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## President Trump's transgender military ban: A legal analysis

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PRESIDENT TRUMP'S TRANSGENDER MILITARY BAN:

A LEGAL ANALYSIS

A Thesis Submitted

in Partial Fulfillment

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On August 25, 2017, President Trump announced a policy banning transgender individuals from military service. Transgender individuals had been banned from military service for most of history, but were given the right to serve in 2016 under Obama's presidency. Trump's ban was a reversal of this policy of inclusion. The ban on transgender military service has received both support and criticism. It has been challenged in the court system by transgender individuals currently serving in the military, though these cases have not yet reached the Supreme Court. In order to understand what the Supreme Court might decide in a case about the ban, it is important to examine the precedent the Court has established in several different areas of law. This thesis will provide a legal analysis of President Trump's transgender military ban by first laying out the history of LGBT military service, and specifically military service of transgender individuals. Next, this thesis will examine precedent in the areas of deference to Congress in areas related to the military, and then examine the constitutional principles of substantive due process and equal protection. An analysis of these areas will show that the Court retains the right to answer constitutional questions and does not owe deference to the military, particularly when it comes to the protection of disadvantaged classes. President Trump's transgender military ban is not constitutional because it violates the fundamental right to privacy found under substantive due process, and denies transgender individuals equal protection under the law because the policy is not substantially related to a governmental interest.

### **History of LGBT Military Service**

Prior to 1993, policy regarding homosexual or transgender military service was uncomplicated; those who identified as a member of the LGBT community were simply not allowed to serve. The first explicit anti-LGBT policy in the military was seen in 1917. It was not

necessarily the identity that was not allowed, but the behavior or conduct. The *Articles of War* at that time, which stated military policy, made sodomy a crime against military law (D'Amico, 1996). This meant that anyone caught engaging in that behavior, or even being suspected of engaging in it, could be dishonorably discharged from military service. This, of course, did not mean that there were no gay service members. It meant that they had to be very careful about hiding their identity for fear of losing their jobs, being imprisoned, or becoming a victim of a hate crime at the hands of their fellow service members.

The ban on LGBT military service continued to persist until the 90s, but the rationale behind it shifted over the years. While in the early 1900s the policy was focused around behavior, by 1942 the policy now also included identification. At that time, homosexuality was classified as a mental illness instead of a criminal offense, and the military regulations reflected this change (D'Amico, 1996). What that policy meant was that people could be discharged from the military or denied reenlistment for identifying as homosexual, whether or not they actually engaged in same sex sexual acts. This policy was not just about, behavior, but identification.

The rationale behind the anti-LGBT military policy shifted again in 1982. At that time the official reasoning behind the ban on homosexual military service was that homosexuality was not compatible with military service (DOD Directive 1332.14) It was thought that having gay service members would affect morale and undermine unit cohesion. These findings were the focus of a 1981 Department of Defense Policy that, in effect, was a ban on homosexuals serving in the military, and resulted in the discharge of many currently serving homosexual service members.

There were times when this policy was not enforced as strongly. During World War II, for example, the demand for higher numbers of military personnel meant that members of the

LGBT community were able to serve more easily (Herek, 2012). The same was true for other periods in US history when need for military personnel was high. During the Vietnam and Korean wars, for example, the policy was more relaxed (Powers, 2018). Anti-LGBT policies were still the official policy, but enforcement was not as strict as it always had been. When these wars ended, however, and the need for personnel was not as high, the policy was once again strictly enforced.

It is difficult to estimate exactly how many individuals were discharged from the military on the basis of their sexual orientation. Many branches of the military didn't keep clear records about how many individuals were discharged specifically for homosexuality until the 1960s. Estimates suggest that about 2000 service members a year were discharged for homosexuality from 1940 to 1960 (Davis, 1991). The Government Accountability Office reported that about 17,000 service members were discharged for homosexuality in the 1980s (GAO, 1992). This would be approximately 1,500 a year being discharged for homosexuality. So rates of discharged had decreased, but the fight against the discriminatory military policy was gaining public attention.

The anti-LGBT military policies were a focus of Bill Clinton's during his presidential campaign. One of his goals was to end the exclusion of individuals from the military on the basis of their sexual orientation (D'Amico, 1996). The issue was hotly debated, with passionate arguments both for and against lifting the ban on homosexual military service. Margarethe Cammermeyer, a veteran who was discharged from the Army because she was a lesbian, argued for lifting the ban, stating:

“People are frightened of what they don't understand. You have an older generation who don't understand homosexuality at all. You have a patriarchal system entrenched

in old beliefs. . . . Our common goal is that we love the country and we're trying to serve it. And diversity can make it richer” (LATimes, 1992)

Arguments made against lifting the ban supported the current military reasoning of the anti-LGBT policy, that homosexuality was incompatible with military service. In an article examining arguments against lifting the ban, David Ari Bianco (1996), specifically lays out 16 arguments that were seen most often from opponents of LGBT military service. Bianco (1996) stated that those 16 arguments fit into four broad categories of argument. Those categories are: “that lesbians and gays are not fit to serve, that heterosexuals and homosexuals cannot serve together, that nondiscrimination would violate the rights of heterosexuals, and that lifting the ban would impair the military mission” (Biano, 1996). In order to avoid alienating military and political officials, Clinton proposed a compromise.

Clinton’s compromise was announced in 1993. This new policy regarding homosexual military service was known as Don’t Ask, Don’t Tell (DADT). Under DADT, sexual orientation was considered a private matter. Identifying as gay or lesbian would not be enough to discharge somebody or bar them from entering the military, but homosexual conduct was still a disqualifier. This policy defined homosexual conduct as “a homosexual act, a statement by the applicant that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage” (DOD Directive 1304.26). Individuals could be discharged for engaging in consensual sex with a member of the same sex, or for being married to someone of the same sex. And while recruiters were no longer able to ask about sexual orientation, volunteering this information would be grounds for not being allowed to serve or discharge from service because it demonstrated an intent to engage in homosexual acts.

Gay and lesbians serving in the military challenged this policy. Though there weren't any cases that made it to the Supreme Court, lower courts did hear arguments against Don't Ask, Don't Tell. In the case of *Able v. US* (1998), gay and lesbian service members argued that Don't Ask, Don't Tell violated their First and Fifth Amendment Rights. A district court supported their claim, but the Second Circuit Court of Appeals overruled the decision and supported Don't Ask, Don't Tell. The reasons the court cited for this decision was that it was proper to defer to Congress on military matters, and that the reasons Congress put forth for the prohibition of homosexual conduct in the military - "unit cohesion, privacy and the reduction in sexual tensions" (*Able v. US*, 1998) - were rational arguments. The Court applied a rational basis review of the Equal Protection Clause arguments in this case. A stricter standard of review had not yet been applied to cases involving sexual orientation, though it later would be. If the Court had applied a stricter standard of review then the decision would have been different and Don't Ask, Don't Tell would not have been supported.

Don't Ask, Don't Tell was repealed in 2010 not as the result of a court finding it unconstitutional, but through legislation (H.R.2965). This came about as a result of arguments, court cases, and a shift in public opinion. A report from Zogby International found that only 37% of military personnel were against allowing gays and lesbians to serve openly (Rodgers, 2006), and a Gallup poll reported that 67% of civilians supported ending the ban (Morales, 2010). A report from the American Psychological Association found that "empirical evidence fails to show that sexual orientation is germane to any aspect of military effectiveness" (APA, 2004). Prominent figures spoke against the ban, such as John Shalikashvili, a former chairman of the Joint Chiefs of Staff, and Supreme Court Justice Elena Kagan (Hepler, 2010). Supporting Don't



Ask, Don't Tell was no longer popular, and public opinion was such that Congress passed a repeal in 2010.

Don't Ask, Don't Tell never specifically mentioned transgender individuals serving in the military. It did, however, define sex as being identified by external genitalia (DOD Directive 1304.26). When DADT was repealed, gay and lesbian service members were allowed to serve openly, but transgender individuals were still barred from service. Much like previous policies regarding homosexuality, the military policy at the time considered transgender identity a mental health issue. This was referred to as 'Sexual Gender and Identity Disorder' and it was listed among conditions that made somebody unfit for service (*Stone v. Trump*, 2017).

It was not until 2016, under Obama's presidency, that conditions for transgender service members improved. The Secretary of Defense released an Open Service Directive stating that "no otherwise qualified Service member may be involuntarily separated, discharged or denied reenlistment or continuation of service, solely on the basis of their gender identity" (DTM 16-005). Based on this policy, transgender service members were allowed to serve openly and could no longer be discharged based on their identity. Transgender individuals were also allowed to enlist in the military and would not be excluded on the basis of their identity. The Open Service Directive also included sex reassignment surgery as part of regular health insurance for transgender military personnel. This policy lasted until 2017 when President Trump released a Presidential Memorandum on Military Service by Transgender Individuals. This memorandum called for a reinstatement of the ban on transgender military service that had been in place before the Open Service Directive of 2016. It also halted "all use of DoD or DHS resources to fund sex reassignment surgical procedures for military personnel" (DTM). This Memorandum was

quickly challenged; there is currently a hold on the policy, meaning that, for the time being, there has been no immediate effect on transgender military personnel (*Stone v. Trump*, 2017).

Recently a case was heard in the District Court in Maryland, where plaintiffs filed a lawsuit to challenge the constitutionality of the ban. This case, *Stone v. Trump* (2017), addresses the main areas of law that have been applied to determine the constitutionality of the ban. Before examining any of these areas it is first important to understand the traditional deference the Court has shown to Congress in areas relating to the military. After examining this deference to the military, we can then examine the areas of equal protection and substantive due process as they can be applied to the constitutionality of the ban on transgender military service.

### **Deference of Courts to the Military**

#### **Overview**

In Article 1 of the US Constitution, the specific powers of Congress are laid out. Within these enumerated powers are powers over the military. These duties include powers “To raise and support Armies...To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces” (Art 1, Sec. 8). It is clear in the Constitution that governance over the military is firmly in the realm of Congress. The president also clearly has powers over the military. As found in Section 2 of the Constitution, “The President shall be Commander in Chief of the Army and Navy of the United States” (Art. 2, Sec. 2). It is clear that both Congress and the president have powers over the military. The judiciary, however, is not specifically given any powers over the military. For this reason, courts have traditionally shown deference to the legislative and executive branches, citing the fact that the military is a sphere of Congress, not the courts.

One case that demonstrates an area where the Court defers to the military is *Orloff v. Willoughby* (1953). This case dealt with a petitioner who felt that he was entitled to a certain position within the military based on his training, and a specific statute, “the Universal Military Training and Service Act, 50 U. S. C. App. § 454 (i) (1) (A), which authorizes conscription of certain ‘medical and allied specialist categories’” (*Orloff v. Willoughby*, 1953). Since he was not given that position, he was asking to be discharged from the military. The Court held that complaints about job duties or treatment within the military were not to be solved by the Court. The Court reasoned that “The military constitutes a specialized community governed by a separate discipline from that of the civilian” (*Orloff v. Willoughby*, 1953). Where the Court was able to make constitutional decisions regarding laws governing over civilians, the military presents a special case where Congress has specialized knowledge that the courts do not have. When there were complaints, such as the one in this case, it was the responsibility of Congress to set up the proper channels within which to hear and resolve disputes over assignments. Solving that sort of complaint was not within the power of the Court. This case demonstrates that the Court defers to the military regarding decisions about specific positions granted.

Another area where the Court has shown deference to the military is when it comes to the military uniform, even if uniform regulations threaten religious freedom of service members. In the case of *Goldman v. Weinberger* (1986), the petitioner sued the Secretary of Defense for not allowing him to wear a yarmulke while in uniform. As he was an Orthodox Jew, wearing a yarmulke was part of his religion. He argued that not allowing him to wear one was a violation of the First Amendment's Free Exercise Clause. When examining the arguments in this case, the Court held that its application of the First Amendment was much less strict than it would be for a civilian case. The decision of this case gave “great deference to the professional judgment of

military authorities concerning the relative importance of a particular military interest” (*Goldman v. Weinberger*, 1986). Since the military is more knowledgeable about military life and military readiness than the courts are, the military is allowed to apply its own professional judgment to the policies it makes. It was within the judgment of military officials that a standardized uniform was important in encouraging “the subordination of personal preferences and identities in favor of the overall group mission” (*Goldman v. Weinberger*, 1986). The Court deferred to the professional judgement of the military and the decision in this case was that the military was not violating the First Amendment because the reasons for the military uniform are important ones. This case demonstrates that the Court will defer to the military in cases about military uniform, even if there are constitutional rights being denied that would have been protected in a civilian case.

The Court has also deferred to the military when it comes to determining who can be drafted. The case of *Rostker v. Goldberg* (1981) deals with an argument that the draft is unconstitutional because it only includes men and not women. When deciding this case, the argument of the Court was that proper deference meant “we must be particularly careful not to substitute our judgment of what is desirable for that of Congress” (*Rostker v. Goldberg*, 1981). If Congress had specialized knowledge about the military, then the reasoning Congress gave for policies was to be given a lot of weight. Congress argued that the purpose of draft registration was to be able to call together combat forces if it became necessary. At the time, women were not allowed to serve in combat positions in the military. So if the military needed combatants, it would be most effective to only call upon men and not women. For this reason, the Court ruled that Congress was not in violation of the Constitution when requiring men to register for the draft but not requiring women to do the same. Congress did not weigh in on the constitutionality of

women not being allowed to serve in combat roles, as that was not the focus of this case. When women were eventually allowed in combat roles it was not because of a decision of the Supreme Court, but from an act of Congress. However, there have been times that the Court took a stance on protecting women in the military, which can be broadly applied as an example of the Court protecting traditionally disadvantaged groups.

In the case of *Schlesinger v. Ballard* (1975) the Court rules in favor of military policy, but it does so in a way that makes it clear that it supports the rights of disadvantaged groups within the military. This case involved an argument against a policy that allowed women a longer time limit than men under which to get a promotion in order to continue to serve. The Court supported the time difference based on the fact that “male and female line officers in the Navy are not similarly situated with respect to opportunities for professional service” (*Schlesinger v. Ballard*, 1975). Based on the fact that women have traditionally had fewer opportunities than men, especially specifically within the military, it is acceptable for the Navy to allow women a longer time period within which to gain promotions. This allowance of a longer time period was not so much of an advantage, as was being argued, but it was aimed at leveling the playing field to give women more of an equal chance. The decision in this case demonstrate that the Court is willing to step in to protect groups that have traditionally been discriminated against in the military. This may suggest that the Court would also protect the rights of transgender individuals in the military.

What is important to remember is that while the Court demonstrates a traditional deference to Congress over the military, the ultimate responsibility for deciding constitutionality still rests with the Court. This responsibility is made clear in the opinions of each of the cases addressed above. The Court in *Rostker* (1981) reiterates that “deference does not mean

abdication” (*Rostker v. Goldberg*, 1981). The Court may recognize the specialized knowledge that Congress has when it comes to military matters, but the Court has specialized knowledge of the Constitution and the power to interpret it. In *Orloff* (1953), the Court explained that there have been instances where the Court has stepped in to determine if someone has been properly admitted to military positions, it just doesn’t have the ability to change the orders of someone who had been lawfully admitted (*Orloff v. Willoughby*, 1953). In *Goldman* (1986), the Court held that the First Amendment was not to be entirely disregarded in the military context, even if that specific case was not found to be in violation. This demonstrates that the Court still holds the power to decide constitutional questions, even in a military environment. The specialized knowledge of Congress in that area is given a lot of deference but will not be completely unquestioned.

### **Analysis**

Past cases demonstrate that there are many areas where the Court has deferred to the military, even when there are other constitutional rights at stake. Specifically, these areas are when it comes to filling specific positions, policies regarding the uniform, and who can be drafted. What is not included in these specific areas is who can join the military in general. What we have seen is that the Court has not stepped in to make a decision about the military deciding who can and cannot serve. When the military has made steps toward inclusion historically, those decisions were not made because of a ruling from the Court. Desegregation was done by an executive order from President Truman (Executive Order 9981). Congress passed legislation allowing women to serve, and later allowing them to serve in combat rolls. And Don’t Ask, Don’t Tell was also repealed by an act of Congress (H.R.2965). The Supreme Court didn’t weigh in on any of these decisions. This may suggest that it would be unlikely for the Court to weigh in

on the matter of transgender individuals serving in the military as well. However, there is one fact that challenges that assumption. Prior to Trump's order, transgender individuals were allowed to serve in the military. They were given the right to serve under Obama. So banning transgender individuals from serving in the military is a step backward. Trump's order is taking away a right that had been granted under a previous President. What we have seen is that in the past the Court has ruled on the side of assisting groups that had a history of being disadvantaged in the military. This suggests that it would also be proper for the Court to step in to assist transgender individuals, who are currently allowed to serve and have a history of being disadvantaged in the military. This situation also does not deal with the specific situations in which we have seen the Court show deference to the military.

Transgender individuals are not lodging complaints to the courts about being denied specific positions, or making any changes to the uniform. These are both areas where we have specifically seen the Court defer to the military. What the Court has ruled is that the inner workings of the military are so specialized that only military officials can really make those decisions. The orders of somebody otherwise lawfully admitted cannot be changed by the court, but the issue in this case is the ability to be admitted at all. That is an area where the Court would be more likely to make a decision. Once transgender people enter the military the positions that they get are up to military officials, but not allowing them to be admitted at all is an area where the Court could step in. Similarly, transgender individuals are not asking to make any changes to the uniform. They are not changing anything or asking for treatment that is any different from any other member of the military. All they want is to be able to continue to serve in the military. Without a rational justification, it should not be lawful for them to be denied the ability to serve. Additionally, transgender individuals are not asking for any special treatment like changes to the

uniform. The decisions of the military would be deferred to in a situation like that. But that is not the case.

The question is simply of allowing transgender individuals to serve in the military. That is not an area where the Court has specifically demonstrated a deference to the military. What the Court has demonstrated is mostly silence in the area of who is allowed to serve in the military. If transgender individuals had never been allowed to serve in the military then it is almost certain that the Court would not weigh in on the decision and leave it up to Congress, like the question of allowing African Americans, women, and gays and lesbians to serve. But this is a case where transgender individuals had been given a right to serve, and that right is being taken away from them without proper justification. The Court has demonstrated a history of supporting parties that have been historically disadvantaged within the military. Those two facts are most important in this case. Taking away a previously granted right of a historically disadvantaged group would be likely to prompt the Court to weigh in on this issue. Once transgender individuals enter the military, the Court would show deference to Congress about the policies that affect them within the military. But on the question of whether or not they can be banned from service, the Court would step in to determine the constitutionality of the ban. That determination would be made from an examination of substantive due process and the Equal Protection Clause.

### **Substantive Due Process**

#### **Overview**

This first constitutional provision that applies to Trump's transgender military ban is the concept of substantive due process. Specifically, it is important to examine the right to privacy. The Court has held that privacy is a fundamental right found under substantive due process. Several areas have been protected under the right to privacy, including same sex relationships.



The rights of transgender individuals should also be protected under this right to privacy.

Applying the right to privacy to transgender individuals means that policies cannot discriminate purely on the basis of gender identity without being a violation of the right to privacy.

Before examining the right to privacy it is important to understand where that comes from. The principles of due process are found in two places in the US Constitution. First in the Fifth Amendment, and then again in the Fourteenth Amendment. The Fifth Amendment states that a person cannot be “deprived of life, liberty, or property, without due process of law,” and the Fourteenth Amendment uses the same language. One application of this principle is through substantive due process, which is the idea that there are certain rights that are so fundamental to liberty that violating them would be a violation of due process. This principle is seen in the case of *Lochner v. New York* (1905). This case struck down a law that would have limited working hours of bakers. The argument against this case was brought by an employer who had allowed an employee to work longer than 60 hours a week. The employee had wanted to work longer than 60 hours, and the argument was that limiting his working hours was a violation of his liberty and his right to make his own decisions about his working arrangements. The Court agreed and ruled that employees had a right to make their own contract with their employers. This is not a right specifically outlined in the Constitution, but it falls under substantive due process.

The principles of substantive due process have been held to many different areas of law. The one that is relevant to the transgender ban is privacy. The application of substantive due process to privacy rights can be seen in *Roe v. Wade* (1973), when the Court upheld the right of a woman to get an abortion, free from governmental interference. The right to an abortion may not be relevant in this case, but the right to privacy is. The decision of *Roe v. Wade* (1973) held that a woman has the right to make her own decision about what happens to her body. While states

may make regulations relating to health and safety concerns, the conclusion of the Court was that the right to make a decision regarding abortion was included in the right to privacy. After *Roe*, the right to privacy was also applied to several cases dealing with relationships and sexual orientation.

This area of privacy comes from the case of *Griswold v. Connecticut* (1965). In this case, the Court struck down a law that had prohibited the use of contraceptives. This decision upheld the idea that personal relationships fell within a protected zone of privacy. In his opinion, Justice Douglass supported the protection of privacy by viewing it as a penumbra. He writes that there are zones of privacy found within the Bill of Rights and, when taken together, they support the idea of privacy as a general right. These zones of privacy include the First Amendment's protection of free speech and association, the Third Amendment's protection against the quartering of soldiers, the Fourth Amendment's protection against unlawful search and seizure, and the Fifth Amendment's protection against self incrimination. The Fourth and Fifth Amendments in particular, he writes, protect against invasions "of the sanctity of a man's home and the privacy of his life" (*Griswold v. Connecticut*, 1965). Based on this reasoning, laws seeking to control the manufacture or sale of contraceptives would be constitutional. But the law in question specifically banned the use of contraceptives. Justice Douglass brings up the point that in order to enforce this law, law enforcement would have to be allowed to search the home and bedroom of the couple. This was considered a repulsive notion, and extreme breach of privacy of the marital relationship. For this reason, the law banning contraceptive use was found unconstitutional. Justices Harlan and White concurred in this opinion, and stated that the right to privacy should be found in the Fourteenth Amendment's Due Process Clause, as part of substantive due process. As mentioned, the concept of substantive due process comes from the

idea that there are certain rights that are not enumerated in the Constitution, but they are so fundamental to liberty that violating them would be a violation of due process. Harlan and White argued that privacy was one of these fundamental right, and that the contraceptive ban was depriving the couple of their liberty through a deprivation of their right to privacy. This case demonstrates not only the right to privacy, but specifically the privacy rights of relationships.

This set an important precedent for later cases, such as the case of *Lawrence v. Texas* (2003). Police had entered the residence of John Lawrence, and found him engaging in a sexual act with another man. Both men were arrested under Texas anti-sodomy laws. In this, the Court extends privacy rights beyond just a marital relationship, but to relationships in general, especially taking place within one's own home. The Court pointed out that the two men were consenting adults, and that they were in a private residence. The private residence, and specifically the bedroom, encompassed a zone of privacy. The Court ruled that the state had no right to invade that zone of privacy. The right to liberty that had been supported by the Court in past cases protected relationships like this one. The relationship that the two men were engaging in was a matter of personal choice and privacy that the state could not infringe upon. Under the right to privacy, two consenting adults are entitled to "respect for their private lives" (*Lawrence v. Texas*, 2003). For this reason, the anti-sodomy law was struck down as a violation of the right to privacy.

Cases challenging the Defense of Marriage Act rested on these principles of privacy addressed, as well as equal protection guarantees. The Defense of Marriage Act defined marriage as between one man and one woman (28 USC § 1738C), effectively preventing same sex marriage. In the case of *Obergefell v. Hodges* (2015), the Court ruled on the basis of the Due Process Clause protecting individuals' rights to liberty. It had already been demonstrated that

relationships were included in the fundamental right to privacy. The state couldn't intervene in a relationship between two consenting adults, which protected same sex relationships, and was extended to protect same sex marriage. Marriage was considered a fundamental right for heterosexual couples. The Court ruled that denying that same right to same sex couples was unconstitutional. Laws against same sex marriage were discriminating only on the basis of sexual orientation, and violated the right to privacy of same sex couples. In this case, the Court defined other liberties pertaining to the right to privacy that should be considered fundamental. These liberties included "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" (*Obergefell v. Hodges*, 2015). These specific liberties can be extended to the question of the rights of transgender individuals in the military.

### **Analysis**

The cases discussed above illustrate that sexual orientation is protected by the right to privacy. Though gender identity is not specifically discussed, it is logical that it should be protected for many of the same reasons. Protections for sexual orientation came about through cases involving relationships, and the privacy that should be given to consenting adults in their relationships. Rights of transgender individuals do not come from rights to relationships, but from something even more fundamental. They have rights to define their own personal identity. What could be more personal and private than the way someone identifies themselves? People have the right to define their gender identity, and that is protected under the right to privacy. Denying somebody rights on the basis of their gender identity is a violation of this right to liberty.

President Trump's transgender military ban is attempting to deny military service to individuals on the basis of their gender identity. Discriminating purely on the basis of gender

identity is a denial of their privacy. So in order to be constitutional, Trump's ban would have to have a justifiable reason for excluding transgender individuals from military service without discriminating purely on the basis of gender identity. The justification President Trump mentioned in his Memorandum included concerns that admitting transgender military personnel would "hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources" (DTM). It can be agreed that these criteria are reasonable, and not arbitrary. So in order to exclude transgender individuals from serving in the military, the Department of Defense would have to show how admitting them would, in fact, achieve the goals addressed. As of yet, there has not been a lot of specific research in these areas but an examination of each of these arguments and the research that has been done shows that military service of transgender individuals is not actually substantially related to any of the areas of concern.

First is the argument that allowing transgender individuals to serve in the military would hinder effectiveness and unit cohesion. There is no direct evidence about the effect of transgender military personnel on effectiveness or lethality, but data has been drawn from other sources. For example, this was also an argument against allowing gays and lesbians to serve. A RAND report released in 2016 explains that neither unit cohesiveness nor military effectiveness were endangered when gays and lesbians were allowed to serve openly. Additionally, data can be drawn by looking at foreign militaries as examples. Data shows that in foreign militaries where transgender individuals are allowed to serve, "there has been no significant effect of openly serving transgender service members on cohesion, operational effectiveness, or readiness" (Schaefer, 2016). If transgender military service has not hindered effectiveness in other countries, this suggests that allowing transgender individuals to serve in the United States military would not hinder effectiveness either. The RAND report and the comparative look at

foreign militaries serve as evidence that allowing transgender individuals to serve in the military would not have a degrading effect on unit cohesiveness or effectiveness of the military.

When it comes to the tax on military resources, that is trickier because the language President Trump used is subjective. What can be considered a tax on military resources? In the RAND report, studies were conducted on private insurance spending to estimate what the healthcare cost increase would be on the military to fund the healthcare of transgender individuals. The results concluded that “even in the most extreme scenario that we were able to identify using the private health insurance data, we expect only a 0.13-percent (\$8.4 million out of \$6.2 billion) increase in AC health care spending” (Schaefer, 2016). This number can be interpreted differently by different people. What is considered to be a tax on military resources varies based on opinion. But the evidence illustrates the increase in spending on healthcare for transgender individuals in the military would be a fraction of a percent.

The claims that President Trump makes to support the ban on transgender military service do not hold up. The evidence shows that it is unlikely that allowing transgender individuals to serve in the military would have an effect on military cohesion or effectiveness. Evidence also shows that the health insurance of transgender individuals would increase the spending on health care by .13 percent, which hardly seems to be a tax on military resources. Since the president and the Department of Defense do not have a fair justification for denying military service to transgender individuals, the proposed ban improperly violates the privacy rights of transgender individuals. This same evidence can be applied to show how Trump’s ban is a violation of the Equal Protection Clause.

### **Equal Protection Clause**

#### **Overview**

The Equal Protection clause is found in the Fourteenth Amendment of the Constitution. It states: “No State shall...deny to any person within its jurisdiction the equal protection of the laws.” (U.S. Const. amend. XIV) The Fourteenth Amendment was ratified in 1868, after the end of the Civil War. The goal of the amendment at the time was to extend citizenship rights to the black former slaves. It gave citizenship to natural born Americans, and extended them the equal protections of the law.

The Fourteenth Amendment refers to the states and not the federal government, but that doesn't mean the federal government can ignore principles of equal protection. The case of *Bolling v. Sharpe* (1954) dealt with the question of desegregation in the District of Columbia. The District of Columbia is not a state and is governed by the federal government so the Fourteenth Amendment didn't apply. However, the Court ruled that the principles of equal protection are implicit in the Fifth Amendment's protection of due process of law. The decision of this case stated “discrimination may be so unjustifiable as to be violative of due process” (*Bolling v. Sharpe*, 1954). The Fifth Amendment does apply to the federal government, so this decision makes it clear that principles of anti-discrimination found in the Equal Protection Clause also apply to the federal government through the Fifth Amendment's Due Process Clause.

The Equal Protection Clause does not mean that the Court cannot make distinctions between two groups. What it means is that the state or federal government has to have a justification for the distinction being made. There are different levels of scrutiny that the Court has applied depending on what the case involves. The least restrictive test is known as the rational basis test, and it is the default test that is used unless the case involves a fundamental right or a suspect class. When one of those factors is involved in a case then the Court will use a strict scrutiny test. Falling between those two tests is the intermediate scrutiny test. Intermediate

scrutiny should be used when the case involves a quasi suspect class, and it is the test that should be applied to Trump's ban.

The least restrictive level of review is known as the rational basis test. Under a rational basis standard of review, justices have to decide whether there is a rational relationship between a governmental interest and the differential treatment of two classes, or whether a distinction is being made arbitrarily. This test is demonstrated in the case of *Nordlinger v. Hahn* (1992). This case dealt with an argument that significant difference in taxes between two comparable properties was a violation of equal protection, as it discriminates between newer and older owners. To satisfy the rational basis test, the policy has to rationally relate to an governmental interest. In other words, the distinction being made between two classes cannot be arbitrary. The state gave two reasons for making a distinction between newer and older owners. First, the state had an interest in preserving neighborhood stability, which could be accomplished by discouraging high turnover of homes. Second, potential buyers were able to know their tax burden ahead of time to make an informed purchasing decision, but raising tax rates on older homeowners would force them to pay rates that they hadn't prepared for. The Court determined that these reasons were rational and the distinction was not being made arbitrarily, so the policy was not a violation of equal protection.

In the decision of *Nordlinger v. Hahn*, 1996, the Court put forth the idea that the rational basis test is the default standard of review that should be used except in a few specific circumstances. A higher standard of review should be used if there is a fundamental right in jeopardy, or the case deals with a suspect class. Previous court cases have established what characteristics a class must have in order to be considered a suspect class. In *Frontiero v. Richardson* (1973), the justices applied three characteristics: a history of discrimination,



immutable characteristic, and a relation to the ability to contribute to society. The decision of *Lyng v. Castillo* (1986) supported these characteristics and added that a suspect class is a minority or politically powerless. So if a group has these four characteristics, then it is considered a suspect class, and cases involving suspect classes are given a higher standard of review.

In addition to suspect class, the Court has recognized what it refers to as quasi-suspect classes. The characteristics that need to be examined in order to determine if a class is considered quasi-suspect are the same characteristics that make up a suspect class. These characteristics are a history of discrimination, an immutable characteristic, a relation to the ability to contribute to society, and if the group is a minority or politically powerless. What makes a quasi-suspect class is different is if these characteristics aren't demonstrated quite as prominently. For example, the Court has considered race a suspect class, and sex has been treated as a quasi-suspect class. There has been a history of sex discrimination, but it hasn't been as severe as racial discrimination in this country. That is why sex is a quasi-suspect class while race is a suspect class.

When a case involves a suspect class, like race, the Court applies a stricter standard of review than rational basis. The standard that the Court applies instead is known as strict scrutiny. Under strict scrutiny there has to be a compelling governmental interest, and the law has to be necessary and narrowly tailored to achieve that interest. *Yick Wo v. Hopkins* (1886) demonstrates that no law can be upheld under strict scrutiny if "no reason for it exists except hostility to the race and nationality to which the petitioners belong" (*Yick Wo v. Hopkins*, 1886). This case involved a San Francisco city ordinance that required owners of laundry businesses to have permits in order to operate. The law was constitutional on its face, but the issue arose with the

fact that the law was not applied fairly. Workers of Chinese descent were denied permits more often than not. The argument was that the ordinance was being unfairly enforced, and violated the rights of the Chinese workers under the Equal Protection Clause. The Court supported this argument. While the actual ordinance was constitutional, the application of the ordinance was biased. It was being unfairly enforced against the workers of Chinese descent. Equal protection was being denied on the basis of race alone, without demonstrating a compelling interest or a law necessary to achieve that interest. By the time of *Yick Wo*, the Fourteenth Amendment had not even been ratified, nor had the Court specifically developed the basis of strict scrutiny. But the ideas presented in that decision demonstrate early ideas that would later lead to these principles.

Another case that demonstrates how strict scrutiny has been applied to cases involving racial discrimination is *Loving v. Virginia* (1967), which is the case that struck down laws prohibiting interracial marriage. Under strict scrutiny, the state had to demonstrate a compelling governmental interest, and demonstrate that the law is necessary and narrowly tailored to achieve that interest. The argument of the state was that the state had an interest in preserving racial integrity and preventing “the corruption of blood” (*Loving v. Virginia*, 1967). Under a rational basis test, the Court would determine if there could be a rational basis for differential treatment of classes, and would defer to the state legislature to reasonably apply what it considered the best policy. That is what the state of Virginia was asking the Court to do in this case. But the Court rejected that argument. Instead, the Court ruled that there had been no compelling governmental interest demonstrated. The law was purely based on racial discrimination. For this reason, the law was found to be in violation of the Equal Protection Clause under the strict scrutiny standard of review.

Strict scrutiny was also applied in the early days of gender discrimination cases. In the case of *Frontiero v. Richardson* (1973), the justices were split about which standard to use. This case challenged the idea that servicewomen couldn't claim their husbands as dependents, and asserted that this discriminated against servicewomen and violated the Equal Protection Clause. The majority opinion was in support of treating sex, like race, as a suspect class and apply a strict level of scrutiny. There were three specific reasons cited as to why sex should be a suspect class. First, the long history of sex discrimination in our country made it necessary to treat sex as a suspect class. Second, "sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth" (*Frontiero v. Richardson*, 1973). In other words, sex was not a choice, and people should not have to face unequal treatment in the law on the basis of something that was outside their control. Here the court cites *Weber v. Aetna Casualty & Surety Co* (1972), which upheld that illegitimate children have as much rights as legitimate children to recover claims in the result of the death of their father. The decision is supported by the idea of "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing" (*Weber v. Aetna Casualty & Surety Co*, 1972). An illegitimate child should not be held responsible for the situation of his birth and denied rights as a result of that, in the same way that somebody should not be denied rights on the basis of their sex, something that they were born with and have no control over. The third piece of evidence the Court uses to support their view of sex as a suspect class is that "the sex characteristic frequently bears no relation to ability to perform or contribute to society" (*Frontiero v. Richardson*, 1973). Any law made differentiating men and women would be arbitrary was not supported by any real differences of ability. Several justices agreed that not allowing servicewomen to claim their

husbands was discrimination, but they did not support the adoption of sex as a suspect class. Instead, they wanted to adopt the rational basis standard of review.

This argument resulted in a compromise that cases involving sex shouldn't be examined with either a rational basis test or strict scrutiny test. Instead, the justices decided on a test that fell between rational basis and strict scrutiny. This test is known as intermediate scrutiny. Under intermediate scrutiny, a differentiation between classes has to serve an important governmental objective, and has to be substantially related to the achievement of that objective. This standard of review is demonstrated in the case of *Craig v. Boren* (1976). This case dealt with an Oklahoma statute that prohibited "the sale of 'nonintoxicating' 3.2% beer to males under the age of 21 and to females under the age of 18" (*Craig v. Boren*, 1976). The statute was challenged on the grounds that it denied males between the ages of 18 and 21 equal protection under the law. To satisfy the intermediate level of scrutiny, the state had to demonstrate an important governmental interest and show that the law was substantially related to the achievement of that objective. The governmental objective the state identified was traffic safety, which the Court agreed was an important governmental interest. But the state was not able to show that the distinction being made between males and females was substantially related to that interest. The only evidence that the state could provide was broad generalizations about the differences in drinking habits between the sexes. This was not enough evidence to justify that the law was substantially related to the objective. For that reason the Court ruled that the statute did unfairly discriminate against boys between 18 and 21 and was a violation of the Equal Protection Clause.

Since *Craig v. Boren* (1976), the Court has followed the precedent of applying intermediate scrutiny when it comes to cases involving sex discrimination. *United States v. Virginia* (1996) established that a single sex school that refused to admit women was in violation

of the Equal Protection Clause. In this case the Court held that there are some inherent differences between men and women, and those differences could be used to justify differential treatment, but not unequal treatment. Those differences cannot be used “for denigration of the members of either sex or for artificial constraints on an individual's opportunity” (*United States v. Virginia*, 1996). Further, laws are not justified if they rely on “overbroad generalizations about the different talents, capacities, or preferences of males and females” (*United States v. Virginia*, 1996). Since cases after *Frontiero v. Richardson* (1973) have not upheld the idea of sex as a suspect class, it is not given a strict scrutiny standard of review. However, the fact that the Court consistently applies an intermediate level of scrutiny demonstrates that sex is considered a quasi-suspect class. It is still a class that needs to be protected, just not under the strictest standard of review.

A few cases have also supported the idea that sexual orientation should also be considered a quasi-suspect class, and cases involving differential treatment on the basis of sexual orientation should be examined under an intermediate standard of review. The case of *US v. Windsor* (2013) dealt with a challenge to the Defense of Marriage Act. Edith Windsor was legally married to her wife but unable to claim an estate tax exemption upon her death as a result of the federal law. She challenged the constitutionality of DOMA, and the Court ruled in her favor. The Court found that there was no real governmental interest demonstrated beyond the desire to discriminate against a politically unpopular group. For that reason, the provision of DOMA at question in this case would not survive under intermediate or strict scrutiny. In the court proceedings for this case, the Attorney General issued a statement that “the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of

scrutiny” (*US v. Windsor*, 2013). The Supreme Court did not explicitly take on this position, but the Second Circuit Court of Appeals concluded that sexual orientation should be considered a quasi-suspect class, just like sex.

There have not been many cases explicitly dealing with discrimination against transgender individuals, but some cases involving discrimination under Title VII demonstrate that the Court treats transgender discrimination as a form of sex discrimination. *Smith v. City of Salem, Ohio* (2004) was a case before the 6th Circuit Court of Appeals involving a transgender firefighter. Smith was assigned male at birth, and began presenting as a female while working as a firefighter. Smith approached her supervisor about discriminatory remarks from coworkers, and ended up being suspended as a direct result of her transgender identity. The Court ruled that “Employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.” (*Smith v. City of Salem, Ohio*, 2004). While this case does not deal specifically with the Equal Protection Clause, but with the Civil Rights Act, it is important for demonstrating that discrimination against transgender individuals can be classified as sex discrimination. This sentiment was echoed in *Glenn v. Brumby* (2011). When a transgender woman was fired because she dressed and presented in a feminine manner, while her boss perceived her as a male, the Court found this to be a violation of the Equal Protection Clause. The Court held that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender” (*Glenn v. Brumby*, 2011). These cases support the idea that discrimination against transgender individuals can be classified as a form of sex discrimination.

## **Analysis**

In order to determine whether or not President Trump's transgender military ban is a violation of equal protection, it is first necessary to determine which standard of review is proper to use. The default test is a rational basis standard of review unless the case deals with a fundamental right or a suspect class. I argue that transgender individuals make up a quasi-suspect class and therefore the intermediate scrutiny test should be used to examine equal protection cases. It has been shown that the Court treats transgender discrimination as a form of sex discrimination. Since sex is a quasi suspect class and cases involving sex discrimination are examined using intermediate scrutiny, then cases involving discrimination against transgender individuals should also be given that same treatment. Even if transgender individuals had to be taken as their own group instead of as a form of sex discrimination, they would still be considered a quasi suspect class. The characteristics that need to be examined to show that a class is a suspect or quasi-suspect class are a history of discrimination, an immutable characteristic, a relation to the ability to contribute to society, and if the group is a minority or politically powerless.

The first characteristic of a suspect or quasi-suspect class is a history of discrimination. Not much of an argument has to be made that transgender individuals have suffered from discrimination. The 2015 US Transgender Survey examined the experiences and discrimination faced by transgender individuals across the US. This survey reported that transgender individuals who were out at school, at work, or to their families faced threats of violence and harassment. In addition, 30% of the respondents reported that they had been directly discriminated against in their workplace, such as through being harassed or denied a job or a promotion (James et al, 2016). This survey does not report on specific data about discrimination faced within the military, but that is not important in this context. In order to determine if transgender individuals

should be considered a suspect or quasi-suspect class, what needs to be demonstrated is a history of discrimination in general. This evidence shows that transgender individuals continue to face discrimination in the workplace and in their everyday lives.

The second basis for determining a suspect or quasi-suspect class is an immutable characteristic. In other words, this is a characteristic that is a product of birth and not something that somebody can choose to change about themselves. Race is an immutable characteristic because race does not change over somebody's lifetime. Likewise, sex is an immutable characteristic because it's not something that somebody chooses to change. The argument about whether or not being transgender is an immutable characteristic can be tricky because many people have a misconception about what being transgender means. Instead of looking at it as changing sex, it is more applicable to look at it as somebody changing how they present or what their body looks like to match their gender identity. In other words, being transgender is not a choice just like sexual orientation is not a choice. Somebody doesn't wake up one day and decide to be transgender or cisgender. Presentation may change, but somebody's idea of themselves or their identity does not change. In this way, being transgender is an immutable characteristic.

The third characteristic is the ability to contribute society. Things like race and sex have no bearing on somebody's ability to contribute to society, and that is part of the reason why they are considered suspect or quasi suspect classes. If there was something about an individual that made them less able to contribute to society that would be a viable reason to differentiate them from someone who was more able to contribute to society. So if being transgender made somebody have less of an ability to contribute to society, that would support the classification of being transgender as a non-suspect class. However, whether or not somebody is transgender has



no bearing on their ability to contribute to society. This supports treating being transgender as either a suspect or quasi-suspect class.

The final characteristic is whether the group is a minority or politically powerless. Estimates show that about .06% of American adults, or about 1.4 million, identify as transgender (Flores et al, 2016). This certainly makes transgender individuals a minority. The second prong of this test is whether or not they are politically powerless. This argument is also supported. Only a few states have had transgender individuals elected to any sort of government office, and none have been elected into the federal legislature. In addition, the US Transgender Survey reported on transgender civilians who had not registered to vote for a variety of reasons, such as because their identification did not reflect their current, preferred name, or “because they wanted to avoid anti-transgender harassment by election officials” (James et al, 2016). These facts demonstrate that transgender individuals may lack a voice in politics in this country. They are unable to adequately protect themselves from discrimination. For this reason, they fall under the classification of being politically powerless.

The evidence shows that transgender individuals hold each of the characteristics of suspect classes. There is a demonstrated history of discrimination against transgender individuals, being transgender is not a choice, whether or not somebody is transgender does not have an effect on their ability to contribute to society, and transgender individuals are a minority and may lack a political voice. For these reasons, transgender individuals cannot be treated as a non-suspect class. The discrimination against transgender individuals is not severe enough to consider them a suspect class, but rather it would be proper to consider being transgender a quasi-suspect class. Some of the evidence in support of treating transgender individuals as a suspect class might face arguments. In particular, people may have misperceptions about

transgender individuals and argue that being transgender is a choice. However, even if this argument was entertained, transgender individuals would still fit three of the four characteristics of a suspect class, which supports the classification of a quasi suspect class. This also fits with court cases that have considered transgender discrimination a form of sex discrimination, since sex is a quasi-suspect class. It has been shown that transgender individuals constitute a quasi-suspect class, which means that cases involving discrimination against transgender individuals should be held to an intermediate level of scrutiny.

In order for a policy to succeed under an intermediate level of scrutiny, there must be an important government objective and the policy must be substantially related to the achievement of that objective. These issues have already been discussed under the examination of substantive due process. The governmental objective of this policy is to protect military effectiveness and unit cohesion. These are both extremely important objectives in order to protect the safety and security of the country. There are no arguments against the government objectives in this case. Trump's transgender military ban passes the first prong of the intermediate scrutiny test.

The second prong of the intermediate scrutiny test is that the policy has to be substantially related to the achievement of that objective. Evidence has shown that allowing transgender individuals to serve in the military would not hinder effectiveness or cohesion. This evidence was demonstrated under the discussion of substantive due process. Evidence from foreign militaries suggest that allowing transgender individuals to serve does not harm military effectiveness or cohesion. Data shows that funding transgender health insurance would only result in a mere .13% increase in spending (Schaefer, 2016), which couldn't be considered a tax on military resources. This evidence shows that the proposed ban is not substantially related to the achievement of those objectives. For that reason, the ban does not succeed under a test of

intermediate scrutiny. Banning transgender individuals from serving in the military is a violation of the Equal Protection Clause.

### **Conclusion**

It has been demonstrated that President Trump's ban on transgender military service is not constitutional. An examination of substantive due process shows that transgender individuals are protected under the right to privacy. Looking at the Equal Protection Clause illustrates the fact that the discrimination that transgender individuals face entitles them to the status of a quasi-suspect class. This means that cases involving discrimination against transgender individuals should be looked at using an intermediate level of scrutiny, where policies are only constitutional if they are substantially related to important government objectives. While military effectiveness and unit cohesion are important government objectives, evidence makes it clear that banning transgender individuals from military service does not threaten either effectiveness or cohesion. For these reasons, the ban on transgender military service violates transgender individuals' rights to privacy and their rights to equal protection under the law. This is why President Trump's transgender military ban is unconstitutional.

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