

REVIEW

Trump’s Transgender Military Ban: Policy, Law, and Litigation

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I. INTRODUCTION

Christine Jorgensen, born George William Jorgensen Jr., was drafted into the Army in 1944 and honorably discharged two years later.¹ 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.² While Jorgensen did not serve openly as a transwoman, she was the first prominently known individual to undergo a procedure for gender reassignment.³

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1. Ben White, *Bronx Army Vet Undergoes First Widely Known Gender Reassignment Procedure in 1952*, N.Y. DAILY NEWS (Dec. 1, 1952), <https://www.nydailynews.com/new-york/bronx-army-vet-ground-breaking-sex-change-1952-article-1.2198836>.

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

4. ANDREW R. FLORES ET AL., THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 3 (2016), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf>; see JODY L. HERMAN ET AL., THE WILLIAMS INST., AGE OF INDIVIDUALS WHO IDENTIFY AS TRANSGENDER IN THE UNITED STATES 2 (2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/TransAgeReport.pdf>.

5. *Issues: Military & Veterans*, NAT’L CTR. FOR TRANSGENDER EQUALITY, <https://transequality.org/issues/military-veterans> (last visited Nov. 21, 2019).

6. U.S. DEP’T OF DEF., DOD PERS., WORKFORCE REPORTS & PUBLICATIONS, ACTIVE DUTY MILITARY STRENGTH REPORT FOR NOVEMBER 30, 2018 (2018).

7. Dave Phillipps, *New Rule for Transgender Troops: Stick to Your Birth Sex, or Leave*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/transgender-troops-ban.html> (quoting Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>).

8. *Id.*

9. Sarah Pruitt, *Once Banned, Then Silenced: How Clinton’s ‘Don’t Ask, Don’t Tell’ Policy Affected LGBT Military*, HISTORY.COM, <https://www.history.com/news/dont-ask-dont-tell-repeal-compromise> (last updated July 3, 2019); see also *Transgender Military Service*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/transgender-military-service> (last updated Mar. 2, 2020).

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.¹⁰ 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 125.¹¹ 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.¹²

Technical Sergeant Leonard Matlovich of the United States Air Force was discharged from the military on the basis of his sexual orientation.¹³ A veteran of the Vietnam War, Matlovich was the recipient of a Bronze Star and a Purple Heart.¹⁴ 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 1980.¹⁵ 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.¹⁶

As part of his 1992 presidential campaign platform, Bill Clinton promised to change the ban on gay and lesbian enlistment after his election.¹⁷ There was much opposition to this initiative.¹⁸ 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 carnal 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).

12. Pruitt, *supra* note 9.

13. Lily Rothman, *How a Closeted Air Force Sergeant Became the Face of Gay Rights*, TIME (Sept. 8, 2015), <https://time.com/4019076/40-years-leonard-matlovich/>.

14. *Id.*

15. *Id.*

16. Pruitt, *supra* note 9.

17. Thom Shanker & Patrick Healy, *A New Push to Roll Back ‘Don’t Ask, Don’t Tell,’* N.Y. TIMES (Nov. 30, 2007), <https://www.nytimes.com/2007/11/30/us/30military.html>.

18. Eric Schmitt, *Military Cites Wide Range of Reasons for Its Gay Ban*, N.Y. TIMES (Jan. 27, 1993), <https://www.nytimes.com/1993/01/27/us/military-cites-wide-range-of-reasons-for-its-gay-ban.html>.

to support the assertion.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.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.”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.”²²

This opposition resulted in President Bill Clinton breaking his campaign promise to the LGBTQ+ community.²³ The Clinton administration “had to compromise” and signed the “Don’t Ask, Don’t Tell” policy into law in 1993,²⁴ despite homosexuality having been removed from the Diagnostic and Statistical Manual of Mental Disorders six years earlier.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.²⁶

In 2012, the Palm Center²⁷ 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.”²⁸ Instead of negatively impacting readiness or morale, the

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. Shanker & Healy, *supra* note 17.

24. *Id.*; 10 U.S.C. § 654 (1993) (repealed 2010).

25. Neel Burton, *When Homosexuality Stopped Being a Mental Disorder*, PSYCHOL. TODAY (Sept. 18, 2015), <https://www.psychologytoday.com/us/blog/hidden-and-see/201509/when-homosexuality-stopped-being-mental-disorder>.

26. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515, 3516, 3517 (2010); Elisabeth Bumiller, *Obama Ends ‘Don’t Ask, Don’t Tell’ Policy*, N.Y. TIMES (July 22, 2011), <https://www.nytimes.com/2011/07/23/us/23military.html>.

27. AARON BELKIN ET AL., THE PALM CTR., ONE YEAR OUT: AN ASSESSMENT OF DADT REPEAL’S IMPACT ON MILITARY READINESS 3 (2012).

28. *Id.* at 4.

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

29. David Crary, *Military Still Standing After End of Don't Ask, Don't Tell*, WASH. POST (Sept. 17, 2012), https://www.washingtonpost.com/politics/decision2012/military-still-standing-after-end-of-dont-ask-dont-tell/2012/09/16/36a9f5b6-002b-11e2-b257-e1c2b3548a4a_story.html.

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).

31. U.S. DEP'T OF THE ARMY, ARMY REG. 40-501, STANDARDS OF MEDICAL FITNESS, § 3-35 (2011). The 2019 version of this regulation does not use the language cited here. See U.S. DEP'T OF THE ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS (2019).

32. *Leyland*, 828 F.2d at 585.

33. *Id.* at 586.

34. *Doe v. Alexander*, 510 F. Supp. 900, 902 (D. Minn. 1981).

such as change of sex . . . ' constitute[] a disqualifying medical defect."³⁵ The court dismissed the plaintiff's complaint for lack of reviewability.³⁶

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.³⁷ 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.³⁸ 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.³⁹ 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.⁴⁰ Following her discharge, Major DeGroat legally changed her name and had gender confirmation surgery.⁴¹

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,'"⁴² despite high recommendations and support from other officials.⁴³ 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.⁴⁴

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

35. *Id.* (quoting U.S. DEP'T OF THE ARMY, REG. 40-501, STANDARDS OF MEDICAL FITNESS, § 2-14(s) (1981)).

36. *Id.* at 905.

37. *DeGroat v. Townsend*, 495 F. Supp. 2d 845, 846 (S.D. Ohio 2007).

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 'oustanding performer.'").

44. *Id.* at 852-53.

the Uniform Code of Military Justice.⁴⁵ 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.”⁴⁶

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.”⁴⁷ The following year, in 2016, RAND Corporation issued a report on findings regarding transgender individuals serving in the United States military.⁴⁸ 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.⁴⁹ The report also noted that the research seemed to indicate that transgender military personnel had “no significant effect . . . on cohesion, operational effectiveness, or readiness,”⁵⁰ 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 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).

46. 10 U.S.C. § 934 (2012).

47. Press Release, U.S. Dep't of Def., Statement by Secretary of Defense Ash Carter on DOD Transgender Policy (July 13, 2015), <https://www.defense.gov/Newsroom/Releases/Release/Article/612778/>.

48. AGNES GEREKEN SCHAEFER ET AL., RAND CORP., ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY, at iii (2016). RAND Corporation is a policy think tank, financed in part by the United States government. *RAND at a Glance*, RAND CORP., <https://www.rand.org/about/glance.html> (last visited Jan. 7, 2020).

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.

54. Press Release, U.S. Dep’t of Def., Secretary of Defense Ash Carter Announces Policy for Transgender Service Members (June 30, 2016), <https://www.defense.gov/Newsroom/Releases/Release/Article/821675/secretary-of-defense-ash-carter-announces-policy-for-transgender-service-members/>; see Courtney Kube & Halimah Abdullah, *Pentagon Lifts Ban on Transgender Service Members Serving Openly*, NBC NEWS (June 30, 2016), <https://www.nbcnews.com/feature/nbc-out/pentagon-lifts-ban-transgender-service-members-serving-openly-n601816>.

55. Press Release, *supra* note 54 (quoting former Secretary of Defense Ash Carter).

56. *Id.*

57. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>.

be focused on decisive and overwhelming⁵⁸ victory and cannot be burdened with the tremendous medical costs and disruption that transgender [people] in the military would entail. Thank you[.]⁵⁹

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

[B]y 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 2016⁶¹

The Trump administration then issued another memorandum in March 2018 (second memorandum) that revoked and replaced the first memorandum.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.”⁶³

In March 2019, the Department of Defense issued another policy for transgender troops that was to take effect on April 12, 2019.⁶⁴ 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

58. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>.

59. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

60. Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 82 Fed. Reg. 41,319 (Presidential Documents) (Aug. 30, 2017), <https://www.govinfo.gov/content/pkg/FR-2017-08-30/pdf/2017-18544.pdf>.

61. *Id.*

62. Military Service by Transgender Individuals Memorandum for the Secretary of Defense [and] the Secretary of Homeland Security, 83 Fed. Reg. 13,367 (Presidential Documents) (Mar. 23, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-03-28/pdf/2018-06426.pdf>.

63. *Id.*

64. OFFICE OF THE DEPUTY SEC'Y OF DEF., MEMORANDUM ON MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA (Mar. 12, 2019), <https://www.hsdl.org/?view&did=823232>; Phillipps, *supra* note 7; Chris Johnson, *Trump's Transgender Military Ban Now in Effect*, WASH. BLADE (Apr. 12, 2019), <https://www.washingtonblade.com/2019/04/12/trumps-transgender-military-ban-now-in-effect>.

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 enjoinder 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.

67. Petition for a Writ of Certiorari Before Judgment at 21, *Trump v. Karnoski*, 139 S. Ct. 946 (2018) (No. 18-676), 2018 WL 6169245.

68. U.S. DEP’T OF DEF., DEPARTMENT OF DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS 42-43 (2018), <https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF>.

69. Petition for a Writ of Certiorari Before Judgment, *supra* note 67, at 16, 27.

70. *Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17 Civ. 1597), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019).

71. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *14 (W.D. Wash. Apr. 13, 2018), *vacated and remanded*, 926 F.3d 1180 (9th Cir. 2019).

72. *Stockman v. Trump*, 331 F. Supp. 3d 990, 993 (C.D. Cal. 2018), *vacated and remanded*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).

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.”⁷⁵ This idea will be further explored in Part V of this Review.

Karnoski v. Trump, a case from Washington state, stayed the second memorandum.⁷⁶ The court determined that the revised order did not render the plaintiff's claims moot.⁷⁷ The plaintiffs in this case were three organizations and nine transgender individuals (three aspiring enlistees, 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).⁷⁸ The State of Washington later joined as a plaintiff to protect its interests and the welfare of its residents.⁷⁹

The plaintiffs in *Karnoski* claimed that the transgender military ban was a violation of equal protection, substantive due process, and the First Amendment.⁸⁰ 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.⁸¹

Though the case was later vacated and remanded by the Ninth Circuit, the plaintiffs in *Stockman v. Trump*⁸² 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."⁸³

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

75. *Id.* at 208.

76. *Karnoski*, 2018 WL 1784464, at *14.

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.

82. *Stockman v. Trump*, 331 F. Supp. 3d 990, 993 (C.D. Cal. 2018), *vacated and remanded*, No. 18-56539, 2019 WL 6125075 (9th Cir. Aug. 26, 2019).

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

84. Complaint for Declaratory and Injunctive Relief at 17, *Stockman v. Trump*, 331 F. Supp. 3d 990 (C.D. Cal. 2018) (No. 17-CV-6516), WL 6125075.

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.*

93. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

94. *Tinker et al. v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969) (finding that a regulation prohibiting students from wearing black armbands to protest the United States’

The Trump administration has appealed to the Supreme Court to grant immediate review of the consolidated *Karnoski, Doe, and Stockman* cases.⁹⁵ 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;”⁹⁶ 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.”⁹⁷ 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.⁹⁸ 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.⁹⁹

Since unquestionable deference to the executive branch regarding military policy is not consistently recognized by the courts,¹⁰⁰ the federal government should not have the ability or authority to wantonly discriminate against a class of people based on an immutable characteristic.¹⁰¹ This should not be allowed to stand.¹⁰² 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.¹⁰³

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.”).

101. See *United States v. Virginia*, 518 U.S. 515, 555-58 (1996) (finding that denying women admission as cadets to the Virginia Military Institute violated the Equal Protection Clause of the 14th Amendment); *Rostker v. Goldberg*, 453 U.S. 57, 112 (1981) (holding that Selective Service Act requiring men to register for the draft and not women did not violate the Fifth Amendment).

102. Heather Marie Stur, *Donald Trump’s ‘Trans Ban’ Reverses More than 70 Years of Military Integration*, WASH. POST (Jan. 29, 2019), <https://www.washingtonpost.com/outlook/2019/01/29/donald-trumps-trans-ban-reverses-more-than-years-military-integration/>.

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,¹⁰⁴ allowing the transgender military ban to go into effect.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 persons¹⁰⁶ 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.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.”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.”¹⁰⁹

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

104. Ariane de Vogue & Zachary Cohen, *Supreme Court Allows Transgender Military Ban to Go into Effect*, CNN (Jan. 22, 2019), <https://www.cnn.com/2019/01/22/politics/scotus-transgender-ban>.

105. Orders in Pending Cases, 586 U.S. 1 (Jan. 22, 2019), https://www.supremecourt.gov/orders/courtorders/012219zor_8759.pdf.

106. *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784474, at *14 (W.D. Wash. Apr. 13, 2018).

107. *Strict Scrutiny*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited Nov. 21, 2019).

108. *Id.*

109. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989)).

110. See *Stone v. Trump*, 280 F. Supp. 3d 747, 768 (D. Md. 2017); *Doe v. Trump*, 275 F. Supp. 3d 167, 208-10 (D.D.C. 2017), *vacated sub nom. Doe 2 v. Shanahan*, 755 F. App'x 19 (D.C. Cir. 2019); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 873-76 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015).

111. See Susan Milligan, *Isolated and Left Behind*, US NEWS (Sept. 29, 2017), <https://www.usnews.com/news/the-report/articles/2017-09-29/transgender-americans-face-daily-struggles>; *Understanding the Transgender Community*, HRC, <https://www.hrc.org/resources/understanding-the-transgender-community> (last visited Feb. 1, 2020).

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

112. *Windsor v. United States*, 699 F.3d 169 (2nd Cir. 2012); *Adkins*, 143 F. Supp. 3d at 139. *Windsor* would ultimately be heard before the Supreme Court. *United States v. Windsor*, 570 U.S. 744 (2013).

113. *Adkins*, 143 F. Supp. 3d at 139.

114. *Id.* at 139-40.

115. *Bd. of Educ.*, 208 F. Supp. 3d at 873.

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))).

117. *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 209-10 (D.D.C. 2017).

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 . . .").

121. See Hallie Jackson & Courtney Kube, *Trump's Controversial Transgender Military Policy Goes into Effect*, NBC NEWS (Apr. 12, 2019), <https://www.nbcnews.com/feature/nbc-out/trump-s-controversial-transgender-military-policy-goes-effect-n993826>.

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.

Justice Scalia's and Justice Samuel Alito's dissents in *United States v. Windsor* in 2013, his dissent in *Obergefell v. Hodges* in 2015, and his concurrence in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* in 2018. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1740 (2018) (Thomas, J., concurring); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Thomas, J. dissenting); *United States v. Windsor*, 570 U.S. 744, 778 (2013) (Scalia, J., dissenting) (Alito, J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 605 (2003) (Thomas, J. dissenting); *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J. dissenting). Similarly, Chief Justice John Roberts and Justice Alito both have a history of siding against LGBTQ+ rights, as both issued dissenting opinions in *Windsor* and *Obergefell* and joined the majority in the *Masterpiece Cakeshop* decision. *Masterpiece Cakeshop*, 138 S. Ct. at 1723-32; *Obergefell*, 135 S. Ct. at 2611, 2640; *Windsor*, 570 U.S. at 775, 802. While not a member of the bench during the *Romer*, *Lawrence*, *Windsor*, and *Obergefell* decisions, Justice Gorsuch did side with the majority in *Masterpiece Cakeshop* and wrote a concurring opinion. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1733-34. While Justice Kavanaugh's term on the bench is still in its infancy, his decision to side with the other members of the conservative wing and lift the injunction placed on the transgender military ban by the lower courts is telling of his position. Robert Barnes & Dan Lamothe, *Supreme Court Allows Trump Restrictions on Transgender Troops in Military to Go into Effect as Legal Battle Continues*, WASH. POST (Jan. 22, 2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-allows-trump-restrictions-on-transgender-troops-in-military-to-go-into-effect-as-legal-battle-continues/2019/01/22/e68a7384-1763-11e9-88fe-f9f77a2bcb6c_story.html.

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.

128. *Violence Against Trans and Non-Binary People*, VAWNET, <https://www.vawnet.org/sc/serving-trans-and-non-binary-survivors-domestic-and-sexual-violence/violence-against-trans-and> (last visited Jan. 8, 2020); see Dawn Ennis, *American Medical Association Responds to 'Epidemic' of Violence Against Transgender Community*, FORBES (June 15, 2019), <https://www.forbes.com/sites/dawnstaceyannis/2019/06/15/american-medical-association-responds-to-epidemic-of-violence-against-transgender-community/#3870d6f9510b>.