the military on the basis of his sexual orientation. A veteran of the Vietnam War, Matlovich was the recipient of a Bronze Star and a Purple Heart. His legal battle against being discharged from the Air Force in 1975 lasted five years, culminating in a judge, on appeal, ordering his reinstatement into the Air Force and five years of back pay in 1980. In 1981, the ban on homosexual service was reasserted by the Department of Defense, and throughout the decade, approximately 17,000 service members were discharged due to homosexuality.

As part of his 1992 presidential campaign platform, Bill Clinton promised to change the ban on gay and lesbian enlistment after his election. There was much opposition to this initiative. For example, Commander Craig Quigley, a spokesperson for the Navy, claimed that “[h]omosexuals are notoriously promiscuous,” without offering anything

10. Pruitt, supra note 9; see also Transgender Military Service, supra note 9 (“For decades, transgender people were prohibited from serving openly in the U.S. military based on outdated and discriminatory medical standards.”).
11. Pruitt, supra note 9. Prior to its repeal, article 125 of the Uniform Code of Military Justice stated that a member of the armed forces “who engages in unnatural sexual copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.” 10 U.S.C.S. § 925 (1956) (repealed 2016).
14. Id.
15. Id.
to support the assertion.\textsuperscript{19} He went on to comment that straight servicemen “who showered with gay men would have an ‘uncomfortable feeling of someone watching’” them if gay men could serve openly.\textsuperscript{20} General Carl E. Mundy Jr., then-Commandant of the Marine Corps, was “said to be particularly concerned that the corps’ proud 217-year-old tradition would be irreparably damaged by allowing gay men and lesbians to serve.”\textsuperscript{21} And in a speech to the United States Naval Academy, General Colin Powell stated that “[t]he presence of homosexuals in the force would be detrimental to good order and discipline, for a variety of reasons, principally relating around the issue of privacy.”\textsuperscript{22}

This opposition resulted in President Bill Clinton breaking his campaign promise to the LGBTQ+ community.\textsuperscript{23} The Clinton administration “had to compromise” and signed the “Don’t Ask, Don’t Tell” policy into law in 1993,\textsuperscript{24} despite homosexuality having been removed from the Diagnostic and Statistical Manual of Mental Disorders six years earlier.\textsuperscript{25} The law would remain in effect until the Obama administration saw the Don’t Ask, Don’t Tell Repeal Act of 2010 passed and signed into law.\textsuperscript{26}

In 2012, the Palm Center\textsuperscript{27} reported that the repeal of Don’t Ask, Don’t Tell “has had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale” and that “survey data shows that service members reported the same level of military readiness after [the] . . . repeal as before it.”\textsuperscript{28} Instead of negatively impacting readiness or morale, the
repeal of Don’t Ask, Don’t Tell allowed LGBTQ+ Americans to serve their country openly and proudly.29

B. The Transgender Military Ban

Transgender individuals were essentially banned from military service if they openly expressed their gender identities. For example, transgender individuals could be discharged from the Air Force for being “psychologically unsuitable and physically unfit because of transsexualism and completion of sex change surgery.”30 Further, under Army Regulation 40-501, “[a] history of, or current manifestations of, personality disorders, . . . transvestism, voyeurism, . . . or . . . psychosexual conditions, transsexual[ism], gender identity disorder[s] to include major abnormalities or defects of the genitalia such as change of sex [or an attempt to do so] . . . render an individual administratively unfit.”31

Early legal challenges to these regulations were unsuccessful. In Leyland v. Orr, the plaintiff “was honorably discharged from the Air Force Reserves as psychologically unsuitable and physically unfit because of transsexualism and completion of sex change surgery.”32 Although the plaintiff argued that she had been discharged solely on the basis of her status as a transwoman and not because of an inability to perform military duties, the Ninth Circuit affirmed summary judgment in favor of the Air Force Reserves.33

The plaintiff in Doe v. Alexander served for over eight years in the Air Force, during which time they presented as a man.34 After leaving the Air Force, the plaintiff had gender confirmation surgery to become a woman. A few years later, the plaintiff tried to become an Army officer but was denied because of the provision in Army Regulation 40-501, section 2-14(s) providing that “‘major abnormalities and defects of the genitalia

30. Leyland v. Orr, 828 F.2d 584 (9th Cir. 1987) (discussing the application of United States Department of the Air Force Regulation 160-43, which required medical evaluations of transgender servicemen in order to see if they were to be denied retention on activity duty).
32. Leyland, 828 F.2d at 585.
33. Id. at 586.
such as change of sex...’ constitute[] a disqualifying medical defect.”

The court dismissed the plaintiff’s complaint for lack of reviewability.

_DeGroat v. Townsend_ is a case in which the plaintiff underwent “a series of medical and psychiatric treatment and counseling for gender dysphoria” that had been both conducted and authorized by the Air Force during her service. Though she remained anatomically male, she was encouraged to dress as a woman when she was not on-base and on-duty as part of her treatment. In 1988, Major DeGroat was seen dressed as a woman at church and was reported to the military police and charged with two instances of public cross-dressing. Regardless of her authorized medical treatment, the Air Force initially ordered her to stop dressing as a woman, though the order was amended the following year to provide limited exceptions. Following her discharge, Major DeGroat legally changed her name and had gender confirmation surgery.

The Commandant “recommended that action be initiated against [Major DeGroat]... because she had ‘exhibited sexual perversion by attiring himself in female clothing and subjecting himself to public view... while dressed in such attire,’” despite high recommendations and support from other officials. The plaintiff sought to be reinstated to complete years required for retirement benefits or to be credited years of service required towards retirement that were denied by her discharge, which the court denied on grounds that her request for reinstatement was rendered moot because of uncontroverted evidence that she was ineligible under the Air Force’s regulations and that she had forsworn monetary damages in her complaint and therefore could not be compensated in a manner that would be the equivalent of such an award.

The military has also prosecuted biologically male service members for wearing clothing identified as being for females under article 134 of

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36. _Id._ at 905.
38. _Id._ at 846-47.
39. _Id._ at 847.
40. _Id._ at 846-47.
41. _Id._ at 847.
42. _Id._
43. _Id._ at 847-48 (“[General Boyd] marked an overall ‘nonconcur’ to the assessment of the Head of the Department of Electrical and Computer Engineering that ‘Major DeGroat is a superior instructor who inspires his students to achieve extraordinary results’ and by the Senior Dean of the AFIT and of the School of Engineering that Major DeGroat was an ‘outstanding performer.’”).
44. _Id._ at 852-53.
The article states that “all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be taken cognizance of by a general, special, or summary court-martial.”

C. The Obama Administration’s Lifting of the Transgender Military Ban in 2016

In 2015, former Secretary of Defense Ash Carter released a statement reporting that the military’s “current regulations regarding transgender service members are outdated and are causing uncertainty that distracts commanders from our core missions.” The following year, in 2016, RAND Corporation issued a report on findings regarding transgender individuals serving in the United States military. Using private health insurance claims data to estimate the cost of extending gender transition-related health care coverage to transgender personnel, the report estimated that active component health care costs would “have little impact on” health care expenditures. The report also noted that the research seemed to indicate that transgender military personnel had “no significant effect . . . on cohesion, operational effectiveness, or readiness,” similar

45. 10 U.S.C. § 934 (2012); see, e.g., United States v. Guerrero, 33 M.J. 295 (C.M.A. 1991) (affirming the judgment of the Navy-Marine Corps Court of Military Review convicting a male officer for dressing as a female in such a manner that was prejudicial to the Navy’s reputation, order, and discipline as well as upholding the sentence the reducing the appellant’s pay grade and bad-conduct discharge); United States v. Davis, 26 M.J. 445, 446, 448 (C.M.A. 1988) (affirming the decision of the Navy-Marine Corps Court of Military Review that had upheld the conviction of a service member on two violations of dressing as a woman and sentence of a bad conduct discharge that was later reduced to a general discharge).


49. Schaefer et al., supra note 48, at xi (“We estimate that AC MHS health care costs will increase by between $2.4 million and $8.4 million annually—an amount that will have little impact on and represents an exceedingly small proportion of AC health care expenditures (approximately $6 billion in FY 2014) and overall DoD health care expenditures ($49.3 billion actual expenditures for the FY 2014 Unified Medical Program . . . )” (citing DEF. HEALTH AGENCY, EVALUATION OF THE TRICARE PROGRAM: ACCESS, COST, AND QUALITY, FISCAL YEAR 2015 REPORT TO CONGRESS 22 (2015))).

50. Id. at 44.
to studies that showed that the lift of the Don’t Ask, Don’t Tell policy seemed to have no overall negative impact on military readiness.51

At the conclusion of the study, the researchers recommended that the military implement policies to support and include transgender personnel, based on experiences foreign countries have had with allowing transgender servicepeople.52 Such recommendations included the enforcement of anti-harassment policies protecting transgender personnel and provision of experts in gender issues to commanders who need assistance on issues affecting transgender personnel.53

On June 30, 2016, the Department of Defense announced that American transgender individuals would be permitted to serve their country openly.54

“This is the right thing to do for our people and for the force,” Carter said. “We’re talking about talented Americans who are serving with distinction or who want the opportunity to serve. We can’t allow barriers unrelated to a person’s qualifications [to] prevent us from recruiting and retaining those who can best accomplish the mission.”55

Briefly, it appeared that transgender rights would finally be afforded equal protection of the law.

III. THE TRUMP TRANSGENDER MILITARY BAN AND POLICY

Under the June 2016 policy announced by the Obama administration, transgender military personnel would be able to serve openly and seek sex-reassignment procedures from the Department of Defense beginning July 1, 2017.56 However, in the early hours of July 26, 2017, President Trump tweeted the following to the nation:

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow57 [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must

51.  BElkin ET AL., supra note 27, at 4-5.
52.  Schaefer ET AL., supra note 48, at 70-71.
53.  Id. at 71.
55.  Press Release, supra note 54 (quoting former Secretary of Defense Ash Carter).
56.  Id.
be focused on decisive and overwhelming\textsuperscript{58} victory and cannot be burdened with the tremendous medical costs and disruption that transgender [people] in the military would entail. Thank you.[\textsuperscript{59}]

On August 25, 2017, President Trump issued a Presidential Memorandum regarding Military Service by Transgender Individuals (first memorandum),\textsuperscript{60} which stated:

[By] the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States under the Constitution and the laws of the United States of America, including Article II of the Constitution, 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 . . . .\textsuperscript{61}

The Trump administration then issued another memorandum in March 2018 (second memorandum) that revoked and replaced the first memorandum.\textsuperscript{62} The second memorandum stated that “[a]mong other things, the policies set forth by the Secretary of Defense state that transgender persons with a history or diagnosis of gender dysphoria—individuals who the policies state may require substantial medical treatment, including medications and surgery—are disqualified from military service except under certain limited circumstances.”\textsuperscript{63}

In March 2019, the Department of Defense issued another policy for transgender troops that was to take effect on April 12, 2019.\textsuperscript{64} Under this policy, troops would have been able to identify as transgender, but they would have to use the “uniforms, pronouns, and sleeping and bathroom

\begin{footnotesize}
\textsuperscript{58}Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), https://twitter.com/realdonaldtrump/status/890196164313833472.
\textsuperscript{59}Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), https://twitter.com/realdonaldtrump/status/890197095151546369.
\textsuperscript{61}Id.
\textsuperscript{63}Id.
\end{footnotesize}
facilities for their biological sex."65 The policy further provided that transgender troops would only be permitted to serve if they conformed to the standards of their biological sex regarding “medical fitness for duty; physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards.”66

In a petition for certiorari, the Trump administration argued that the policy was in line with the Court’s traditional deference to the other branches of government regarding military affairs even though it “would disqualify from service any individual who has undergone gender transition or seeks to do so, unless that individual obtains a waiver or falls within the reliance exemption.”67 However, the exemption is only available in limited circumstances, such as if the individual “can demonstrate 36 consecutive months of stability (i.e., absence of gender dysphoria)” or if “they are willing and able to adhere to all standards associated with their biological sex.”68

IV. Litigation Against the Trump Transgender Military Ban

The Trump administration has appealed to the Supreme Court to consolidate and review69 the three cases discussed in this Part: Doe v. Trump,70 Karnoski v. Trump,71 and Stockman v. Trump.72

Doe v. Trump was an early case in response to the first memorandum, filed on August 9, 2017.73 In that case, current members of the military sought an enjoinment of the memorandum due to their allegations that the memorandum violates the due process rights of the Fifth Amendment.74 Though this case was later vacated, it is significant because the court noted that “transgender individuals . . . appear to satisfy the criteria of at least a

65. Phillipps, supra note 7.
66. Office of the Deputy Sec’y of Def., supra note 64.
73. Complaint at 1, Doe 1, 275 F. Supp. 3d 167 (No. 17 Civ. 1597), vacated sub nom. Doe 2, 755 F. App’x 19.
74. Doe 1, 275 F. Supp. 3d at 176.
quasi-suspect classification.” This idea will be further explored in Part V of this Review.

*Karnoski v. Trump*, a case from Washington state, stayed the second memorandum. The court determined that the revised order did not render the plaintiff’s claims moot. The plaintiffs in this case were three organizations and nine transgender individuals (three aspiring enlisters, five current transgender service members who serve openly, and one service member not currently serving openly but who had intended to come out and serve openly prior to the announcement of the transgender military ban). The State of Washington later joined as a plaintiff to protect its interests and the welfare of its residents.

The plaintiffs in *Karnoski* claimed that the transgender military ban was a violation of equal protection, substantive due process, and the First Amendment. The court disagreed with the arguments put forth by the Trump administration that the ban is not unconstitutional because it allows transgender individuals to serve on the condition that they conform to their biological sex to do so, stating:

> [B]ecause transgender people have long been subjected to systemic oppression and forced to live in silence, they are a protected class. Therefore, any attempt to exclude them from military service will be looked at with the highest level of care, and will be subject to the Court’s “strict scrutiny.” This means that before Defendants can implement the Ban, they must show that it was sincerely motivated by compelling interests, rather than by prejudice or stereotype, and that it is narrowly tailored to achieve those interests.

Though the case was later vacated and remanded by the Ninth Circuit, the plaintiffs in *Stockman v. Trump* had “four causes of action: (1) Fifth Amendment equal protection; (2) Fifth Amendment due process; (3) Fifth Amendment right to privacy; and (4) First Amendment retaliation for free speech and expression.”

The plaintiffs alleged that the exclusion of transgender persons from military service, denial of equal health benefits based on their status as

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75. *Id.* at 208.
77. *Id.*
78. *Id.* at *4 (“Organizational Plaintiffs include the Human Rights Campaign . . . the Gender Justice League . . . and the American Military Partner Association.”).
79. *Id.*
80. *Id.*
81. *Id.* at *1.
83. *Id.*
being a transgender individual, and deprivation of “protected interests in continued military service as openly transgender persons” is unconstitutional.84 They argued it “lacks a rational basis, is arbitrary, and cannot be justified by any government interest.”85 The plaintiffs also argued that their right to privacy had been violated because the plaintiffs’ “fundamental liberty to live consistently with their gender identity” had been “impermissibly burden[ed]” and that a “fundamental aspect of their personal identity” had been “penalize[ed] and stigmatiz[ed].”86 Furthermore, they alleged that the ban “impermissibly burdens such speech on the basis of the content and viewpoint of such speech” by barring all public and private speech that would identify the plaintiff as a transgender individual.87

The plaintiffs sought relief and a preliminary injunction against the order, which was granted by the court.88 The defendants alleged, like in Karnoski, that the second memorandum rendered the plaintiffs’ complaints moot, though the court did not agree.89 Moreover, the defendants’ motion to dissolve the preliminary injunction was denied.90

The First Amendment challenge by the plaintiffs in Stockman was that the transgender military ban is unconstitutional and a content-based regulation91 because the ban barred public and private speech identifying transgender individuals as such,92 even though the Supreme Court previously stated that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”93 For the Trump administration to censor expression by transgender individuals, “it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”94

85. Id. at 15.
86. Id. at 17-18.
87. Id. at 18.
88. Stockman, 331 F. Supp. 3d at 993, vacated and remanded, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).
89. Id. at 998.
90. Id. at 1004.
91. Complaint for Declaratory and Injunctive Relief, supra note 84, at 18.
92. Id.
The Trump administration has appealed to the Supreme Court to grant immediate review of the consolidated Karnoski, Doe, and Stockman cases. In its appeal, the Trump administration argued that its policy is consistent with equal protection because the administration is not prohibiting individuals from enlisting “solely on account of their transgender status”; rather, they are seeking to “ensure that those entering service are free of medical conditions or physical defects that may require excessive time lost from duty.” The Trump administration went on to discuss medical costs of transgender service members and potential negative effects on readiness should transgender individuals be allowed to serve. The administration also argued that (1) there is no substantive due process claim because there is no fundamental right to serve in the military, and (2) there is no violation of the First Amendment because speech has not been banned.

Since unquestionable deference to the executive branch regarding military policy is not consistently recognized by the courts, the federal government should not have the ability or authority to wantonly discriminate against a class of people based on an immutable characteristic. This should not be allowed to stand. Such an approach is an egregious reversal of decades of progress paved by the advocacy and suffering of LGBTQ+ Americans who sought an equal opportunity to serve their country.

involvement in Vietnam, which caused no disruption on campus, was a violation of the First Amendment).

95. Petition for a Writ of Certiorari Before Judgment, supra note 69, at 27.
96. Id. at 7.
97. Id. at 5.
98. Id. at 23-24.
99. Id. at 25; Karnoski v. Trump, 926 F.3d 1180 (9th Cir. 2019).
100. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 588 (1952); see also Doe 1 v. Trump, 275 F. Supp. 3d at 210 (“Although the Court recognizes that deference to the Executive and Congress is warranted in the military context, the Court is not powerless to assess whether the constitutional rights of America’s service members have been violated.”).
103. Id.
On January 22, 2019, the Supreme Court, in a 5-4 decision, stayed the preliminary injunctions while the lower courts continued to hear arguments,\textsuperscript{104} allowing the transgender military ban to go into effect.\textsuperscript{105}

V. STANDARDS OF REVIEW IN LITIGATION OF TRANSGENDER RIGHTS AND TRUMP’S TRANSGENDER MILITARY BAN

A court should utilize strict scrutiny when reviewing a case involving transgender persons\textsuperscript{106} because the highest level of scrutiny is warranted when a law or regulation targets a suspect class—a class of people who are marginalized and have a history of being discriminated against and exploited.\textsuperscript{107} “Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination. To pass strict scrutiny, the legislature must have passed the law to further a ‘compelling governmental interest,’ and must have narrowly tailored the law to achieve that interest.”\textsuperscript{108} Furthermore, the law must demonstrate “the means chosen [to] ‘fit’ the compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate . . . prejudice or stereotype.”\textsuperscript{109}

Recognizing these factors, courts have begun to find that transgender people constitute, at a minimum, a quasi-suspect class.\textsuperscript{110} Transgender people have long been forced to live in silence, or face the threat of overwhelming discrimination if they come out.\textsuperscript{111}

\begin{footnotesize}
\begin{enumerate}
\item[107.] \textit{Strict Scrutiny}, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 21, 2019).
\item[108.] Id.
\end{enumerate}
\end{footnotesize}
To determine that transgender people are a quasi-suspect class in Adkins v. City of New York, the District Court for the Southern District of New York used the four factors established in the Second Circuit case, Windsor v. United States.112 “While transgender people and gay people are not identical, they are similarly situated with respect to each of Windsor’s four factors.”113 The Adkins court found that “transgender people have suffered a history of persecution and discrimination . . . transgender status bears no relation to ability to contribute to society . . ., transgender status is a sufficiently discernible characteristic to define a discrete minority class . . . [and] transgender people are a politically powerless minority.”114

The U.S. District Court for the Southern District of Ohio has also applied these factors in Board of Education v. United States Department of Education, finding that transgender people were at least a quasi-suspect class.115 Further, the District Court for the Northern District of California, in Norsworthy v. Beard, found that laws pertaining to transgender individuals should at least survive intermediate scrutiny.116 Additionally, the U.S. District Court for the District of Columbia has held that, at a minimum, heightened or intermediate scrutiny is warranted, due to the ban being a form of gender discrimination.117

VI. CONCLUSION

After the announcement from the Supreme Court on January 22, 2019, permitting implementation of the ban, Pentagon spokesperson Lieutenant Colonel Carla Gleason stated:

As always, we treat all transgender persons with respect and dignity. [The Department of Defense’s] proposed policy is NOT a ban on service by transgender persons. It is critical that [the Department of Defense] be permitted to implement personnel policies that it determines are necessary

113. Adkins, 143 F. Supp. 3d at 139.
114. Id. at 139-40.
116. Id. (“The Court agrees with the analysis of Adkins and largely incorporates it here.”); see Norsworthy v. Beard, 87 F. Supp. 3d 1104, 1119 (N.D. Cal. 2015) (“[W]hat matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the [transsexual] victim was a man who ‘failed to act like’ one.’ For these reasons, the Court concludes that discrimination on the basis of transgender status is subject to intermediate scrutiny.” (quoting Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000))).
to ensure the most lethal and combat effective fighting force in the world. [The Department of Defense’s] proposed policy is based on professional military judgment and will ensure that the U.S. armed forces remain the most lethal and combat effective fighting force in the world.118

The Pentagon tried to state that the ban was not on all transgender members of the military, though this does not correlate with the message in President Trump’s announcement on banning transgender service members.119 While it is possible that there are individuals in the Department of Defense and the Pentagon seeking to limit the effects of President Trump’s ban, they cannot countermand President Trump’s authority as Commander in Chief of the armed forces.120

The outlook for transgender service members in the United States military seems to be very grim.121 The reversal of President Obama’s decision to lift the ban on transgender service members only a year later was a harsh and bitter backstab to decades of advocacy to have the ban removed.122

While 15,000, the estimated number of transgender individuals actively serving in the military, is a significantly smaller number than the total number of individuals serving (over 1,300,000), the rights and civil liberties owed to individuals cannot and should not be limited solely because they represent a minority of the population.123 The Constitution does not provide quotas or minimum numbers needed for a group to have its rights protected and enforced.124

If the Supreme Court hears the case for the transgender military ban, it is likely that they will uphold the ban.125 Even if President Trump is

118. de Vogue & Cohen, supra note 104.
119. Id.
120. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .”).
122. Id.
123. Issues: Military & Veterans, supra note 5.
124. See United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (“Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or nations . . . or racial minorities . . .: whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry . . . .”).
125. Justice Clarence Thomas, the most senior Associate Justice on the Court, has not been sympathetic to the plight of LGBTQ+ Americans, as seen in his joining with Justice Antonin Scalia’s dissent in Romer v. Evans in 1996, his dissent in Lawrence v. Texas in 2003, joining with
voted out of office in November 2020, the Justices nominated and confirmed to the Court during his administration can serve for the rest of their lives, meaning that their policies and interpretation of law will remain, potentially for decades.¹²⁶

However, one viable avenue for transgender individuals and their allies to regain their equal protection of the law will be through executive and legislative efforts after the next election. This was how Don’t Ask, Don’t Tell was repealed in 2010, after approximately seventeen years of enforcement.¹²⁷

The transgender community is a vulnerable one, prone to facing high levels of violence.¹²⁸ Trump’s transgender military ban is just one of the many issues the transgender community must face. The reality is that transgender Americans, whether openly or in hiding, have shed blood, sweat, and tears for this country just like their cisgendered counterparts and they deserve to be able to serve openly as themselves.


¹²⁶. U.S. CONST. art. III, § 1, cl. 2 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . . .”).
¹²⁷. See Bumiller, supra note 26.