

REVIEWING A BAN ON TRANSGENDER TROOPS FROM AN INTERNATIONAL PERSPECTIVE

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INTRODUCTION

Transgender individuals have served and died for the U.S. military for decades without recognition or support. A blanket ban to prevent transgender soldiers from enlisting in the United States armed forces inappropriately conveys to the world that transgender individuals are unfit for military service.¹ A policy that excludes transgender service members undermines military cohesiveness and contradicts the nation's foundations of democracy, freedom and equality.²

Currently, approximately nineteen countries aside from the U.S. allow soldiers to openly serve as transgender individuals in their militaries.³ In 1974, the Netherlands became the first country to allow transgender individuals to serve in its military.⁴ Australia, Canada, Israel and the United Kingdom followed suit.⁵

The United States became the last country to join the list when President Barack Obama lifted the ban on transgender soldiers in 2016.⁶ However, the move was an ephemeral win. On July 26, 2017, President Donald Trump

1. See Steve Hendrix, *A History Lesson for Trump: Transgender Soldiers Served in the Civil War*, WASH. POST (Aug. 25, 2017), https://www.washingtonpost.com/news/retropolis/wp/2017/07/26/a-history-lesson-for-trump-transgender-soldiers-served-in-the-civil-war/?utm_term=.37365a4d5596; Ryan Thoreson, *President Trump's Despicable Move to Ban Transgender People from Military Service*, HUM. RTS. WATCH (July 2, 2017, 3:50 PM), <https://www.hrw.org/news/2017/07/26/president-trumps-despicable-move-bar-transgender-people-military-service>.

2. Kara Milstein, Katy Steinmetz & Kim Bubello, *I Will Forever be an American Soldier: Transgender Service Members Respond to Trump's Ban*, TIME (July 28, 2017), <http://time.com/donald-trump-president-transgender-troops/>.

3. See AGNES GEREKEN SCHAEFER ET AL., RAND CORP., *ASSESSING THE IMPLICATIONS OF ALLOWING TRANSGENDER PERSONNEL TO SERVE OPENLY* 50 (2016) (citing POLCHARET AL., THE HAGUE CTR. FOR STRATEGIC STUDIES, *LGBT MILITARY PERSONNEL* 11-14 (2014), http://hcss.nl/sites/default/files/files/reports/HCSS_LGBT_webversie.pdf), https://www.rand.org/pubs/research_reports/RR1530.html (Australia, Austria, Belgium, Bolivia, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Israel, Netherlands, New Zealand, Norway, Spain, Sweden, and the United Kingdom); Paul LeBlanc, *The Countries that Allow Transgender Troops to Serve in their Armed Forces*, CNN (July 27, 2017, 9:11 AM), <http://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html>; Tessa Weinberg, *U.S. is One of Many Countries Allowing Transgender Military Personnel*, L.A. TIMES (July 8, 2016, 12:29 PM), <http://www.latimes.com/nation/la-na-transgender-military-20160707-snap-story.html>.

4. LeBlanc, *supra* note 3.

5. *Id.*

6. U.S. SEC'Y OF DEF., DTM-16-005, *MILITARY SERVICE OF TRANSGENDER SERVICE MEMBERS* (2016); Matthew Rosenberg, *Transgender People Will be Allowed to Serve Openly in Military*, N.Y. TIMES (June 30, 2016), <https://www.nytimes.com/2016/07/01/us/transgender-military.html>.

revealed that he intended to reinstate the blanket ban on transgender troops.⁷ The President advised via his dispensable “twitter” social media account:

[T]he United States Government will not accept or allow Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you.⁸

The President’s “tweet” message, despite its casual nature, was not “fake news.”⁹ On August 25, 2017, the White House released an official memorandum that directed the military to (1) stop enlisting transgender individuals and (2) halt the use of government resources to fund sex-reassignment surgeries for military personnel, unless the procedures had already begun.¹⁰ For transgender service members already serving in the military, the President directed the departments of Defense and Homeland Security to determine how to deal with these individuals.¹¹ The President’s directives were scheduled to take effect on March 23, 2018.¹² President Trump gave Defense Secretary James Mattis six months, by February 21, 2018, to submit a plan on how to implement the President’s directives.¹³

In response, The National Center for Lesbian Rights (NCLR) and GLTBQ Legal Advocates and Defenders (GLAD) filed a lawsuit in federal district court in Washington, D.C. to challenge President Trump’s directives

7. Donald Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>; Donald Trump, @realDonaldTrump, TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472>; Donald Trump, @realDonaldTrump, TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369>.

8. @realDonaldTrump, *supra* note 7.

9. Maria Perez, *Donald Trump’s ‘Fake News’ the Second-Most Annoying Phrase of 2017, Americans Say*, NEWSWEEK (Dec. 19, 2017, 1:30 PM), <http://www.newsweek.com/donald-trump-fake-news-annoying-phrase-poll-752882> (President Trump commonly refers to false stories or unfavorable news reports as “fake news”); *see* Donald Trump (@realDonaldTrump), TWITTER (Dec. 19, 2017, 7:07 AM), https://twitter.com/realDonaldTrump/status/943135588496093190?ref_src=twsrc%5Etfw%7Ctwamp%5Etweetembed%7Ctwtterm%5E943135588496093190&ref_url=https%3A%2F%2Fwww.newsweek.com%2Fdonald-trump-fake-news-annoying-phrase-poll-752882.

10. Memorandum on Military Service by Transgender Individuals, 2017 DAILY COMP. PRES. DOC. 1 (Aug. 25, 2017).

11. *Id.*

12. *Id.*

13. *Id.*

to reinstate the ban.¹⁴ NCLR and GLAD represented five anonymous transgender soldiers and two recruits in *Doe v. Trump*.¹⁵ The plaintiffs claimed that the transgender ban violated their Equal Protection and Due Process rights under the Fifth Amendment of the U.S. Constitution.¹⁶ Presently, at least three other federal lawsuits are also pending. Advocacy groups in Maryland, Washington, and California have similarly challenged the ban.¹⁷

On October 30, 2017, Judge Colleen Kollar-Kotelly of the District of Columbia granted a preliminary injunction against the ban.¹⁸ The injunction returned the policy on transgender service members to the “status quo” prior to President Trump’s July 2017 transgender ban.¹⁹ As a result, the court granted the plaintiff’s motion preventing President Trump from implementing his directives until final resolution of *Doe v Trump*.²⁰ Moreover, the court enjoined the government from implementing a ban that rejected transgender individuals from military service solely on the basis of his or her trans status.²¹ However, Judge Kollar-Kotelly’s ruling was only a partial injunction: The court refused to enjoin the ban on government-funded sex reassignment surgeries.²² Judge Kollar-Kotelly reasoned that none of the plaintiffs showed that they would likely be affected by the funding ban.²³ On

14. Amended Complaint, *Doe v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17CV1597 (CKK)).

15. *Doe v. Trump*, 275 F. Supp. 3d 167, 196 (D.D.C. 2017).

16. *Id.*

17. *See* *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017), *appeal dismissed*, No. 1:17CV2459, 2018 WL 2717050 (4th Cir. Feb. 2, 2018); *Stockman v. Trump*, No. 5:17CV01799, 2018 WL 4474768 (D. Cal. Sept. 18, 2018); *Kamoski v. Trump*, 328 F. Supp. 3d 1156 (D. Wash. 2018); Travis J. Tritten, *California Group Files Fourth Transgender Lawsuit Against Trump*, WASH. EXAMINER (Sept. 5, 2017), <https://www.washingtonexaminer.com/california-group-files-fourth-transgender-lawsuit-against-trump>; Press Release, GLBTQ Legal Advocates & Defs., GLAD, NCLR Join as Co-Counsel in Equal. CA Lawsuit Against Transgender Military Ban (Oct. 2, 2017), <https://www.glad.org/post/glad-nclr-join-co-counsel-equality-california-lawsuit-transgender-military-ban/>.

18. *Doe v. Trump*, 275 F. Supp. 3d at 176-77.

19. *Id.* at 177.

20. *Id.* at 207.

21. *Id.* at 216 (finding that “[a]bsent an injunction, Plaintiffs will suffer a number of harms that cannot be remediated after that fact even if Plaintiffs were to eventually succeed in this lawsuit. The impending ban brands and stigmatizes Plaintiffs as less capable of serving in the military, reduces their stature among their peers and officers, stunts the growth of their careers, and threatens to derail their chosen calling or access to unique educational opportunities”).

22. *Id.* at 217.

23. *Id.* at 203.

November 21, 2017, the U.S. Department of Justice appealed the October injunction, which was dismissed by the D.C. Circuit on January 4, 2018.²⁴

In another federal decision, *Stone v. Trump*, Maryland District Court Judge Marvin J. Garbis granted the preliminary injunction that Judge Kollar-Kotelly denied, enjoining the government from withholding government funds for sex reassignment surgeries for military personnel.²⁵ The Maryland court held that the plaintiffs had successfully

demonstrated that they [were] already suffering harmful consequences such as the cancellation and postponements of surgeries, the stigma of being set apart as inherently unfit, facing the prospect of discharge and inability to commission as an officer, the inability to move forward with long-term medical plans, and the threat to their prospects of obtaining long-term assignments.²⁶

On March 23, 2018, President Trump issued another memorandum revoking his prior August 25, 2017 memorandum.²⁷ This time President Trump disqualified transgender persons who “may require substantial medical treatment, including medications and surgery . . . except under certain limited circumstances.”²⁸ The limited circumstances were not specified in the President’s second memorandum.²⁹ This new memorandum would still generally bar most transgender people from the military.³⁰ On April 13, 2018, the amended policy was stayed in *Karnoski v. Trump*.³¹ The U.S. District Court ruled that the new memorandum was not “new,” but was essentially the same as the prior memorandum and, importantly, that the ban must survive a strict scrutiny standard of review.³² The case is set for trial in April 2019.³³

24. *Id.* at 167.

25. *Stone v. Trump*, 280 F. Supp. 3d 747, 767-69 (D. Md. 2017) (granting a preliminary injunction enjoining enforcement of the Retention, Accession, and Sex Reassignment Surgical Directives pending the final resolution of the case).

26. *Id.* at 767.

27. Memorandum on Military Service by Transgender Individuals, DAILY COMP. PRES. DOC. 1 (Mar. 23, 2018).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Karnoski v. Trump*, No. 2:17-CV-01297 (W.D. Wash. Apr. 13, 2018).

32. *Id.* slip. op. at 6 (“The Court finds that the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place.”).

33. Order Denying Motion to Stay at 9, *Karnoski v. Trump*, 2018 WL 1784464 (2018) (No. C17-1297-MJP).

Contrary to President Trump's assertions, transgender individuals in the military do not harm national security. The U.S. government should not impose a ban on transgender military persons because (1) this ban would fail under the scrutiny of international human rights law that provides transgender people, regardless of military or civilian statuses, equal protection and privacy rights; (2) international human rights decisions have previously struck down bans on gay military personnel and thus a similar fate would likely ensue for a ban on transgender service members; (3) United States courts have previously derived persuasive authority from international human rights practices and can similarly look to international practices on the issue of transgender soldiers; and (4) several other countries have successfully implemented inclusive transgender military policies so the United States should be able to succeed as well.

Thus, the U.S. government's failure to join its international counterparts in rejecting a ban on transgender soldiers subjects it to the scrutiny of the international community and increases the chance that the U.S. will soon be in violation of general principles of international law.

I. BACKGROUND: THE U.S. MILITARY HAS ALWAYS RECRUITED TRANSGENDER INDIVIDUALS, THOUGH PERHAPS WITHOUT REALIZING

There is no universally recognized definition for transgender, the term is generally fluid, broad and inclusive.³⁴ According to the advocacy organization, Gay & Lesbian Alliance Against Defamation (GLAAD), transgender is:

An umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms – including *transgender* . . . Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures.³⁵

Commonly, discussions of transgender issues are associated with the term “gender identity,” which is defined as:

34. See *National Glossary of Terms*, PFLAG, <https://www.pflag.org/glossary> (last visited Oct. 25, 2018) (“Transgender [is] [a] term describing a person’s gender identity that does not necessarily match their assigned sex at birth . . . This word is also used as a broad umbrella term to describe those who transcend conventional expectations of gender identity or expression.”).

35. *Media Reference Guide: Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited Mar. 22, 2018).

One's innermost concept of self as male, female, a blend of both or neither – how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.³⁶

By contrast, the term “transsexual” is an older term that originated in the medical and psychological communities and differs from transgender because it is not an umbrella term.³⁷ Transsexuals have changed or seek to change their bodies through medical interventions such as hormones or surgery.³⁸ The terms are arguably interchangeable, depending on one's preference.³⁹

Although definitions and awareness of transgender communities may not have been as pervasive in the past, transgender individuals participation in the military is hardly a novel concept.⁴⁰ Transgenderism has been woven into the military for centuries.⁴¹ Historically, women who wished to enlist but were barred from gender restrictive policies often identified themselves as male in order to render service.⁴² On numerous occasions, women posed as men to serve in the Civil War.⁴³ Although the reasons for women enlisting in the military ranged from joining their male partners who were in service to contributing to the war effort, the phenomenon of transgender service members is not new.⁴⁴

For example, Albert Cashier, born Jennie Rodgers, enlisted in the Union Army in 1862 as a male soldier and fought as an infantryman in forty battles.⁴⁵ Cashier evaded detection during service; no one thought anything

36. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (last visited Mar. 22, 2018).

37. See GLADD, *supra* note 35.

38. *Id.*

39. *Id.*

40. See M. Sheridan Embser-Herbert, *Transgender Military Service: A Snapshot in Time*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF GENDER AND THE MILITARY 177, 178 (Rachel Woodward & Claire Duncanson eds., 2017).

41. *Id.*

42. *Id.*

43. Bonnie Tsui, *Long Before Transgender was a Word, Women Posed as Men to Serve in the Army*, L.A. TIMES (July 30, 2017, 4:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-tsui-transgender-history-wars-20170730-story.html>.

44. Embser-Herbert, *supra* note 40.

45. Vicksburg Nat'l Military Park, *Jennie Rodgers, aka Private Albert Cashier*, NAT'L PARK SERV., <https://www.nps.gov/articles/jennie-hodgers-aka-private-albert-cashier.htm> (last updated Aug. 14, 2017).

of his seeking privacy when bathing or dressing.⁴⁶ Cashier continued to identify as a man after the war.⁴⁷ Although his fellow soldiers eventually discovered he was born a woman, Cashier was buried with full military honors and dressed in his Union uniform.⁴⁸ Cashier's male name was inscribed on his tombstone, along with the details of his military service.⁴⁹ Thus, regardless of how Cashier chose to personally identify himself, his military efforts garnered acceptance and praise by his compatriots.⁵⁰

Despite its history, transgenderism in the military has been discouraged. The military has alleged that exclusionary policies are necessary because trans persons are medically unfit for service.⁵¹ For instance, in *Doe v. Alexander*, the Army disqualified the female plaintiff on medical fitness grounds because her sex-reassignment surgery that transitioned her from male to female could require continued hormonal and psychological treatment.⁵² Although the court declined to reach the merits of the case, the court noted that the Army "might well conclude" that the plaintiff's trans status could cause her to "lose excessive duty time and impair her ability to serve" around the world.⁵³ Despite previously having served in the Air Force for eight and one-half years as a man prior to seeking enlistment in the Army as a woman, Doe was denied admission into the Army.⁵⁴

Additionally, in *Leyland v. Orr*, the court upheld the military's decision to discharge the plaintiff from military service because of her sex reassignment surgery from male to female.⁵⁵ Her genital surgery was likened to an amputated limb.⁵⁶ The Air Force argued that Leyland's surgery would cause potential health risks that would impair her ability to serve.⁵⁷ The court denied Leyland's request to have an opportunity to prove that she could perform her duties despite her sex change surgery.⁵⁸

The exact number of transgender military personnel throughout history is unclear because the trans community was not widely known, not accepted,

46. *Id.*

47. Tsui, *supra* note 43.

48. *Id.*

49. *Id.*

50. *See id.*

51. *See* Stone v. Trump, 280 F. Supp. 3d 747, 753-54 (D. Md. 2017) (quoting Memorandum on Military Service by Transgender Individuals, *supra* note 10).

52. *Doe v. Alexander*, 510 F. Supp. 900, 905 (D. Minn. 1981).

53. *Id.*

54. *Id.* at 902.

55. *Leyland v. Orr*, 828 F.2d 584, 586 (9th Cir. 1987).

56. *Id.*

57. *Id.*

58. *Id.*

and undistinguished from homosexual individuals.⁵⁹ The current number of transgender personnel in the United States military is likewise unclear.⁶⁰ The Pentagon has not revealed an accounting.⁶¹ Considering that openly serving as a transgender person was banned until 2016, an accounting would likely be an estimate at best.⁶² A 2016 study by the RAND Corporation (a contraction of research and development),⁶³ commissioned by the Defense Department, estimated that between 1,320 to 6,630 transgender people were actively serving in the military.⁶⁴ The study further noted that between 830 and 4,160 transgender members served in the Selected Reserves.⁶⁵ These numbers pale in comparison to the total 1.3 million servicemen on active duty as of September 2017.⁶⁶

As to legally recognizing a trans individual, there is debate over whether sexual reassignment surgery is necessary to legally change one's identifying documents such as licenses and birth certificates.⁶⁷ Many people say that sexual reassignment surgery or hormone treatment is required to fully transition, others say that simply identifying with another gender is sufficient.⁶⁸ For instance, the U.S. is divided on whether states should require proof of one's sex reassignment surgery to change a gender marker on identification cards.⁶⁹

Because the military has long been formatted in a binary system that addresses the physical needs of men versus women, this comment will

59. Angela Jude & Jessie Earl, *A History of Trans People in the Military*, ADVOCATE (July 28, 2017, 5:05 PM), <https://www.advocate.com/transgender/2017/7/28/history-trans-people-military>.

60. Tom Kertscher, *How Many People in the Military are Transgender*, POLITIFACT WIS. (July 26, 2017, 3:42 PM), <https://www.politifact.com/wisconsin/statements/2017/jul/26/mark-pocan/how-many-people-military-are-transgender/>.

61. *Id.*

62. *Id.*

63. *Frequently Asked Questions*, RAND CORP., <https://www.rand.org/about/faq.html#is-rand-an-acronym-> (last visited Oct. 4, 2018).

64. SCHAEFER ET AL., *supra* note 3, at x-xi.

65. *Id.*

66. DMDC, *Active Duty Military Personnel by Service by Rank/Grade*, U.S. DEP'T OF DEF. (Sept. 30, 2017), https://www.dmdc.osd.mil/appj/dwp/dwp_reports.jsp.

67. *See* Embser-Herbert, *supra* note 40, at 192, n.13 (asking at what point has one "transitioned?"); GLAAD, *supra* note 35.

68. *See* Embser-Herbert, *supra* note 40, at 179; GLAAD, *supra* note 35 (maintaining that "a transgender identity is not dependent upon medical procedures").

69. *Frequently Asked Questions*, NAT'L CTR. TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/frequently-asked-questions-about-transgender-people>; *see also* Mary Emily O'Hara, *AMA Says Transgender People Shouldn't Require Surgery to Change their Birth Certificate*, VICE NEWS (June 11, 2014, 1:30 PM), <https://news.vice.com/article/ama-says-transgender-people-shouldnt-require-surgery-to-change-their-birth-certificate>.

primarily discuss those service members with an end goal to transition from one gender to another, regardless of where they stand in hormone therapy and surgery. This is not to undervalue or overlook the spectrum that exists for gender identity issues.

II. INTERNATIONAL HUMAN RIGHTS LAW EXTENDS TO TRANSGENDER INDIVIDUALS

A. *The Broad Reach of International Law*

There is currently no international treaty on LGBT rights.⁷⁰ Although international human rights law does not specify transgender individuals as categorically covered by equal protection and privacy rights, international law implicitly extends these rights to transgender individuals. For instance, Article 1 of the Universal Declaration of Human Rights (UDHR), states, “*All* human beings are born free and equal in dignity and rights.”⁷¹ The UDHR also states, “*All* are equal before the law and are entitled without any discrimination to equal protection of the law.”⁷² Certainly, transgender individuals would fall under such a broad umbrella.

Similarly, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) states, “All persons are equal before the law and . . . the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*.”⁷³

Although the ICCPR does not define or explain the use of the term “other status,” the term appears in a similar provision in Article 2 of the International Covenant on Economic, Social, and Cultural Rights [ICESCR].⁷⁴ Arguably, the drafters of these provisions intentionally included “other status”

70. See generally MICHAEL HAAS, INTERNATIONAL HUMAN RIGHTS 326 (2008).

71. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 1 (Dec. 10, 1948) (emphasis added).

72. *Id.* at 7 (emphasis added).

73. International Covenant on Civil and Political Rights art. 26, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

74. International Covenant on Economic, Social, and Cultural Rights art. 2, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]. Article 2 of Part II states that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status.” *Id.*

individuals as a catch-all to protect persons not listed.⁷⁵ According to the Committee on Economic, Social and Cultural Rights, the “other status” category is necessary because discrimination varies and evolves over time.⁷⁶

Because international human rights law has a broad reach and was drafted with the general purpose to shield a wide variety of individuals, transgender individuals are inherently recognized and protected by international law. Thus, the U.S. government should rethink its discriminatory transgender military, which directly contradicts principles of international law.

B. *Privacy and Equal Protection for the Transgender Community*

Transgender individuals have human rights to privacy and equal protection. Although not specifically mentioned in broad international human rights treaties, transgender issues have been specifically addressed in case law. Most frequently, these cases have raised violations of Article 8 of the European Convention on Human Rights, which provides everyone with the right to a “private and family life.”⁷⁷

In 1992, in the case of *B. v. France*, the European Court of Human Rights (ECtHR) held that the French government’s refusal to amend its civil status register to reflect a trans female’s new gender identity violated Article 8.⁷⁸ Specifically, the court agreed with the French court that the plaintiff’s status

75. See U.N. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 18 on Non-discrimination, U.N. Doc. HRI/GEN/1/Rev.9 (Nov. 10, 1989); INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND INTERNATIONAL HUMAN RIGHTS LAW 29 (2009), <https://www.icj.org/wp-content/uploads/2009/07/sexual-orientation-international-law-Practitioners-Guide-2009-eng.pdf> (citing General Comment No. 18, *supra*).

76. U.N. Comm. on Econ., Soc., & Cultural Rts., General Comment No. 20 on Non-discrimination in Economic, Social and Cultural Rights Under Article 2, Paragraph 2, of Covenant, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

77. European Convention on Human Rights art. 8, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953). Article 8 states:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection for the rights and freedoms of others.

Id.

78. *B. v. France*, App. No. 13343/87, 16 Eur. H.R. Rep. 1, 20 (1992) (“In the circumstances, the Commission is of the opinion that the French legal system does not provide the applicant with practical, effective protections, if appropriate by the adoption of positive measures, of her private life within the meaning of Article 8(1) of the Convention.”).

should be amended in the register because the plaintiff was wrongly put in a “daily situation which was not compatible with the respect due to her private life.”⁷⁹ Thus, the court recognized that trans individuals rightfully have personal and private lives, and a government’s refusal to modify its civil records to correctly reflect personal life choices was unwarranted.

Later in 1997, the Court in *X, Y, and Z v. the United Kingdom* acknowledged that a family life existed between a trans individual and his partner’s child.⁸⁰ A trans man (X) and his female partner (Y), lived together and had a child (Z) by artificial insemination.⁸¹ The court determined that X had acted as Z’s father in every respect since Z’s birth and⁸² recognized that adults, regardless of trans status, have the same right to parenthood and to a family life as anyone else.⁸³

Moreover, *Goodwin v. United Kingdom*, a landmark decision in which the ECtHR acknowledged that trans individuals were entitled to “personal development and to physical and moral security in the full sense enjoyed by others in society,” overturned prior decisions that denied gender changes on birth certificates.⁸⁴ Goodwin, a trans woman, faced harassment during employment and had problems receiving insurance payments because her sex at birth remained unchanged on legal documents.⁸⁵ The ECtHR reasoned that such changes had “no concrete or substantial hardship or detriment to the public interest,” and that society should “tolerate a certain inconvenience to enable individuals to live in dignity and worth.”⁸⁶ Because of *Goodwin*, the U.K. Parliament enacted the Gender Recognition Act of 2004, which allowed transgender individuals to obtain new birth certificates.⁸⁷

One could argue that although the above cases seem to support a recognition of transgender rights in society, these cases are limited to the civilian context. However, these concepts are applicable in the military context: Absent a showing that transgender soldiers are detrimental to public interest, transgender soldiers should have the private right to choose their genders and serve with dignity and worth. Certainly, the discomfort of

79. *Id.* at 33.

80. *X, Y & Z v. United Kingdom*, App. No. 21830/93, 24 Eur. H.R. Rep. 143, 157 (1997).

81. *Id.* at 143.

82. *Id.*

83. *Id.*

84. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 1, 30.

85. *Id.* at 9, 10.

86. *Id.* at 31-32.

87. Natasha Holcroft-Emmess, *The Long Road to Legal Recognition of Transgender Rights*, RTS. INFO. (Mar. 31, 2016), <https://rightsinfo.org/long-road-legal-recognition-transgender-rights/>; see Gender Recognition Act 2004, c.7, Explanatory Notes ¶ 4 (Eng.), <http://www.legislation.gov.uk/ukpga/2004/7/notes>.

having to have to conceal one's private life to enlist in the military would infringe upon the right to lead a life outside the military.

C. "Gender Identity" Laws Reflect Acceptance of Transgender Individuals

An onslaught of recent "Gender Identity" laws mirrors the growing acceptance of the transgender community and the need to tailor laws to the community's unique needs. For instance, in 2012, Argentina enacted what is likely the most progressive of gender identity laws.⁸⁸ Under Argentina's *Ley de Género* [Gender Law], individuals may freely develop their gender identities without undergoing psychiatric diagnosis or surgery prior to changing official documents.⁸⁹ Trans people are also given access to comprehensive health care.⁹⁰ Moreover, the sex reassignment surgery is included in both public and private health care plans.⁹¹ This law suggests that the concept of gender is breaking away from the rigidity of a binary system.

Similarly, in 2014, Denmark enacted its form of gender identity law that allowed anyone over the age of eighteen to change their identities on legal documents without requiring medical intervention.⁹² Thus, a Danish citizen may self-determine his or her own gender without surgery or hormone treatment.⁹³ In addition, the Netherlands, Vietnam, India, Australia, Ecuador, Bolivia, and Japan have also passed gender identity legislation.⁹⁴ Thus, recent legislation of gender identity laws reflects a growing acceptance of equal transgender rights on an international scale. And a transgender

88. See Law No. 26.743, May 23, 2012, B.O. 544 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>; see also Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES (May 24, 2012), <http://www.nytimes.com/2012/05/25/world/americas/transgender-advocates-hail-argentina-law.html>.

89. Law No. 26.743, May 23, 2012, B.O. (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/197860/norma.htm>.

90. See Ley 26.743: Identidad de Género (2012), IDENTIDAD & DIVERSIDAD, <http://identidadydiversidad.adc.org.ar/normativa/ley-26-743-identidad-de-genero-2012/> (last visited Oct. 20, 2018) (Arg.); *id.* art. 11.

91. Law No. 26.743, May 23, 2012, B.O. (Arg.), art. 11; Azadeh Ansari, *Transgender Rights: These Countries are Ahead of the US*, CNN (Feb. 23, 2017, 12:28 PM), <http://www.cnn.com/2017/02/23/health/transgender-laws-around-the-world/index.html>.

92. See TGEU PR: *Denmark Goes Argentina!*, TGEU TRANSGENDER EUR. (June 11, 2014), <http://tgeu.org/denmark-goes-argentina/>.

93. *Id.*

94. See *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUM. RTS. WATCH, <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity> (last updated June 23, 2017).

military ban in the U.S. is not only in conflict with this growing trend but reflects poorly on U.S. policy-making.

III. INTERNATIONAL ACCEPTANCE OF LESBIAN AND GAY SERVICEMEMBERS IN THE MILITARY SUPPORTS REPEAL OF THE TRANSGENDER BAN

The discussion of transgender individuals in the military is invariably linked to the discussion of gay and lesbian servicemembers in the military. Several countries that previously denied openly homosexual soldiers have since repealed their policies. Australia, Canada, the Czech Republic, Switzerland, the United Kingdom, Uruguay, Italy and France are among the many countries that now allow openly gay servicemembers in the military.⁹⁵

European Court of Human Rights decisions upholding the rights of gay and lesbian individuals to serve in the military have established a pathway for courts to similarly uphold transgender rights in the military. For example, the ECtHR held in *Smith v. United Kingdom* that discharging soldiers based on homosexual status violated soldiers' rights to privacy.⁹⁶ Moreover, the court rejected claims that gays in the U.K. military would damage the military's "morale and fighting power."⁹⁷ The ECtHR anticipated that the military would experience *some* difficulties from lifting the ban on gays in the military, but suspected these difficulties would not be unlike those when the military had accepted women or racial minorities.⁹⁸ Thus, international human rights courts are likely to invalidate claims that accommodations for transgender individuals are too burdensome. Some transitional difficulty is naturally expected and acceptable.

Similarly in 2002, in *Perkins and R. v. United Kingdom*, the ECtHR held that the military, under Article 8 of the European Convention on Human Rights, violated both the complainant's right to private and family life as well as the right to privacy by investigating and discharging them from the military due to their homosexuality.⁹⁹ Thus, a similar fate will likely ring true for transgender individuals who are also discharged for their identities.

95. PALM CENTER, COUNTRIES THAT ALLOW MILITARY SERVICE BY OPENLY GAY PEOPLE (2009), <http://archive.palmcenter.org/files/active/0/CountriesWithoutBan.pdf>.

96. *Smith v. United Kingdom*, 1999-VI Eur. Ct. H.R. 45, 74-75.

97. *Id.* at 48.

98. *Id.* at 72-73.

99. *Perkins v. United Kingdom*, Eur. Ct. H.R. (2002), ¶ 38, 41.

A. Repealing the Ban on Homosexual Soldiers did not Disrupt Military Effectiveness and is Indicative of Repealing the Ban on Transgender Soldiers

Repealing the ban on gay and lesbian servicemembers did not disrupt military effectiveness in other countries. In Australia, a study conducted in 2000 by Aaron Belkin and Jason McNichol concluded that the 1992 lift on the Australian Defense Force's (ADF) ban on gay service members had "not led to any identifiable negative effects on troop morale, combat effectiveness, recruitments and retention, or other measures of military performance."¹⁰⁰ Rather, the evidence suggested that the policy changes may have contributed to "improvements in productivity and working environments for service members."¹⁰¹

A 2010 research study by the Palm Center found that twenty-five nations allow gays and lesbians to serve openly in the military.¹⁰² Among those States, Canada and Australia have allowed gay service members to serve in the military since 1992.¹⁰³ Israel lifted its ban in 1993 and South Africa in 1998.¹⁰⁴ The research concluded that transitions to policies of equal treatment for gays and lesbians in the military were "highly successful and [] had no negative impact on the morale, recruitment, retention, readiness, or overall combat effectiveness."¹⁰⁵ None of the policies to include gay military personnel were later reversed.¹⁰⁶ The study also found that none of the countries studied installed separate facilities for gay troops, nor did they retain rules treating service members differently based on their sexual orientation.¹⁰⁷

B. Repeal of "Don't Ask Don't Tell" is Indicative of Transgender Ban's Future

Those that previously favored upholding a ban against homosexual soldiers in the U.S. military claimed that gays in the military would detract

100. AARON BELKIN & JASON MCNICHOL, THE EFFECT OF INCLUDING GAY AND LESBIAN SOLDIERS IN THE AUSTRALIAN DEFENSE FORCES 2 (2000), http://www.palmcenter.org/files/active/0/Australia_Final_Report.pdf.

101. *Id.*

102. NATHANIEL FRANK ET AL., GAYS IN FOREIGN MILITARIES 2010, at 2 (2010).

103. *Id.* at 6, 7.

104. *Id.* at 7.

105. *Id.* at 2.

106. *Id.*

107. *Id.* at 3-4.

from military effectiveness.¹⁰⁸ President Trump is attempting a similar argument with his transgender ban.

The history behind the repeal of the ban on openly gay and lesbian service members suggests that a ban on transgender service members will similarly prove unsuccessful. In 1993, the Clinton Administration adopted the military policy “Don’t Ask, Don’t Tell” (“DADT”), which prohibited discrimination against homosexual troops, yet at the same time, barred service members from being openly gay, lesbian, or bisexual in the military.¹⁰⁹ This prohibition sent the message that discrimination in the military was acceptable.¹¹⁰

The DADT policy created a culture of intolerance, mistrust, deception, prevarication, harassment and violence.¹¹¹ In 2010, the Obama Administration repealed DADT, allowing gay and lesbian soldiers to serve openly.¹¹² Prior to signing the repeal, Obama stated:

No longer will our country be denied the service of thousands of patriotic Americans who are forced to leave the military – regardless of their skills, no matter their bravery or their zeal, no matter their years of exemplary performance – because they happen to be gay. No longer will tens of

108. See Philip Bump, *Trump’s Argument Against Transgender Soldiers Echoes One Used Against Gays, Women and Blacks*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/politics/wp/2017/07/26/trumps-argument-against-transgender-soldiers-echoes-one-used-against-gays-women-and-blacks/?utm_term=.a86d434107fe.

109. See DAVID F. BURRELLI, CONG. RESEARCH SERV., R40782, “DON’T ASK, DON’T TELL”: THE LAW AND MILITARY POLICY ON SAME-SEX BEHAVIOR 2 (2010) (quoting President’s News Conference, in *Public Papers of the Presidents of the United States, William J. Clinton, 1993, Book 1*, July 19, 1993: published 1994: 1111 (“One, service men and women will be judged based on their conduct, not their sexual orientation. Two, therefore the practice . . . of not asking about sexual orientation in the enlistment procedure will continue. Three, an open statement by a service member that he or she is a homosexual will create a rebuttable presumption that he or she intends to engage in prohibited conduct, but the service member will be given an opportunity to refute that presumption. . . . And four, all provisions of the Uniform Code of Military Justice will be enforced in an even-handed manner as regards both heterosexuals and homosexuals. And thanks to the policy provisions agreed to by the Joint Chiefs, there will be a decent regard to the legitimate privacy and associational rights of all service members.”).

110. See *The Repeal of “Don’t Ask, Don’t Tell,”* HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/the-repeal-of-dont-ask-dont-tell> (last visited Oct. 20, 2018).

111. See Helena Carreiras, *Gendered Organizational Dynamics in Military Contexts*, in THE PALGRAVE INTERNATIONAL HANDBOOK OF GENDER AND THE MILITARY 105, 113 (Rachel Woodward & Claire Duncanson eds., 2017).

112. *Id.*; Elisabeth Bumiller, *Obama Ends “Don’t Ask, Don’t Tell” Policy*, N.Y. TIMES (July 22, 2011), <https://www.nytimes.com/2011/07/23/us/23military.html>; *The Repeal of “Don’t Ask, Don’t Tell,” supra* note 110.

thousands of Americans in uniform be asked to live a lie, or look over their shoulder in order to serve the country that they love.¹¹³

Research conducted one year after the repeal of DADT showed that the repeal had “no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale. If anything, [the] DADT repeal appears to have enhanced the military’s ability to pursue its mission.”¹¹⁴

The transgender military ban will inevitably fail like DADT because both bans against homosexuals and transgender individuals deny skilled military personnel from serving their countries without justification. Being openly gay in the military did not undermine the U.S. military’s effectiveness, nor will being openly transgender.

C. U.S. Courts May Rely on International Practices

The U.S. Supreme Court has used international authority in its opinions and may do so to decide the future of the transgender ban. For example, in *Lawrence v. Texas*, Justice Kennedy cited to *Dudgeon v. United Kingdom*, a case decided by the European Court of Human Rights (ECtHR), in invalidating a Texas law that criminalized sexual conduct between two consenting adults of the same sex.¹¹⁵

Further, in *Roper v. Simmons*, the Court looked to international standards to conclude that the death penalty for juvenile criminals was unconstitutional.¹¹⁶ In *Hamdan v. Rumsfeld*, the Court applied interpretations of Common Article 3 of the Geneva Conventions.¹¹⁷ The Court also

113. Press Release, Office of Press Sec’y, Remarks by the Pres. & Vice Pres. at Signing of the Don’t Ask Don’t Tell Repeal Act of 2010 (Dec. 22, 2010), <https://obamawhitehouse.archives.gov/the-press-office/2010/12/22/remarks-president-and-vice-president-signing-dont-ask-dont-tell-repeal-a>; see William Branigin et al., *Obama Signs DADT Repeal Before Big, Emotional Crowd*, WASH. POST (Dec. 22, 2010, 11:49 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/22/AR2010122201888.html>.

114. Aaron Belkin et al., *Readiness and DADT Repeal: Has the New Policy of Open Service Undermined the Military?*, 39 ARMED FORCES & SOC’Y. 587, 588 (2012); Carreiras, *supra* note 111, at 112-13 (“In September 2011, the US Congress voted the repeal of the ban and since then gay and lesbian soldiers have been allowed to serve openly. Research conducted one year after, showed that the ‘DATA repeal has had no overall negative impact on military readiness or its component dimensions, including cohesion, recruitment, retention, assaults, harassment or morale. If anything, DADT repeal appears to have enhanced the military’s ability to pursue its mission.’”) (quoting Aaron Belkin et al., *supra*).

115. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 14 (1981)).

116. *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005).

117. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630-35 (2006).

reviewed international authority in *Graham v. Florida* to determine the constitutionality of life imprisonment without the possibility of parole for juvenile offenders.¹¹⁸

Because the Supreme Court has previously relied on international practices, a similar influence on the ban on transgender military personnel could be possible; international practices have favored equal privacy rights for all.

IV. INCLUSIVE TRANSGENDER POLICIES PROVE SUCCESSFUL IN OTHER COUNTRIES

The President's claim that open acceptance of transgender soldiers would disrupt the military is without merit. A 2016 RAND Corporation study stated that "available research found *no evidence* from Australia, Canada, Israel, or the United Kingdom that allowing transgender personnel to serve openly has had any negative effect on operational effectiveness, cohesion, or readiness."¹¹⁹ Thus, a meritless ban on transgender soldiers is discriminatory and in violation of equal protection laws.

In 2014, the Hague Centre for Strategic Studies released a LGBT Military Index ranking 103 countries according to their inclusive policies towards the LGBT community.¹²⁰ New Zealand ranked number one, followed by the Netherlands, United Kingdom, Sweden, Australia and Canada.¹²¹ The United States ranked number forty, in part because of its then existing ban on transgender troops.¹²²

Although President Trump cites "tremendous" medical costs to defend his decision to ban transgender soldiers, a 2016 study by the Department of Defense (DOD) concluded transgender military service would increase health care costs by \$2.4 million to \$8.4 million annually, a "minimal impact" on the \$6.27 billion total budget.¹²³ The U.S. military spends \$41.6 million annually on Viagra alone, nearly five times the amount for estimated transgender military care.¹²⁴

118. *Graham v. Florida*, 560 U.S. 48, 80-82 (2010).

119. SCHAEFER ET AL., *supra* note 3 (emphasis added).

120. JOSHUA POLCHAR ET AL., HAGUE CTR. FOR STRATEGIC STUD., LGBT MILITARY PERSONNEL 56 (2014).

121. *Id.* at 58.

122. *Id.*

123. Press Release, RAND Corp. Impact of Transgender Personnel on Readiness and Health Care Costs in the U.S. Military Likely to be Small (June 30, 2016) (citing SCHAEFER ET AL., *supra* note 3, at 36), <https://www.rand.org/news/press/2016/06/30.html>.

124. Christopher Ingraham, *The Military Spends Five Times as Much on Viagra as It Would on Transgender Troops' Medical Care*, WASH. POST (July 26, 2017),

Additionally, an August 2017 report by the Palm Center estimated that the financial cost of fully implementing President Trump's ban on transgender service members would be \$960 million.¹²⁵ This \$960 million is incomparable to the maximum annual cost of \$8.4 million per year to provide transition related health care.¹²⁶ The report warned policymakers to take into account the costs of discharging transgender service members, not just the costs of retaining them.¹²⁷ Thus, the President's position to ban transgender military personnel for budgetary reasons is unfounded.

Other countries such as Israel, Canada, Australia, and the United Kingdom have successfully incorporated transgender individuals into their militaries, proving that inclusive military policies work. The United States is well equipped to either implement other countries' policies or to create its own policies that implement the themes of education, openness and acceptance that pervade other countries' military strategies.

A. *Israel*

Enduring decades of threats to its national borders, Israel was not dissuaded from opening its military to transgender soldiers in 1993.¹²⁸ The Israel Defense Force (IDF) recognizes that transgender identity is neither a disability nor a liability.¹²⁹ In April 2017, Shachar Erez became the first

https://www.washingtonpost.com/news/wonk/wp/2017/07/26/the-military-spends-five-times-as-much-on-viagra-as-it-would-on-transgender-troops-medical-care/?utm_term=.a6ead8fe81bf; see Patricia Kime, *DoD Spends \$8.4M a Year on Viagra, Similar Meds*, MIL. TIMES (Feb. 13, 2015), <https://www.militarytimes.com/pay-benefits/military-benefits/health-care/2015/02/13/dod-spends-84m-a-year-on-viagra-similar-meds/>.

125. AARON BELKIN ET AL., PALM CTR., DISCHARGING TRANSGENDER TROOPS WOULD COST \$960 MILLION 1 (2017).

126. *Id.*

127. *Id.* at 2 (“If decisions concerning whether to allow transgender personnel to serve are based on financial considerations, then policymakers should take into account the costs of discharging the service members, not just the costs of retaining them under a policy of equal treatment.”).

128. Rachel E. Gross, *What Other Countries Can Teach America About Transgender Military Service*, SLATE (Aug. 10, 2015, 3:41 PM), http://www.slate.com/blogs/outward/2015/08/10/transgender_military_service_lessons_from_around_the_world.html; see Paul LeBlanc, *The Countries that Allow Transgender Troops to Serve in Their Armed Forces*, CNN (July 27, 2017, 9:11 AM), <https://www.cnn.com/2017/07/27/us/world-transgender-ban-facts/index.html>.

129. See Yair Rosenberg, *Trump Just Banned Transgender Soldiers, Claiming They Make Us Less Safe*, TABLET (July 26, 2017, 1:23 PM), <https://www.tabletmag.com/scroll/241764/trump-just-banned-transgender-soldiers-claiming-they-make-us-less-safe-israel-begs-to-differ>.

openly transgender officer in the IDF.¹³⁰ The IDF supported Erez' transition over his years of military service and funded his gender reassignment surgery and hormone treatments.¹³¹ When Erez was asked why he became *openly* transgender in the IDF, he stated that, as a commanding officer, "to have an open and honest relationship with my soldiers, I must be first open and honest with them."¹³² Certainly, a ban on transgender soldiers would only promote secrecy where open and honest leadership is essential on the battlefield.

B. Canada

In Canada, a ban on transgender soldiers was lifted in 1992.¹³³ In response to President Trump's tweet, the official Twitter account for the Canadian Forces responded "[w]e welcome [Canadians] of all sexual orientations and gender identities. Join us!"¹³⁴

Corporal Natalie Murray, who has served with the Canadian Armed Forces for twenty-seven years, transitioned in 2003.¹³⁵ She works as an electronics technician and plans to continue her military career to reach thirty-five years.¹³⁶ Although she stated that her transition has not always been a smooth process, her situation improved over the years. Murray emphasizes that education is the key to changing the way the military perceives transgender individuals.¹³⁷

Canadian researchers Alan Okor and Denise Scott published a 2014 study which investigated whether openly transgender military service undermined the effectiveness of the Canadian Forces (CF). The study, which

130. Naomi Zeveloff, *Meet Shachar Erez, Israel's First Transgender IDF Officer*, FORWARD (Apr. 3, 2017), <http://forward.com/news/israel/367907/meet-shachar-erez-israels-first-transgender-idf-officer/>.

131. Shachar Erez, *I'm the First Transgender Army Officer in Israeli History*, FORWARD (July 6, 2017), <http://forward.com/opinion/israel/376368/im-the-first-transgender-army-officer-in-israeli-history-this-is-my-story/>.

132. Carol Hills, *The Israeli Defense Forces Paid for This Soldier's Sex Reassignment*, PUB. RADIO INT'L (Mar. 30, 2017, 6:30 PM), <https://www.pri.org/stories/2017-03-30/israeli-defense-forces-paid-soldiers-sex-reassignment>.

133. See Alan Okros & Denise Scott, *Gender Identity in the Canadian Forces*, 41 ARMED FORCES & SOC'Y 243, 243 (2014).

134. Canadian Forces (@CanadianForces), TWITTER (July 26, 2017, 12:09 PM), <https://twitter.com/CanadianForces/status/890288099573600256>.

135. Jennifer Bendery, *Transgender Troops in Other Nations are Proof That Inclusive Militaries Work*, HUFFINGTON POST (Oct. 21, 2014, 4:28 PM), https://www.huffingtonpost.com/2014/10/21/transgender-military-ban_n_6017564.html.

136. Lee Berthiaume, Can. Press, *Canadian Military Seeks to Improve its Transgender Policy*, STAR (July 30, 2016), <https://www.thestar.com/news/canada/2016/07/30/canadian-military-seeks-to-improve-its-transgender-policy.html>.

137. *Id.*

consisted of an extensive literature review and interviews, concluded that, “[d]espite ongoing prejudice and weaknesses in the crafting and execution of policy, [the study] did not identify any evidence indicating that allowing transgender individuals to serve openly has harmed the operational effectiveness of the CF.”¹³⁸ The authors of the study advised that nations transitioning their policies to allow for openly transgender soldiers should place emphasis on leadership to minimize difficulties.¹³⁹

Military leaders must be clear that service members are to put their personal feelings aside and work together in pursuit of a common mission. Lieutenant Commander Nicole Lassaline of the Canadian Armed Forces emphasizes that the privacy of the soldier should be respected and the goal for incorporating transgender soldiers should be to preserve people’s dignity.¹⁴⁰ Lassaline suggested that accommodations for transgender service members is minimal, stating “really, how much does it cost to put a curtain in a shower cubicle?”¹⁴¹

Further, Canada’s open acceptance of transgender soldiers has made a negligible impact on its military health costs. Canada reported that only nineteen of its soldiers underwent gender reassignment surgery from 2008 to 2015, for a total cost of \$319,000—about twenty-five percent less than a helmet for a single F-35 pilot costs the U.S. military.¹⁴² This reaffirms the idea that even if the U.S. funds sex-reassignment surgery for active military servicemembers, only a small proportion of personnel are likely to elect surgery.

C. Australia

Australia lifted its prohibition on transgender service members in 2010. Over a four and a half-year period, between November 2012 and March 2017, twenty-seven members of the Australian Defense Force (ADF) were treated

138. Okros & Scott, *supra* note 133.

139. *Id.*

140. Bendery, *supra* note 135.

141. *Id.*

142. Kathleen Harris, *Canada Promotes Recruitment of Transgender Troops as Donald Trump Imposes Military Ban*, CBC NEWS (July 26, 2017, 5:05 PM), <https://www.cbc.ca/news/politics/canada-transgender-military-trump-ban-1.4222787>; Phillip Swarts, *F-35 Helmet Costs \$400,000: Four Times That of Predecessor*, AIR FORCE TIMES (Oct. 26, 2015), <https://www.airforcetimes.com/news/your-air-force/2015/10/26/f-35-helmet-costs-400000-4-times-that-of-predecessor/>; Adam Weinstein, *Here are All the Nations in the World That Let Transgender Troops Serve*, TASK & PURPOSE (July 27, 2017), <https://taskandpurpose.com/here-are-all-the-nations-in-the-world-that-let-transgender-troops-serve/>.

for gender dysphoria.¹⁴³ Seventeen of the twenty-seven service members underwent transitional surgery.¹⁴⁴

From 2015 to 2016, the number of military personnel in Australia was estimated to be 77,399.¹⁴⁵ The total cost over the four and one half-year period to treat personnel for gender dysphoria was \$1 million, not including pharmaceuticals.¹⁴⁶ Comparatively, the ADF spent a total of \$430 million on military health care members in the 2015-2016 financial years.¹⁴⁷ Meaning, over the span of four and a half years, the ADF spent only 0.2% for those with gender dysphoria compared to what the ADF spends in an entire year for health care expenditures.¹⁴⁸

Australian support groups, such as the Defense Force Lesbian Gay Bisexual Transgender and Intersex Information Service (DEFGLIS), work with the ADF to provide support for LGBTI service members.¹⁴⁹ The non-partisan volunteer charity trains, educates and advises the ADF about diverse sexuality and gender issues.¹⁵⁰ Such independent support groups could also prove effective in the United States.

In 2015, the Royal Australian Air Force published a diversity handbook to specifically support transgender troops. The handbook states:

We must rise to [the spectrum of conflict] with new ways of thinking, including new perspectives that a diverse workforce and equal opportunity brings. As an Air Force, we must continually challenge ourselves to provide opportunities for the best people. The best talents are from a broad cross-

143. Shalailah Medhora, *Where Does Australia Stand on Transgender People Serving in the ADF?*, TRIPLE J HACK (Aug. 11, 2017, 3:20 PM), <http://www.abc.net.au/triplej/programs/hack/whats-aust-policy-on-transgender-military-service/8798664>. See generally *What is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria> (defining gender dysphoria as a clinical term that involves a conflict between a person's sex at birth and the gender with which that person actually identifies) (last updated Feb. 2016).

144. Medhora, *supra* note 143.

145. MEG TRUCANO ET AL., FOREIGN MILITARY STRATEGIES TO RECRUIT AND RETAIN WOMEN 8 (2017), <https://dacowits.defense.gov/Portals/48/Documents/General%20Documents/RFI%20Docs/March2017/Insight%20RFI%203.pdf?ver=2017-03-17-113845-857>.

146. Paul Karp & Joshua Robertson, *Marise Payne Defends ADF Provision of Gender Reassignment Surgery*, GUARDIAN (Oct. 16, 2017, 2:05 AM), <https://www.theguardian.com/australia-news/2017/oct/16/marise-payne-defends-adf-provision-of-gender-reassignment-surgery>.

147. Medhora, *supra* note 143.

148. *Id.*

149. See *Our Purpose: To Support and Represent Australian Defense Force LGBTI People and Their Families*, DEFGLIS, <https://www.defglis.com.au/index.php/about> (last visited Oct. 20, 2018).

150. *Id.*

section of all Australians, and our future capability will depend on recruiting the best and brightest, regardless of gender dysphoria.¹⁵¹

Similarly, the U.S. Department of Defense published handbooks and educational materials in response to lifting the ban in 2016.¹⁵² The Implementation Handbook to guide transgender service in the military includes a statement by then Secretary of Defense Ashton Carter that,

Our mission is to defend this country, and we don't want barriers unrelated to a person's qualifications to serve preventing us from recruiting or retaining the Soldier, Sailor, Airman, or Marine who can best accomplish the mission. We have to have access to 100 percent of America's population . . . to be able to recruit from among them the most highly qualified—and to retain them[.]¹⁵³

Thus, the United States was already on the right educational path just prior to President Trump's ban.

D. *United Kingdom*

The United Kingdom allowed openly LGBTI personnel to serve in the military starting in 2000.¹⁵⁴ The British Army's website states: "The Army welcomes transgender personnel and all who apply to join the Army must meet the same mental and physical entry standard as any other candidate. If you have completed transition you will be treated as an individual of your affirmed gender."¹⁵⁵ In response to President Trump's tweet, commander of the U.K. Maritime Forces Alex Burton tweeted "[a]s a Royal Navy LGBT champion and senior warfighter I am so glad we are not going this way."¹⁵⁶

The Ministry of Defense has a flexible five stage gender transition plan for individuals that wish to transition during service: (1) gender realization

151. ROYAL AUSTRALIAN AIR FORCE, AIR FORCE DIVERSITY HANDBOOK 5 (2015), <https://www.airforce.gov.au/docs/Transitioning-Gender-In-Air-Force.pdf>.

152. *See generally* U.S. DEP'T OF DEF., TRANSGENDER SERVICE IN THE U.S. MILITARY (2016), https://www.defense.gov/Portals/1/features/2016/0616_policy/DoDTGHandbook_093016.pdf?ver=2016-09-30-160933-837. *See also* U.S. DEP'T OF DEF., IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS (2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DoD-Instruction-1300.28.pdf.

153. TRANSGENDER SERVICE IN THE U.S. MILITARY, *supra* note 152, at 7.

154. *Countries that Allow Transgender Members in the Military*, CBC NEWS (July 26, 2017, 3:17 PM), <http://www.cbc.ca/news/world/countries-that-allow-transgender-members-in-the-military-1.4222205>; SCHAEFER ET AL., *supra* note 3, at 57.

155. *LGBT+ Soldiers and Officers in the Army*, BRITISH ARMY, <https://apply.army.mod.uk/what-we-offer/what-we-stand-for/lgbt> (last visited Oct. 20, 2018).

156. *UK Military Chiefs Praise Transgender Troops*, BBC NEWS (July 26, 2017), <https://www.bbc.com/news/uk-40733701>.

and diagnosis; (2) social transition (requiring the individual to live and work in their new gender role for a period of one year prior to irreversible surgery); (3) medical treatment/hormone therapy; (4) surgical reassignment; and (5) postoperative transition.¹⁵⁷ The plans are modifiable on a case-by-case basis, but it is estimated that the five-step process could take up to three years.¹⁵⁸ Soldiers' required duties may be reduced during transition.¹⁵⁹ The costs of hormone treatments and surgery are covered by the health care plans.¹⁶⁰

In 1999, Caroline Paige became the first openly transgender officer in the U.K. military.¹⁶¹ Although Paige initially received negative reactions from revealing her transgender status, her commitment to the military won over her critics. Paige completed ten operational tours as a helicopter pilot in Bosnia, Iraq, and Afghanistan. She retired from the Royal Air Force in 2014, after a thirty-five-year flying career.¹⁶² In 2011, the United Kingdom's Military of Defense awarded her the Peoples Award for her leadership in diversity in the U.K. Armed Forces.¹⁶³

CONCLUSION

International human rights principles and case law reflects the need to end blanket bans on transgender military personnel. History suggests that the successful inclusion of openly gay and lesbian military personnel will provide for a similar, if not easier, transition for an open transgender military policy.

As the research shows from studies and examples from other countries that have already included transgender service personnel, it is unlikely that an inclusive policy will have a detrimental effect on the U.S. military's effectiveness or available funds. Transgender soldiers in other countries have significantly contributed to their respective countries' military forces. To ban capable and committed soldiers from the U.S. military solely because of their transgender status would have a detrimental effect on military morale.

157. MINISTRY OF DEF., POLICY FOR THE RECRUITMENT AND MANAGEMENT OF TRANSEXUAL PERSONNEL IN THE ARMED FORCES ¶ 57 (2009).

158. *Id.* ¶¶ 57, 58.

159. *See id.* ¶ 59.

160. *Id.* ¶ 51.

161. *Caroline Paige*, MIL. SPEAKERS, <http://www.militaryspeakers.co.uk/speakers/caroline-paige/> (last visited Oct. 12, 2018).

162. *Caroline Paige*, HUFFPOST, <http://www.huffingtonpost.co.uk/author/caroline-paige/> (last visited Oct. 20, 2018); Anna Walker, *Transgender and Over 50*, READER'S DIG., <https://www.readersdigest.co.uk/inspire/life/transgender-and-over-50-carolines-story> (last visited Oct. 20, 2018).

163. MILITARY SPEAKERS, *supra* note 161.

President Trump's claims of tremendous costs to the military are unfounded. Policymakers are urged to reconsider their positions taking into account the models that have emerged abroad.