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In a three-tweet announcement on July 26, 2017, President Trump announced plans to institute a ban on transgender service members. The President stated that the military must be focused on "decisive and overwhelming victory" as a justification for the proclamation.^[2] Immediately, and in the time since the announcement, there have been protests to the policy across the United States.^[3] National organizations such as the American Civil Liberties Union (ACLU) have committed themselves to "eliminating the outdated, unfair, discriminatory ban."^[4] While the initial decision may appear to have been made in a vacuum, the fair resolution of the subsequent dispute cannot be.

A heightened level of deference must be provided to military leadership, considering that the primary mission of the armed forces is to defend national interests by preparing for and, when necessary, waging war.^[5] Responsibility for the awesome machinery of war requires a degree of training, discipline, and unit cohesion that has no parallel in civilian society.^[6] A primary example of the dissimilarity between that of a civilian and a military member is that service members do not have an absolute right to freedom of speech and freedom of association in the military.^[7] The simple truth is that when one becomes a service member, he/she is forced to relinquish some of your rights in the name of national security.^[8] Therefore, it logically flows from this policy that the decision to allow or disallow transgendered service members from joining the United States military should be considered under the pretense of national security.

With the above considered, a presidential directive barring transgender service members seems to fall squarely within this area of heightened deference.^[9] If the President determines that issues associated with their service detract from the mission and our national interests, it arguably remains constitutional because as Commander in Chief, the President is afforded the deference to make decisions which appear discriminatory in the name of national security.^[10] However, the Supreme Court has once addressed this dilemma of balancing national security interests with the over-infringement on constitutional rights.

In *Rostker v. Goldberg*, the court was presented with the question of whether the Military Selective Service Act violated the due process clause of the Fifth Amendment in authorizing registration of only men for the draft.^[11] The Supreme Court held the Act was constitutional, largely because Congress had completed an extensive research and consideration process, incorporating testimony from top military officials.^[12]

This deliberate deference to the recommendations of the military by the Supreme Court is profoundly important, and solidifies that the decision to allow transgendered Americans to serve cannot be made in a vacuum.^[13] The Joint Chiefs of Staff, acting on behalf of their respective branches, should be lent the ability to research, study, and make an ultimate conclusion to be taken into account by Congress.

In April of 2019, both the Commandant of the Marine Corps and the Chief of Naval Operations testified before Congress, denying that the presence of transgender service members had resulted in any problems for unit cohesion.^[14] In fact, the Commandant of the Marine Corps remarked, "I respect their desire to serve, and all of them, to the best of my knowledge were ready and prepared to deploy."^[15] Therefore, if taking into account the current opinions of our top military officials, it would suggest that there is no justification for the ban on transgender military service outside of discriminatory bias.^[16] However, the services must be allowed to complete a thorough investigation and data collection in order to present a deliberate recommendation to Congress. Under the Supreme Court's decision in *Rostker*,



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the political branches may discriminate in the military in ways that would be unacceptable in ordinary life.^[17] Nevertheless, they must do their due diligence first.^[18]

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[2]

Donald J. Trump (@realDonaldTrump), TWITTER
(July 26, 2017, 8:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864>.

[3] Chris Riotta, *How LGBT groups are fighting to stop Trump's transgender military ban*, INDEP. (June 23, 2018, 00:58 AM) <https://www.independent.co.uk/news/world/americas/us-politics/trump-trans-military-ban-lgbt-pentagon-lgbt-activists-court-a8412581.html>.

[4]

Transgender People and the Military, ACLU.ORG, <https://www.aclu.org/issues/lgbt-rights/transgender-rights/transgender-people-and-military>.

[5]

See Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 557 (1994); see also Tom Kolditz, *Why the Military Produces Great Leaders*, HARV. BUS. REV. (Feb. 6, 2009), <https://hbr.org/2009/02/why-the-military-produces-grea>.

[6]

Nunn, *supra* note 5, at 557; Kolditz, *supra* note 5.

[7]

United States v. Brown, 45 M.J. 389,
397 (C.A.A.F. 1996).

[8]

See generally Gabriel Arkles, *Law, Peace, And Violence: No One Is Disposable: Going Beyond the Trans Military Inclusion Debate*, 13 SEATTLE J. SOC. JUST. 459, 471 (2014); Nunn, *supra* note 5, at 558–59.

[9]

Michel Paradis, *Why Transgender Service Members Will Win in Court*, LAWFARE (July 28, 2017, 12:06 PM), <https://www.lawfareblog.com/why-transgender-service-members-will-win-court>.

[10]

Id.

[11]

Rostker v. Goldberg, 453 U.S. 57, 59
(1981).

[12]

Id. at 58.

[13]

See generally Matthew J. Lang, *Examining the Trump Administration's Transgender Service Ban through an International Human Rights Law Framework*, 25 DUKE J. GENDER L. & POL'Y 249, 253–54 (2018).

[14]

Chris Johnson, *Top Navy, Marine officials say no unit problems with trans military service*, Wash. Blade (Apr. 19, 2018, 5:08 PM), <https://www.washingtonblade.com/2018/04/19/top-navy-marine-official-say-no-unit-problems-trans-military-service/>.

[15]

Id.

[16]

See W. Neil Eggleston & Amanda Elbogen, *The Trump Administration and the Breakdown of Intra-Executive Legal Process*, 127 YALE L.J. F. 825, 838, 843–44 (Feb. 16, 2018), <https://www.yalelawjournal.org/forum/the-trump-administration-and-the-breakdown-of-intra-executive-legal-process>.

[17]

Rostker, 453 U.S. at 112.

[18]

Paradis, *supra* note 9.

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Tags: ACLU, Annie R. Barry, deference, Discrimination, fifth amendment, human rights, military, Rostker v Goldberg, transgender