RESOLVED, That the American Bar Association urges the Federal Government to recognize that service by persons who otherwise meet the standards for accession or retention, as applicable, in the United States Armed Forces should not be restricted, and transgender persons should not be discriminated against, based solely on gender identity
REPORT

Introduction

This Resolution is consistent with ABA policy. Previously, the ABA has urged federal, state, local, and territorial governments to enact laws prohibiting discrimination on the basis of actual or perceived gender identity or expression in employment and public accommodations. See 06A122B.

This Resolution enables the ABA to specifically address any and all discriminatory actions perpetuated by the federal government to bar service in the United States Armed Forces based on one’s gender identity.

This accompanying report will address three key arguments as follows:

I. Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.
   a. Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy or serve.
   b. Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.

II. Costs associated with providing health care for transgender individuals is negligible.

III. The transgender service ban violates the constitutional guarantees of Equal Protection Clause and Due Process.
   a. The transgender service member ban violates the Equal Protection Clause of the Fifth Amendment to the United States Constitution.
   b. The transgender service member ban violates the Due Process Clause of the Fifth Amendment to the United States Constitution
Background

Historic federal policy restricted or prohibited transgender persons from military service. The reasons for that policy were grounded in prejudice and ignorant of medical science. Beginning in 2015, the Department of Defense (“DoD”) began a review of existing regulations and considering both medical evidence and military expertise. Based that review, the Secretary of Defense (“SecDef”) announced new policy in June 2016 that allowed for transgender military personnel to serve openly and to receive necessary medically care. In July 2017, a new president announced his decision to bar transgender people from serving in the military “in any capacity.”

I. A subsequent memorandum directed SecDef to provide recommendations to implement this new ban. On February 22, 2018, SecDef made such recommendations and on March 23, 2018, the Administration announced a new policy regarding the service of transgender individuals in the United States Armed Forces. It states that, while SecDef and other executive branch officials will have some latitude in implementing the policy, “persons with a history or diagnosis of gender dysphoria — including individuals who the policies state may require substantial medical treatment, including medications and surgery — are disqualified from military service except under limited circumstances.” The Administration’s new policy provides that: Transgender persons with a history or diagnosis of gender dysphoria1 are disqualified from military service, except under the following limited circumstances:

a. if they have been stable for 36 consecutive months in their biological sex prior to accession;

b. Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and

c. currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.

II. Transgender persons who require or have undergone gender transition are disqualified from military service.

1 The report underlying this new policy distinguishes between “gender dysphoria” (which is defined as a “marked incongruence between one’s experienced/expressed gender and assigned gender” that is “associated with clinically significant distress or impairment in social, occupational, or other important areas of functioning.”) and transgender, which contains a much broader segment of society.
III. Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.

Evolution of the Current Policy

For decades, transgender individuals could not serve openly in the U.S. Armed Forces. The repeal in 2011 of the U.S. Government’s policy commonly referred to as “Don't Ask, Don't Tell,” allowed open service by gay, lesbian, and bisexual service members; however, transgender individuals were still barred from openly serving in or joining the U.S. Armed Forces. This ban was effective via enlistment health screening regulations which denied individuals the ability to enlist if they had a "[c]urrent or history of psychosexual conditions (302), including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias." Unlike Don't Ask, Don't Tell, this policy was not a law mandated by Congress, but an internal military policy.

On June 30, 2016, the DoD announced that it would allow transgender individuals already in uniform to begin serving openly and ordered the military branches to begin preparing to accept new transgender recruits by July 1, 2017. That policy was the result of a lengthy review process by high-ranking military personnel, supported by a RAND Corporation study, which concluded that permitting transgender people to serve would have, at most, an insignificant adverse effect on military readiness or effectiveness.

In November 2016 President Trump was elected; he became President in January 2017. Retired Marine Corps General James Mattis was appointed as the SecDef.

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5 Despite this, studies suggest that the propensity of transgender individuals to serve in the U.S. military is as much as twice that as cisgender individuals. In the Harvard Kennedy School's 2013 National Transgender Discrimination Survey, 20% of transgender respondents reported having served in the armed forces, compared with 10% of cisgender respondents. Harrison-Quintana, Jack; Jody L. Herman, “Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey,” LGBTQ Policy Journal 3(2013) (Retrieved 17 November 2013); Brydum, Sunnivie, “Trans Americans Twice As Likely to Serve in Military, Study Reveals,” The Advocate (1 August 2013) (Retrieved 17 November 2013).
On June 30, 2017, the SecDef delayed the required implementation of policies allowing the enlistment of transgender individuals.\(^7\)

On August 25, 2017, the President issued a memorandum to the SecDef and the Secretary of Homeland Security banning transgender people from military service.\(^8\) This memo confirmed that, effective March 23, 2018, the Armed Forces would “return to the longstanding policy and practice on military service by transgender individuals that was in place prior to June 2016,” no longer permitting transgender individuals to serve openly in the military, and no longer authorizing the use of the Departments’ resources to fund sex-reassignment surgical procedures. The President’s directive also continued indefinitely DoD’s delay in implementing the June 2016 open service policy on accessions. The President stated, “In my judgment, the previous Administration failed to identify a sufficient basis to conclude that terminating the Departments’ [DoD’s] longstanding policy and practice [forbidding service by transgender service members] would not hinder military effectiveness and lethality, disrupt unit cohesion, or tax military resources, and there remain meaningful concerns that further study is needed to ensure that continued implementation of last year’s policy changes would not have those negative effects.” As a result of that memorandum, transgender people would have been barred from accession (entry into the military), and currently serving transgender service members would no longer be eligible for service as of March 23, 2018.

In August-September 2017, four law suits were filed to stop implementation of the policy articulated in the August 25, 2017 Memorandum; in all four cases federal courts have issued preliminary injunctions stopping the implementation of the policy as stated in the August 25, 2017 Memorandum.\(^9\) Under the court rulings the DoD was required to begin accepting transgender recruits on January 1, 2018 -- and has reportedly accepted at least one transgender recruit so far. To date all these courts have continued injunctions against the implementation of the new policy, at least pending further briefing, and the military services have acknowledged that they will comply with the court rulings, i.e., they will continue to allow transgender military service members to enlist and serve in the U.S. Armed Forces in accordance with the 2016 policy memorandum.


On September 14, 2017 the SecDef issued a memorandum providing interim guidance to the U.S. Armed Forces. This interim guidance explained that accession of transgender individuals would be suspended immediately, and created a “panel of experts” to consider the issues raised by accession and retention of transgender individuals.\(^\text{10}\)

The panel of experts issued a report in February 2018 entitled “Department of Defense Report and Recommendations on Military Service by Transgender Persons,” which was adopted by the Secretary of Defense and forwarded to the White House. The policies recommended by the DoD were adopted by the President in White House March 23, 2018 Memorandum for the Secretary of Defense, Subject: “Military Service by Transgender Individuals,” which also withdrew the August 25, 2017 Memorandum. It states that while the SecDef and other executive branch officials will have some latitude in implementing the policy, “persons with a history or diagnosis of gender dysphoria — including individuals who the policies state may require substantial medical treatment, including medications and surgery — are disqualified from military service except under limited circumstances.” Basically, the policy provides that:

\[\text{I. Transgender persons with a history or diagnosis of gender dysphoria are disqualified from military service, except under the following limited circumstances:}\]

\[\begin{align*}
\text{a. if they have been stable for 36 consecutive months in their biological sex prior to accession; } \\
\text{b. Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and } \\
\text{c. currently serving Service members who have been diagnosed with gender dysphoria since the previous administration’s policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.}\]

\[\text{\text{II. Transgender persons who require or have undergone gender transition are disqualified from military service.}}\]

\[\text{\text{III. Transgender persons without a history or diagnosis of gender dysphoria, who are otherwise qualified for service, may serve, like all other Service members, in their biological sex.}}\]

The proposed policy does not issue a blanket bar on transgender individuals. It allows transgender individuals without a diagnosis of gender dysphoria to serve in their

\(\text{\text{10 The Secretary of Defense announced shortly after receiving the memo that transgender troops could continue serving while the Pentagon studied the issue. Since then, at least one transgender service member underwent sex reassignment surgery.}}\)

\(\text{\text{11 A 2016 study conducted by the government-funded RAND Corporation for the Pentagon estimated that nearly 4,000 transgender troops were serving on active duty and in the reserves. Military LGBT advocacy groups put the estimate much higher, at around 15,000.}}\)
“biological” sex. It treats those with a diagnosis of gender dysphoria in a manner consistent with the U.S. Armed Forces treatment of individuals with mental conditions described in the Diagnostic and Statistical Manual of Mental Disorders (“DSM”), while ignoring that the current DSM no longer classifies being transgender as a mental health condition. The progression of the DSM view regarding being transgender is similar to that of being homosexual, which also is no longer considered to be a mental health condition. The proposed policy supports this discriminatory treatment on a review of medical literature that purportedly shows those with gender dysphoria suffer from higher than usual rates of mental health conditions, including anxiety, depression, and substance abuse disorders. It also refers to studies purportedly showing this condition leads to increased rates of suicide.

**Legal Standards**

There are two issues to be addressed here. First, the standards for military accession, i.e., the standards for joining the military. Second, the standards for retention in the military, i.e., the standards applied for those who are already in the military.

**Accession Standards**

Joining the United States military is not the same as applying for a civilian job. For example, Title VII of the Civil Rights Act of 1964, which ensures all individuals are treated equally before the law with respect to civilian employment, does not apply to the military profession. In order to serve in the military, you must be qualified under current federal laws and regulations or have an appropriate waiver. There are, among other requirements, age, citizenship, physical, education, height/weight, criminal record, medical, and drug history standards that can exclude one from joining the military. Most relevant to this situation, generally, a person will not be eligible to serve if they have a medical condition that falls into one of these categories: (1) applicants must be free of contagious diseases that would likely endanger the health of other personnel; (2) applicants must be free of medical conditions or physical defects that would require excessive time lost from duty for necessary treatment or hospitalization; (3) applicants must be medically capable of satisfactorily completing required training, and medically adaptable to the military environment without geographical area limitations; and (4) applicants need to be medically capable of performing duties without aggravation of existing physical defects or medical conditions.

Nonetheless, denying one the right to serve in the U.S. Armed Forces can be considered an “injury” which could be in violation of the Equal Protection Clause of the Constitution. Denial of a right to serve can be a legally cognizable right.\(^\text{12}\) And, although there may be

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\(^{12}\) See generally Int’l Brotherhood of Teamsters v. United States, 431 U.S. 324, 365 -66 (1977) (“When a person’s desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.”).
other reasons for denying one’s desire to serve, the injury here would be “in the denial of an equal opportunity to compete, not the denial of the job itself.”\textsuperscript{13}

The Equal Protection Clause prohibits government action “denying to any person the equal protection of the laws.”\textsuperscript{14} Discrimination on the basis of transgender status is likely subject to “intermediate scrutiny,” as a quasi-suspect classification.\textsuperscript{15} A policy subject to intermediate scrutiny must be supported by an “exceedingly persuasive justification.” The policy must serve important governmental objectives, and the government must show “that the discriminatory means employed are substantially related to the achievement of those objectives.”\textsuperscript{16}

\textbf{Retention Standards}

Unlike accession standards, which are set by the DoD, retention standards are set by individual services. However, as stated above, such standards are subject to intermediate scrutiny with regard to any regulations controlling the continued service of transgender service members, and serving service members have the protection of the Equal Protection Clause.

\textbf{Arguments}

To be clear, many of the arguments made in support of this policy have been made, in much the same terms, to deny equal opportunity to serve to blacks, women, and most recently, gay and lesbian Americans. With all these groups, the arguments have proven to be hollow and, when the policy inevitably changed, the U.S. Armed Forces continued to be an effective fighting force. And while the opinion of experienced military officers in support of this policy must be given weight, in all the prior instances experienced military officers articulated reasons in support of the discriminatory policies, which were subsequently proven unnecessary. For example, the legislation and litigation involving women serving in the military, and even being subject to registering for the draft, frequently invoked the standard of “fitness for combat,” just as this new policy does. Military experts and experienced military officers argued that women could not be expected to meet the standards required for combat duty. In fact, until 1976 the mission of the United States Military Academy at West Point invoked the concept of “combat leaders,” resulting in the exclusion of women from West Point. Today, women have served as the senior cadet at West Point, have repeatedly served in combat in the Middle East (regardless of their official military occupational specialty), have now earned the coveted Ranger Tab, serve in combat positions including as Infantry officers in the U.S.

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\textsuperscript{13} Shea v. Kerry, 796 F.3d 42, 50 (D.C. Cir. 2015).

\textsuperscript{14} United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

\textsuperscript{15} Ball v. Massanari, 254 F.3d 817, 823 (9th Cir. 2001) (gender is a quasi-suspect classification); Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000) (discrimination based on a person’s failure “to conform to socially-constructed gender expectations” is a form of gender discrimination”).

Army, and fighter pilots in the U.S. Air Force. And that these discriminatory notions result from “professional military judgment acquired from hard-earned experience leading service members in peace or war” does not make them immune from critique; all of the prior discriminatory policies shown to be unnecessary were supported by such judgments. Many experienced military leaders, active and retired, have argued that the 2016 policy was totally consistent with the needs of the military. “Fitness for combat” is a standard subject to differing interpretation, and has been through the centuries, and will likely continue to evolve. Policies designed to limit the right of patriotic Americans to serve their country must respect that reality.

The other argument which permeates the rationale for this new policy is that integration of transgender individuals will be so offensive to the existing military force that it will be detrimental to military effectiveness. In support of this, the argument is that a military fighting unit is a “unique social organism” which requires “human bonding” to be effective, and that introducing transgender individuals into that social organism will destroy the effectiveness of that unit. Of course, as will be described below, such arguments have been made in support of policies which discriminated against integration of blacks, women, gays and lesbians. The continued effectiveness of the American fighting forces has been proven time and time again for more than six decades, even with the integration of blacks, women, gays and lesbians, on battlefields from Korea to Vietnam to Afghanistan and to Iraq.

One other general point -- despite the arguments raised in support of the policy, the new policy provides that service members who are already on active duty, and were diagnosed with gender dysphoria after June 30, 2016 but before the effective date of this new policy, and continue to serve can continue to serve in their preferred gender (as opposed to their biological gender). If the horrors suggested by the expert panel were real and tangible, continued service of transgender individuals would be impossible.

1. **Transgender individuals openly serving in the Armed Forces will have an insignificant impact on military readiness.**

   a. **Transgender individuals openly serving in the Armed Forces will have only a marginal impact on an ability to deploy**

One argument that is relied upon by those who oppose allowing transgender individuals to serve in the Armed Forces is that the medical needs of those members would affect Armed Forces’ readiness and deployment. It is axiomatic that the U.S. military requires its members to maintain a certain level of physical fitness and to have the ability to deploy as necessary. However, there is no empirical evidence that supports the argument that transgender people are physically unfit for service.  

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The new policy relies in part on accession standards which are facially neutral, i.e., they apply to all potential applicants, including standards that are associated with conditions identified in the DSM, as well as medical conditions related to medical or surgical treatment, including a history of chest surgery or genital surgery. To the extent that these policies are facially neutral, however, there is no reason they could not continue to be applied to individuals who fail to meet these standards, without reference to whether or not they are transgender or have gender dysphoria.

Since 2016, active U.S. military members who identify as transgender have been able to seek transition-related care. In that time, there has not been any significant disruption to military operations or deployment. In fact, it is estimated that less than 0.1% of the U.S Army Forces will seek transition-related care, and with only a slight disruption to deployment.18 Thus, it is clear that transgender individuals would have a minimal likely impact on the U.S. military’s force readiness, a measure that includes factors like unit cohesion and physical ability.

Nonetheless, the Armed Forces will need to implement certain policies and procedures to accommodate transgender members. For example, while undergoing transition-related medical treatments, it may become necessary to restrict deployment of transitioning individuals from environments where their health care needs cannot be met. Additionally, as expected, there is a post-operative recovery period for individuals who undergo gender re-assignment or related surgeries, and they are unable to work or deploy while recovering from surgery. However, after this short-term leave, a member could resume activity in an operational unit if otherwise qualified. To date, there is no evidence that transition related medical care will have any long-term effect on a transgender individual's ability to serve in the Armed Forces.

b. **Unit cohesion will not be affected by allowing transgender individuals to serve openly in the Armed Forces.**

Unit cohesion, a military concept closely tied to morale, has been analyzed dating back to Sun Tzu, a Chinese military theorist who viewed cohesion as the unity of will of a unit through which all ranks could achieve victory.19 The importance of unit cohesion to the

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18 Schaefer, Agnes Gereben, et al. RAND Corporation. 2016, “Assessing the Implications of Allowing Transgender Personnel to Serve Openly” www.rand.org/pubs/research_reports/RR1530.html. “Our estimates based on private health insurance data ranged from 0.022 to 0.0396 annual claimants per 1,000 individuals. Applied to the AC [Active Component, rather than reserves] population, these estimates led to a lower-bound estimate of 29 AC service members and an upper-bound estimate of 129 AC service members annually utilizing transition-related health care, out of a total AC force of 1,326,273 in FY 2014., Summary xi.

success of an army in battle has been emphasized by military theorists since. Karl von Clausewitz wrote that the loss of order and cohesion in a unit often makes even the resistance of individual units fatal for them. More recently, researchers studying military units during World War II, the Korean War, and the Vietnam War have concluded that unit cohesion enhanced fighting power, reducing combat inhibitors and promoting morale and teamwork. As one Army officer recently wrote, unit cohesion is an important consideration in the best of times; in the worst of times unit cohesion may be the one attribute enabling a unit to survive.

The importance of unit cohesion to military success coupled with the difficulty in objectively measuring it, has provided ready ammunition for opponents of social change in the U.S. armed forces. Throughout much of the U.S. military’s recent history, various groups have argued that a particular category of people—from African-Americans in the 1940s, to women in the 1970s, to gays and lesbians in the 1990s, and now, transgender individuals—would destroy the military from within by degrading unit cohesion. The underlying assumption is that if service members discover that a member of their unit is transgender (or Black, or a woman, or lesbian or gay), this discovery would inhibit bonding within the unit, reducing operational readiness. It is an argument that has repeatedly proven to be false.

During World War II, the U.S. military was segregated despite the growing number of African-Americans serving in the military during the war, putting increasing pressure on the U.S. administration to desegregate the Armed Forces. Military officials frequently argued that racial integration of the armed forces would have a negative impact on unit

ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: AN UPDATE OF RAND'S 1993 STUDY 139 (RAND Corp. 2010), https://www.rand.org/pubs/monographs/MG1056.html. Recent studies have concluded that task cohesion is the primary component of cohesiveness impacting performance and that social cohesion has no reliable effects on performance once task cohesion is statistically controlled. Id. at 142. For purposes of this report, we refer to “unit cohesion” in a monolithic sense.

20 Id. at 5.


In 1940, President Franklin D. Roosevelt, stated that he kept the armed forces segregated because he feared that “[a]t this time and this time only, we dare not confuse the issue of prompt preparedness with a new social experiment however important and desirable it may be.” A 1944 memorandum authored by the War Department (the predecessor of the Department of Defense) noted that “[t]he policy of the War Department is not to intermingle colored and white enlisted personnel in the same regimental organizations. This policy has proven satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental to the preparation for national defense.”

However, after testing the proposition of integrated units under wartime conditions, the threat to unit cohesion was dispelled. A 1945 survey of soldiers who had served in integrated units conducted by Truman's Committee on Equality of Treatment and Opportunity in the Armed Services found that 64% percent of white service members had negative views of serving with African-Americans before they served in an integrated unit, but that 77% said they had more favorable views about serving in an integrated unit afterward. Similarly, evaluations of racial integration on supply ships during 1944 and 1945 revealed high performance and morale among the racially mixed crews. Currently, the U.S. Armed Forces are regarded as among the most integrated and diverse institutions in the United States; as exemplified by interracial marriage, which is it is significantly more prevalent in the U.S. military than in civilian society.

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28 Rostker supra note 25 at 173.


30 Rostker supra note 25 at 173.

Similar arguments were voiced during the debates that occurred over the integration of women into the military and the end to the prohibition on gays and lesbians serving in the United States military. With the enactment of the Armed Services Integration Act in 1948, women were limited to 2% of active duty personnel in each of the Services and it was not until the late-1970s, the number and the roles of women in the military increased.\(^{32}\) As with racial integration, many leaders expressed concerns about women having a negative impact on unit cohesion.\(^{33}\) U.S. Navy surveys of ships’ crews integrating women indicated concerns about unit cohesion.\(^{34}\) However, as with racial integration, the Department of Defense has found that “the expansion of women’s roles in the military have not brought a degradation in military readiness, military effectiveness, or unit cohesion.”\(^{35}\)

Similarly, the concern about the effect that a gay or lesbian service member would have on unit cohesion dominated the debate over ending the prohibition on gay and lesbian people serving in the U.S. military.\(^{36}\) At the time, The Chairman of the Joint Chiefs of Staff and other senior military leaders believed that the presence of a known gay person in a unit would seriously undermine the cohesiveness of that unit.\(^{37}\) Congress codified the unit cohesion argument in the 1993 “Don’t Ask, Don’t Tell” legislation.\(^{38}\) In 2010, those who opposed repeal of the “Don’t Ask, Don’t Tell” policy continued to use the same argument.\(^{39}\) However, a Department of Defense study conducted in 2010 surveyed active duty service members and concluded that the risk of permitting open service by gays and lesbian people on overall military effectiveness was low.\(^{40}\) The surveys indicated that approximately 70% of service members predicted that repeal of the prohibition service by gay and lesbian people would have mixed, positive or no effects on unit cohesion.\(^{41}\)

A recent study of the implications of allowing transgender individuals to serve in the U.S. Armed Forces examined the impact of such service on unit cohesion and found that

\(^{32}\) Id. at 86.

\(^{33}\) Id.

\(^{34}\) Id.

\(^{35}\) Id. at 87.

\(^{36}\) ROSTKER supra note 25 at xxii.

\(^{37}\) Id. at 1, 28.

\(^{38}\) 10 U.S.C. § 654(a)(15) (2006) (“The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of Armed Forces capability.”).

\(^{39}\) NATIONAL DEFENSE RESEARCH INSTITUTE, supra note 19 at 5.

\(^{40}\) U.S. DEP’T OF DEF., supra note 31 at 129.

\(^{41}\) Id. at 119.
existing data suggests a minimal impact on unit cohesion as a result of allowing transgender individuals to serve.\textsuperscript{42} The study reviewed the experiences of foreign militaries that permit service by transgender individuals and found that there has been no significant effect on cohesion, operational effectiveness, or readiness.\textsuperscript{43}

As outlined above, the U.S. military, has historically wrestled with the integration of diverse populations: African-Americans, women, and gays and lesbians. We now know that a great body of research shows that this concern for the protection of unit cohesion has consistently proven to be unjustified. There is in fact, research that suggests that that concealment of sexual orientation appears to reduce, rather than increase unit cohesion. While sexual orientation disclosure positively impacted unit cohesion.\textsuperscript{44}

\textbf{II. \textit{Costs associated with extending health coverage for transgender individuals is negligible.}}

The new policy rests in part on the analysis that medical costs would be meaningful, and are increasing. However, prior research commissioned by the DoD does not bear this statement out. \textsuperscript{45}

Instead, the study found that a change in policy that permits transition-related care for transgender individuals was likely to have marginal impact on health care costs. The report stated that only a small population of service members would likely seek transition-related care each year (described as both surgical and hormone therapy) therefore the estimated costs were only expected to be a .013-percent increase. (A high-end estimate was estimated to be $8.4 million a year, out of health care expenditures for active component military members of $6.27 billion in 2014.) Conversely, the report revealed the potential cost of not providing necessary transition-related health care. One risk identified included having transgender personnel avoid other necessary health care, including preventative care and increased rates of substance abuse and even suicide. Other risks identified included individuals turning to alternative solutions such as injecting construction-grade silicone into their bodies to alter body shape. The report did note that the potential cost of mental health care services for individuals who did not receive care due to implementing the ban would cost $960

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42 \textit{SCHAEFER supra} note 23 at xii.
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43 Id. at 45. Policies regulating the service of transgender military personnel vary greatly by country; Joshua Polchar et al., LGBT Military Personnel; A Strategic Vision for Inclusion (The Hague, the Netherlands: ;The Hague Centre for Strategic Studies, 2014); seventeen countries currently allow transgender people to serve in their military: Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom. Elders et al, "Medical Aspects of Transgender Military Service" Armed Forces & Society (2014) vol. 41 no. 2 pp 199-220
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45 AGNES GEREBEN SCHAEFER ET AL.,
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15 million—more than 100 times the cost of providing necessary healthcare services to transgender personnel.

III. Transgender service ban would violate the constitutional guarantees of equal protection and due process.

a. A Transgender Service Member Ban Would Violate the Equal Protection Component of the Fifth Amendment to the United States Constitution

“The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws.” United States v. Windsor, 133 S. Ct. 2675, 2695 (2013). This equal protection guarantee applies to men and women who serve in the Armed Forces. See, e.g., Frontiero v. Richardson, 411 U.S. 677 (1973); Emory v. Sec’y of Navy, 819 F.2d 291 (D.C. Cir. 1987) (per curiam).

A government action that treats certain classes of people differently “is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.” City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). This general rule does not apply, however, where the government action draws distinctions between individuals based on certain suspect or quasi-suspect classification and, in those instances, courts apply a heightened degree of scrutiny. Id. at 440-441.

The transgender military service ban is subject to a heightened degree of scrutiny for two reasons. First, the targeting of men and women who are transgender involves a suspect classification because they have experienced a “history of purposeful unequal treatment” and been “subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities.” See Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); see also Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1051 (7th Cir. 2017) (holding that “[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity,” and that “[a]ccording to a report issued by the National Center for Transgender Equality, 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12”). See also GG ex rel. Grimm v. Gloucester County School Bd., 822 F. 3d 709 (4th Cir. 2017) (Concurrence by Davis, J.)(Noting animus against transgender people and need to protect them from discrimination); Federal Register / Vol. 76, No. 15 / Monday, January 24, 2011 / Proposed Rules, Equal Access to Housing in HUD Programs—Regardless of Sexual Orientation or Gender Identity (proposing rule to curb pervasive discrimination against transgender people in housing).

46 See, e.g., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY, EXECUTIVE SUMMARY Grant, Jaime M., Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman, and Mara Keisling. Washington: National Center for Transgender Equality and National Gay and Lesbian Task Force, 2011, at 2: “Transgender and gender non-conforming people face injustice at every turn: in childhood homes, in school systems that promise to shelter and educate, in harsh and exclusionary workplaces, at the grocery store, the hotel front desk, in doctors’ offices and emergency rooms, before judges and at the hands of landlords, police officers, health care workers and other service providers.”
Further, transgender individuals as a group have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.” *Murgia*, 427 U.S. at 313. Transgender individuals also “exhibit obvious, immutable, or distinguishing characteristics that define [the members of the class] as a discrete group.” *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987). The presence of these factors “is a signal that the particular classification is ‘more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective,’ thus requiring heightened scrutiny.” *Golinski v. OPM*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012).

Second, the transgender military service is subject to heightened scrutiny because it is a form of discrimination based on non-conformity with gender stereotypes. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017); see also *Fabian v. Hosp. of Cent. Conn.*, 172 F.Supp.3d 509, 527 (D. Conn. 2016) (noting that “[d]iscrimination against transgender people because they are transgender people, by that reading, is quite literally discrimination “because of sex”).

Moreover, the transgender service member ban fails any level of scrutiny. Under rational basis review, the classification must have a “footing in the realities of the subject addressed,” *Heller v. Doe by Doe*, 509 U.S. 312, 321 (1993), and the government “may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.” *Cleburne*, 473 U.S. at 446. A “desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.” *Romer v. Evens*, 517 U.S. 620, 634 (1996). The transgender military service ban is not rationally related to military effectiveness, particularly as service members who are transgender are held to the same standards as other service members. Moreover, the *de minimis* deployability constraints on undergoing transition-related surgery does not plausibly justify the sweeping ban on transgender service members. The transgender military service ban is also not rationally related to an interest in avoiding costs as medically necessary transition-related surgeries for men and women who are transgender are overwhelmingly small.

In determining whether a law is motivated by an improper animus or purpose, ‘[d]iscriminations of an unusual character’ especially require careful consideration.” *Windsor*, 133 S. Ct. at 2693 (quoting *Romer*, 517 U.S. at 633). The discrimination demonstrated by the ban is just that; and evidence of animus is borne out by the timeline of events that took place just prior to the ban going into effect.

As outlined above, after a lengthy review process by senior military personnel, the military had determined that permitting transgender individuals to serve would not have adverse effects on the military and had announced that such individuals were free to serve openly. Similarly, this policy results from a lengthy review process by senior military personnel, who reached a different conclusion. However, we cannot be unmindful of the President’s prior statements on banning transgender individuals from service without measured
research and thought beforehand. See Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267 (1977) (holding that “[t]he specific sequence of events leading up the challenged decision . . . may shed some light on the decisionmaker's purposes” and “[d]epartures from the normal procedural sequence also might afford evidence that improper purposes are playing a role”).

b. The Transgender Service Member Ban Violates the Due Process Clause of the Fifth Amendment to the United States Constitution

The Due Process Clause of the Fifth Amendment provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. This “substantive component” of due process prevents the government from engaging in conduct that “shocks the conscience,” Rochin v. California, 342 U.S. 165, 172 (1952), or interferes with rights “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U. S. 319, 325-326 (1937).

The due process requirement that every government action must have a “reasonable justification in the service of a legitimate governmental objective” protects individuals against the arbitrary and oppressive exercise of government power. Cty. of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998) (internal quotations omitted); Abelfattah v. U.S. Dep’t of Homeland Sec., 787 F.3d 524, 540 (D.C. Cir. 2015). As explained in detail above, the ban lacks any rational connection to a legitimate governmental objective, and for this reason violates due process as well as equal protection. See, e.g., George Washington Univ. v. Dist. of Columbia, 391 F. Supp. 2d 109, 114 (D.D.C. 2005) (noting that the rational basis tests under equal protection and due process “are almost indistinguishable”).

The ban impermissibly burdens transgender service members’ fundamental rights to autonomy. The right to live in accord with one’s gender identity is an inherent aspect of the right to personal autonomy. As the Supreme Court has repeatedly explained, the liberty protected by the Due Process Clause includes the right to make “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015); see also Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992); Lawrence v. Texas, 539 U.S. 558, 562, 578-79 (2003); Roberts v. U.S. Jaycees, 468 U.S. 609, 618-19 (1984) (explaining that the Constitution protects these decisions from “unwarranted state interference” in order to “safeguard[] the ability independently to define one’s identity that is central to any concept of liberty”).

Under these well-established principles, the fundamental right to autonomy must include a person’s right to be transgender, just as it includes a person’s right to be lesbian, gay, bisexual, or heterosexual. Like a person’s sexual orientation or other central aspects of personhood, gender identity is “inherent to one’s very identity as a person.” Hernandez-Montiel v. INS, 225F.3d 1084, 1093-94 (9th Cir. 2000) (internal citations and quotation marks omitted). The ban intrudes upon the right of transgender men and women to live as who they are, consistent with this core aspect of their identity. Thus it is subject to heightened review. See Witt v. Dep’t of Air Force, 527 F.3d 806, 819 (9th Cir. 2008)
(holding that heightened scrutiny applies “when the government attempts to intrude upon … the rights [of personal autonomy] identified in Lawrence”).

Moreover, the ban is also subject to heightened due process review because it burdens this fundamental right selectively, only for transgender people. “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects.” Lawrence, 539 U.S. at 575. Subjecting one group of persons to adverse treatment based solely on a characteristic that is so central, immutable, and deep-seated violates that prohibition unless supported by a sufficient governmental interest. See id.

Conclusion

Transgender individuals have long served in the United States Armed Forces and have been able to serve their country openly since June 30, 2016. For all of the reasons stated above, the ABA should have a policy that supports the continued service by all Americans regardless of gender identity.

Respectfully submitted,

Mark Johnson Roberts, Chair
Commission on Sexual Orientation and Gender Identity
August 2018
GENERAL INFORMATION FORM

Submitting Entities: ABA Commission on Sexual Orientation and Gender Identity

Submitted by: Mark Johnson Roberts, Chair, ABA Commission on Sexual Orientation and Gender Identity

1. Summary of Resolution

This Resolution addresses the current Transgender military ban policies and will enable the ABA to more specifically address any and all discriminatory actions perpetuated by the federal, state, local, territorial and tribunal courts to bar service in the United States Military based on one’s gender identity.

2. Approval by Submitting Entity

April 25th, 2018

3. Has This or a Similar Recommendation Been Submitted to the House or Board Previously?

Yes; It was submitted at the 2018 Midyear Meeting and subsequently withdrawn.

4. What Existing Association Policies are Relevant to This Resolution and How Would They be Affected by its Adoption?

This resolution is consistent with prior policy supporting laws that prohibit discrimination on the basis of sexual orientation and gender identity. See 06A122B and 89M8.

5. If this is a late report, what urgency exists which requires action at this meeting of the House?

N/A

6. Status of Legislation

N/A

7. Plans for Implementation of the Policy if Adopted by the House of Delegates

N/A
The policy will provide authority for the preparation and filing of any ABA amicus curiae brief in the U.S. Supreme Court or other appropriate judicial forum in any case presenting the issues that are addressed in the policy. The policy would also allow the ABA to directly advocate on behalf of transgender military personnel.

8. **Cost to the Association (both direct and indirect costs).**

Adoption of the recommendations will not result in additional direct or indirect costs to the Association.

9. **Disclosure of Interest**

There are no known conflicts of interest with regard to this recommendation.

10. **Referrals**

This resolution is being distributed to each of the Sections, Divisions, Standing Committees, and Commissions of the Association. Additionally, this is being distributed to the National LGBT Bar Association

11. **Contact Persons (prior to meeting)**

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12. **Contact Persons (who will present the report to the House)**

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The Resolution will establish policy to recognize that service in the United States Armed Forces should not be restricted and that members should not be discriminated based on one’s gender identity.

2. Summary of the Issue that the Resolution Addresses

The Resolution addresses a number of factors that were outlined by the current administration as reasons why the United States Government will reverse course and not accept or allow transgender individuals to serve in any capacity in the U.S. Armed Forces.

3. Please Explain How the Proposed Policy Position will Address the Issue

The Resolution clarifies and emphasizes the ABA’s position on discrimination by the United States Government on the basis of gender identity and more fully enables the Government Affairs Office, the ABA President, and the Standing Committee on Amicus Curiae Briefs to act.

4. Summary of Minority Views

None