THE CASE FOR INCLUSION

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Why does the military get to discriminate against the transgender community? Is this even legal?

BY BOWDITCH & DEWEY • SEPTEMBER 13, 2017

This question is the most recent culmination of a long line of military-related issues with the LGBT community that far pre-date the Trump Administration. Historically, the military took the position that transgender people are medically unfit to serve. Although case law is sparse, that justification was validated in *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn., 1981) and again in *Leland v. Orr*, 528 F.2d 584 (9th Cir. 1987).

After a RAND Study performed on behalf of the Department of Justice suggested that the impact of allowing transgender people to serve in the military to be minimal, former Defense Secretary Ash Carter announced the military's shift in policy to allow transgender people to enlist or openly serve in the military. Remnants of that earlier medically-based policy are apparent in the language of this new policy.

Now, the Trump Administration is backpedaling from that change and many people are left asking the question, "Can they do that? Is this even legal?" The answer is complicated.

Under the Constitution, Congress has the authority to "make rules for the government and regulation of the land and naval forces." This leaves courts hesitant to interfere in intra-military decision-making. However, that power cannot be used in a way that violates a person's constitutional rights. Bearing that in mind, the question is really whether, by prohibiting transgender individuals from serving in the military, the government is infringing on individual's constitutional rights.

When it comes to the Equal Protection Clause, courts generally review government actions through "rational basis review." What that means is that the court determines whether a law is rationally related to a legitimate government interest. Under this standard of review, it does not matter whether a government's position is supported by evidence or empirical data. If there is a hypothetical, legitimate interest that is served by the government's action, it will withstand the court's scrutiny. This is a pretty low bar.

The issues are more complicated when government actions affect a particular group of people on the basis of gender. In these circumstances, a person is entitled to a heightened standard of scrutiny. The government must show that the challenged law serves an important government interest, and that the discriminatory means employed are substantially related to achieving that interest. The government's justification must be genuine and exceedingly persuasive – not hypothetical. This is called "intermediate scrutiny."

There is no case law from the Supreme Court to provide guidance as to which standard of scrutiny should apply to transgender people, but lower courts in the last several years have applied intermediate scrutiny to analyses involving transgender status, which gives support to the premise that this is the appropriate level of review for this issue.

There are serious questions as to whether the government's retrenchment on transgender policy can clear this intermediate scrutiny hurdle. Certainly, the government has a substantial interest in managing our military's costs and maintaining an effective and cohesive military. The recent policy announcement, however, provided no basis for the idea that allowing transgender people to serve would negatively impact these interests. Further, the RAND Study evaluated these concerns and ultimately found that allowing transgender people to serve openly would have a minimal impact on military readiness and healthcare costs. As a result of the findings of that study, the government lifted its ban. Given that the government's policy rationale for its discriminatory action must be genuine and persuasive, it will be interesting to see which arguments unfold to justify this recent change.