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Uncle Sam Wants You, Unless You're Trans: How Greene v. McElroy Allows Discrimination in the Military

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UNCLE SAM WANTS YOU, UNLESS YOU'RE TRANS: HOW *GREENE V. MCELROY* ALLOWS DISCRIMINATION IN THE MILITARY

Amy Vedder[*]

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I. INTRODUCTION

> When less than 1 percent of Americans are volunteering to join the military, we should welcome all those who are willing and able to serve our country. . . . [D]ischarg[ing] someone who has incredible things to contribute makes no sense. . . . The challenge to this military ban has just highlighted how wrong it is to exclude people because of who they are.[1]

The military, historically, has only allowed transgender individuals to serve if they serve in the sex they were assigned at birth. Despite that, the Williams Institute estimates that 15,500 transgender people currently serve the military, either on active duty or reserve.[2] Additionally, transgender individuals are twice as likely as cisgender[3] people to serve in the military.[4] However, transgender individuals make up roughly 0.6 percent of total adults who reported to have served in the military.[5] Navy Chief Petty Officer Brock Stone is just one of many transgender individuals who had served in the military, quietly doing his job well, when he woke up one day to find that then President Trump wanted him discharged.[6] Stone served in Afghanistan, is trilingual,

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[1] Julie Moreau, *Years After Trans Military Ban, Legal Battle Rages On*, NBC NEWS (Apr. 11, 2020), https://www.nbcnews.com/feature/nbc-out/year-after-trans-military-ban-legal-battle-rages-n1181906.

[2] Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, WILLIAMS INSTIT., May, 2014, at 1, https://williamsinstitute.law.ucla.edu/publications/trans-military-service-us/.

[3] *What Do Transgender and Cisgender Mean?*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-transgender-and-cisgender-mean (last visited Mar. 24, 2023) (defining cisgender as people who identify with the sex that they are assigned at birth, for example, someone assigned female at birth identifying as a woman would be cisgender).

[4] Gates & Herman, *supra* note 2, at 2–3.

[5] *Id.* at 1.

[6] Devin Dwyer, *'I'm Still Here': Transgender Troops Begin New Era of Open Military Service*, ABC NEWS (Feb. 23, 2021),

and has served for over fifteen years.[7] Air Force Lieutenant Colonel Bree Fram, the highest-ranking openly transgender officer in February of 2021 stated in response to the Trump ban that, "we became an endangered species. There weren't going to be any more of us. No one new could come out, no one new could get in."[8]

> It is somewhat paradoxical that [LGBTIA+ individuals] who are treated as second-class citizens by their own country and government, with limited rights, would want to risk their lives and potentially die for that same country. . . . [M]any homosexual men and women have chosen such a profession in order to justify their existence and demonstrate that they are worthy of the same rights as others.[9]

Transgender people face daily risk of violence when it comes to serving openly in the military.[10] However, current and former transgender individuals who have served in the military have developed support groups to help with this harassment and violence. Nonprofits such as SPARTA serve this purpose by providing educational resources and advocating for military policy inclusivity.[11] Despite the usefulness of organizations such as SPARTA, the Trump administration's ban on transgender individuals imposed an artificial window of time that prohibited any service person from transitioning unless they wanted to lose their career.[12]

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https://abcnews.go.com/Politics/im-transgender-troops-begin-era-open-military-service/story?id=76046328.

[7] *Id.*

[8] *Id.*

[9] G. Dean Sinclair, *Homosexuality and the Military: A Review of the Literature*, 56 J. HOMOSEXUALITY 6, 701 (2009).

[10] Dwyer, *supra* note 7 (discussing that LGBTQIA+ service members face an increased risk for sexual harassment, abuse, and violence according to a study from Oregon State University). Eighty percent of LGBTQIA+ troops faced harassment versus fifty percent of non-LGBTQIA+ troops.

[11] *Who We Are*, SPARTA: A TRANSGENDER MIL. ADVOC. ORG., https://spartapride.org/about-us/.

[12] Moreau, *supra* note 1.

This article discusses military policy surrounding transgender individuals and military service, and analyzes whether there is a constitutional right to military service under the Second Amendment, Militia Clauses, and 10 U.S.C § 246 that would require the Department of Defense's delegation of authority from Congress or the President to satisfy the *Greene* test, requiring explicit authorization if a constitutional right is infringed. Part I of this article will provide a brief history of military policy regarding LGBTQIA+ individuals. Specifically, Part I will analyze the progression of military policy, from the Articles of War of 1916 to the policy under former President Trump. Part II analyzes current military policy under President Biden, focusing on the implications it has for internal military health screening policy. Part III examines circuit splits, the United States Constitution, and statutes to determine whether there is or is not a constitutional right to military service. Part IV proposes that under the framework in *Greene v. McElroy*, since the ban on transgender individuals serving in the military infringes on a constitutional right, Congress and the President must have explicit language authorizing the Department of Defense to promulgate rules banning transgender individuals from military service. Part V concludes that any policy banning transgender people from military service would likely result in legal challenges based on Equal Protection grounds and theorizes the likelihoods of success of these potential challenges. Ultimately, this article's analysis shows that there is a constitutional right to military service, and any future ban on transgender individuals from serving in the military must be pursuant to an explicit grant of authority from Congress or the President.

II. BACKGROUND

A. *HISTORY OF LGBTQIA+ DISCRIMINATION IN THE UNITED STATES MILITARY*

1. Articles of War of 1916 to Truman's Creation of the Uniform Code of Military Justice

The first explicit prohibition on same-sex conduct in the United States military was in the Articles of War in 1921.[13] The Article punished individuals who engaged in sodomy with a court-martial.[14] However, during World War II the military recognized the impracticality of court martialing for same-sex conduct violations. Therefore, "blue discharges" or "blue tickets" were created.[15] Blue tickets were administrative military discharges and were neither honorable nor dishonorable.[16] These discharges, while not explicitly used solely for gay and lesbian service members, were primarily used for gay and Black service members.[17] There is no official number for how many gay and lesbian service members were discharged with a blue ticket.[18] However, the Army released an estimate that between 49,000 and 68,000 blue tickets were

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[13] Rostker et al., RAND CORPORATION, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 2 (1993), https://www.rand.org/pubs/monograph_reports/MR323.html.

[14] *Articles of War, Approved June 4, 1920*, Article 93, http:/ibiblio.org/hyperwar/USA/ref/AW/index.html [https://web.archive.org/web/20081004163647/] (last visited Mar. 21, 2023); Jim Absher, *What Is a Military Court Martial?*, MILITARY.COM (Mar. 25, 2022), https://www.military.com/benefits/military-legal-matters/courts-martial-explained.html (defining court-martial as a "legal proceeding for military members that is similar to a civilian court trial. It is usually reserved for serious criminal offenses like felonies.").

[15] *Blue and "Other Than Honorable" Discharges,* NAT'L PARK SERV., https://www.nps.gov/articles/000/blue-and-other-than-honorable-discharges.htm (last updated Jan. 26, 2022).

[16] Rachel Petrik, Mason Veterans & Servicemembers Legal Clinic, *The Blue Ticket Discharge: A Color That Has Stained the Lives of WWII-Era Veterans for over 75 Years,* ANTONIN SCALIA L. SCH. M-VETS BLOG (May 17, 2019), https://mvets.law.gmu.edu/2019/05/17/the-blue-ticket-discharge-a-color-that-has-stained-the-lives-of-wwii-era-veterans-for-over-75-years/.

[17] *Id.*

[18] Michael Waters, *When the Military Expelled LGBTQ Soldiers With 'Blue Discharges,'* HISTORY (June 16, 2022), https://www.history.com/news/wwii-blue-discharge-ticket-lgbt-soldiers.

issued.[19] Further, "homosexuals" were committed to military hospitals per Section 8 in the 1944 Regulation 615-360.[20] Blue discharges were replaced with general and undesirable discharges in 1947.[21] As a result of that change, the Army further changed its policies, ruling that gay and lesbian service people didn't qualify for general discharges.[22] These policy changes resulted in gay and lesbian service members that were found to be gay without "acting on it" but still received a dishonorable discharge.[23]

2. Post-creation of the Uniform Code of Military Justice to before Don't Ask Don't Tell (1949 to 1993)

President Truman created the Uniform Code of Military Justice in 1951, which established a single justice system for armed forces.[24] This standardization led to Article 125 of the Uniform

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[19] *Id.*; ALLAN BÉRUBÉ, COMING OUT UNDER FIRE THE HISTORY OF GAY MEN AND WOMEN IN WORLD WAR II 232 (20th Anniversary ed., Uni. of N.C. Press Chapel Hill 2010) (1990).

[20] *Allen Bernstein's Defense of Homosexuality: 'Millions of Queers (Our Homo America),' 1940, by Jonathan Ned Katz and Randall Sell,* OUTHISTORY, https://outhistory.org/exhibits/show/1940-defense/intro-bernstein (last visited Mar. 21, 2023); Andrew Marshall, *What was Section 8 (Military Discharge)?*, BOOT CAMP & MILITARY FITNESS INSTIT. (Dec. 22, 2022), https://bootcampmilitaryfitnessinstitute.com/2022/12/22/what-was-section-8-military-discharge/.

[21] Edirin Oputu, *A WWII Veteran's Fight to Receive an Honorable Discharge*, TEMP. UNIV. (Nov. 9, 2020), https://news.temple.edu/news/2020-11-09/wwii-veteran-s-fight-receive-honorable-discharge.

[22] Discharges were allowed for "latent homosexuality." *See* Waters, *supra* note 18.

[23] *See generally,* Adam Bosch, *Lesbian Cadet Quits West Point*, TIMES HERALD-RECORD (Aug. 12, 2010), https://www.recordonline.com/story/news/2010/08/12/lesbian-cadet-quits-west-point/51508658007/.

[24] *History*, UNIFORM CODE OF MILITARY JUSTICE, https://ucmj.us/history-of-the-ucmj/#:~:text=The%20military%20justice%20system%20continued,effective%20on%2031%20May%201951. (last visited Oct. 25, 2023); *Blue and "Other Than Honorable" Discharges*, NATIONAL PARK SERV., https://www.nps.gov/articles/000/blue-and-other-than-honorable-discharges.htm

Code of Military Justice, which forbid sodomy.[25] Article 125 defined sodomy as "unnatural carnal copulation" with someone of the same or opposite sex.[26] Penetration of any kind was enough to constitute sodomy and bestiality under Article 125.[27]

Later, during the Vietnam War, men tried to avoid passing the screening process by appearing gay.[28] In the 1970s, there were many high-profile challenges from public figures to military regulations.[29] However, these were met with very little success. After the Vietnam War, the Department of Defense in 1982 promulgated new regulations regarding gay and lesbian servicemembers.[30] Under Department of Defense Directive 1332.14 Enlisted Administrative Separations,

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(last visited Oct. 25, 2023) ("Homosexual personnel, irrespective of sex, should not be permitted to serve in any branch of the Armed Forces in any capacity, and prompt separation of known homosexuals from the Armed Forces is mandatory"); Jim Absher, *The Uniform Code of Military Justice (UCMJ),* MILITARY.COM (Mar. 25, 2022), https://www.military.com/join-armed-forces/the-uniform-code-of-military-justice-ucmj.html.

[25] 10 U.S.C. § 925, Art. 125(a)–(c) (2013).

[26] *Id.*

[27] *Id.* (listing that "unnatural carnal copulation" with an animal also constitutes sodomy under the law).

[28] Randy Shilts, *Claim You're Gay, Avoid the Military*, N.Y. TIMES (Jan. 7, 1991), https://www.nytimes.com/1991/01/07/opinion/claim-youre-gay-avoid-the-military.html.

[29] *See generally, Harvey Milk: Honor, Courage and Commitment,* U.S. DEP'T VETERANS AFFS. (June 3, 2021), https://news.va.gov/89713/harvey-milk-honor-courage-commitment/ (discussing Harvey Milk, who had served in the Navy for almost four years before being discharged with an "other than honorable discharge" for "allegedly participating in a 'homosexual act[]'"); Bonnie Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements,* AM. PSYCH. ASS'N (2009), https://www.apa.org/pi/lgbt/resources/history/ (discussing the high-profile
social movements or events about gay rights, such as the Mattachine Society, Daughters of Bilitis, Stonewall Inn Riots, and the National Gay and Lesbian Task Force, among others, which rose to prominence but had little impact on military policy since new military policies regarding "homosexuality" were later promulgated).

[30] *See generally*, *LGBTQ in the Military: A Brief History, Current Politics and Safety*, MIL. ONESOURCE (Mar. 19, 2021), https://www.militaryonesource.mil/military-life-cycle/friends-extended-family/lgbtq-in-the-military/.

"homosexuality" was "incompatible with military service."[31] Conduct, statements, and "propensity" was deemed enough to impair military objectives.[32]

This Directive removed the "queen for a day" rule, which had previously allowed "soldiers to have gay sex as long as the soldier could prove subsequently that they're not gay—they were just having a homosexual emergency . . . ."[33] Later, in 1992 the United States General Accounting Office released their report "Defense Force Management: DOD's Policy on Homosexuality," which outlined the Department of Defense's policy on gay and lesbian service members and the reasons for the policy. This report included portions from the 1988 Defense Personnel Security Research and Education Center study on homosexuality, which was unpublished at the time and obtained through a Freedom of Information Act request.[34] The 1988 Report had concluded similarly to the 1957 Crittenden Report.[35] Ultimately, the report concluded that there was no sound reasoning to conclude that "homosexuals pose a security risk."[36]

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[31] U.S. GEN. ACCT. OFF., GAO/NSIAD-92-98, REPORT TO CONGRESSIONAL REQUESTS: DEFENSE FORCE MANAGEMENT DOD'S POLICY ON HOMOSEXUALITY at 11 (1992) [hereinafter GAO/NSIAD-92-98].

[32] *Id.*

[33] *Id.* (clarifying that previous directives did not mandate separation from service if "homosexual activity was unlikely to recur and was shown to be . . . motivated by youthful curiosity or performed under intoxication); Rossiter Drake, *HBO's 'History of Don't Ask, Don't Tell' Recounts the Undoing of a Military Mistake,* 7X7 (Sept. 25, 2011), https://www.7x7.com/hbos-history-of-dont-ask-dont-tell-recounts-the-undoing-of-a-military--1781333034.html; *More Open Minds and the Military*, N.Y. TIMES (Feb. 14, 2009), https://www.nytimes.com/2009/02/15/opinion/l15gay.html ("If you commit a 'homosexual act' and are gay, you're out. But if you commit such an act and can show it was a drunken homosexual lapse, you can stay.").

[34] GAO/NSIAD-92-98, *supra* note 31, at 24–28.

[35] *Compare* GAO/NSIAD-92-98 *supra* note 31, at 31, *with* Shauna Miller, *50 Years of Pentagon Studies Support Gay Soldiers*, ATLANTIC (Oct. 20, 2009), https://www.theatlantic.com/politics/archive/2009/10/50-years-of-pentagon-studies-support-gay-soldiers/28711/ (discussing the Crittenden Report, which was a study from the Department of Defense that looked at the effect of gay troops; ultimately the report found "'no factual data' to support the idea that [gay service members] posed a greater security risk than heterosexual personnel").

[36] GAO/NSIAD-92-98 *supra* note 31, at 44.

3. Don't Ask Don't Tell to the repeal of Don't Ask Don't Tell (1993 to 2011)

United States v. Stirewalt and *United States v. Marcum* found Article 125 constitutional, but ultimately held that the conduct falls within the liberty interest identified by the Supreme Court.[37] Further, the court held that Article 125 could be upheld, despite the application of *Lawrence v. Texas*[38] to the military, in cases where there are factors unique to a military environment that places conduct "outside any protected liberty interest recognized in *Lawrence.*"[39] These unique factors outside any protected liberty interest include fraternization, public sexual behavior, or anything that might "create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[40]

In cases such as *United States v. Meno* and *United States v. Bullock*, sodomy convictions were overturned in military courts using *Lawrence*.[41] The Army Court of Criminal Appeals in *Bullock* in 2004 and *Meno* in 2005 reversed lower courts' holdings that found the appellant guilty of punishable sodomy.[42] Further, the

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[37] *See* United States v. Stirewalt, 60 M.J. 297 (CAAF 2004); United States v. Marcum, 60 M.J. 198 (CAAF 2004).

[38] *Lawrence v. Texas* is a groundbreaking case that held that private and consensual sexual relations is protected by liberty rights. *See* Lawrence v. Texas, 539 U.S. 558, 564 (2003).

[39] United States v. Stirewalt, 60 M.J. 297, 304 (CAAF Sept. 29, 2004); United States v. Marcum, 60 M.J. 198, 205–07 (CAAF 2004).

[40] Marcum, 60 M.J. at 206; *see also* Spiro P. Fotopoulos, *The Beginning of the End for the Military's Traditional Policy on Homosexuals: Steffan v. Aspin, We Hope to Have in Place Soon the New U.S. Policy on Homosexuality in the Military Which Focuses on Conduct Rather Than Status*, 29 WAKE FOREST L. REV. 611, 612 (1994) (discussing that each year, at least until 1994, "approximately 1,400 servicemembers are discharged from the military because of their homosexuality").

[41] United States v. Meno, 2005 CCA LEXIS 470 at 11–12 (A.C.C.A., June 22, 2005); United States v. Bullock, 2004 CCA LEXIS 349 at 7–8 (Nov. 30, 2004).

[42] Meno, 2005 CCA LEXIS 470 at 11–12; Bullock, 2004 CCA LEXIS 349 at 8–9.

courts held in both cases that the appellants were protected by the liberty interest in *Lawrence*.[43]

4. Post-Don't Ask Don't Tell repeal to the transgender ban under former President Trump (2011 to 2020)

Article 125 of the Uniform Code of Military Justice's ban on consensual sodomy was repealed in 2013 by the National Defense Authorization Act.[44] However, even after *Don't Ask Don't Tell* was repealed and gay and lesbian service members were allowed to serve, the ban on transgender service members remained in effect.[45] This ban was not authorized through a specific ban, but instead originated from internal military enlistment health screening regulations.[46] The health screening regulations banned both current and past history of psychosexual conditions including but not limited to "transsexualism, exhibitionism, transvestitism, voyeurism, and other paraphilias."[47]

Under the Trump Administration Department of Defense Instruction 1300.28, (Military Service by Transgender Persons and Persons with Gender Dysphoria (Sept. 4, 2020)) individuals with a history or diagnosis of gender dysphoria were disqualified, unless

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[43] Meno, 2005 CCA LEXIS 470 at 11–12; Bullock, 2004 CCA LEXIS 349 at 5–7. Other well-known cases challenging DADT's constitutionality include *Witt v. Dep't of the Air Force*, 527 F.3d 806, 809 (9th Cir. 2008) and *Log Cabin Republicans v. United States*, 2010 U.S. App. LEXIS 22655 at 1–2 (9th Cir. 2010).

[44] Chris Johnson, *Defense Bill Contains Gay-Related Provisions*, WASH. BLADE (Dec. 20, 2013), https://www.washingtonblade.com/2013/12/20/defense-bill-contains-gay-related-provisions/.

[45] *See generally* Adam F. Yerke & Valory Mitchell, *Transgender People in the Military: Don't Ask? Don't Tell? Don't Enlist!*, J. HOMOSEXUALITY (2016).

[46] DEP'T OF DEF., INSTRUCTION 6130.03, MEDICAL STANDARDS FOR APPOINTMENT, ENLISTMENT, OR INDUCTION IN THE MILITARY SERVICES (2010), https://web.archive.org/web/20170514144321/http:/www.dtic.mil/whs/directives/corres/pdf/613003p.pdf [hereinafter DOD Instruction 6130.03].

[47] Gary Gates & Jody Herman, *Transgender Military Service in the United States*, WILLIAMS INSTIT. at 1 (May 2014); *Medical Conditions That Can Keep You from Joining the Military*, MILITARY.COM, https://www.military.com/join-armed-forces/disqualifiers-medical-conditions.html (last visited Mar. 24, 2023).

they met certain standards.[48] The standards required any applicant to have (1) thirty-six months of "stability" in the sex assigned at birth, (2) not transitioned and medical records to show that transitioning is not medically necessary, and (3) meet the standards required for the sex they were assigned at birth.[49] Further, the standards state that "cross-sex hormone therapy or a history of sex reassignment or genital reconstruction surgery is disqualifying."[50]

The Trump administration policy also afforded service members who had already transitioned or received a gender dysphoria diagnosis along with hormone treatment to continue to serve in their preferred gender identity.[51] However, after the policy release, members diagnosed had to serve in their gender assigned at birth.[52] Further, the policy prohibited service members from taking hormones or undergoing gender-affirming surgery.[53]

III. CURRENT MILITARY POLICY

A. *INTERNAL MILITARY POLICY AND HEALTH SCREENING REGULATIONS*

Department of Defense Instruction 1300.28 (Apr. 30, 2021) rescinded the Trump Administration's Department of Defense Instruction 1300.28, "Military Service by Transgender Persons and Persons with Gender Dysphoria."[54] The new 1300.28 Department of Defense Instruction provides updated guidelines for how

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[48] DEP'T OF DEF., INSTRUCTION 1300.28, MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA (2020) [hereinafter DOD Instruction 1300.28].
[49] *Id.*
[50] *Id.*
[51] Darragh Roche, *Transgender People Move Another Step Closer to Serving in U.S. Military Again,* NEWSWEEK (Feb. 2, 2021), https://www.newsweek.com/transgender-people-move-step-closer-serving-us-military-again-1566028.
[52] *Id.*
[53] *Id.*
[54] Press Release, Department of Defense, DOD Announces Policy Update for Transgender Military Service (Mar. 31, 2021).

transgender service members can transition while they are still actively serving.[55] The update explicitly prohibits discrimination based on the service member's gender identity and provides an avenue for how service members can seek medical treatment and transition services.[56]

In addition, Department of Defense Instruction 6130.03-V2 (June 6, 2022) reassured that "gender dysphoria-related standards in this volume do not apply to Service members considered exempt pursuant to DODI 1300.28."[57] This is specifically relevant for Section 5.14 Male Genital System, which disqualifies someone from serving if there is an "[a]bsence of both testicles with medically required injectable hormone therapy."[58]

The Biden administration reversed the previous ban on transgender individuals serving in the military, but it is not unlikely that future conservative administrations would attempt to reinstate the Trump-era ban. Supreme Court precedent, such as *Greene v. McElroy*, establishes that if a directive from the President or Congress infringes on a constitutional right, that directive must explicitly identify the constitutional rights violated, and how it does so. In order to require explicit directives, that directive must violate a constitutional right. Therefore, the first question is whether serving in the military is a constitutional right.

IV. IS THERE A CONSTITUTIONAL RIGHT TO SERVE IN THE MILITARY?

A. *COURTS ARE SPLIT IN DICTUM, BUT THERE IS NO DEFINITIVE LEGAL HOLDING OF THE LACK OF A CONSTITUTIONAL RIGHT TO SERVE IN THE MILITARY.*

There is a split amongst the circuit courts as to whether there is or is not a constitutional right to serve in the military. This is largely because the Supreme Court has not ruled on the issue. In

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[55] *Id.*
[56] *See* DOD Instruction 1300.28, *supra* note 48.
[57] DEP'T OF DEF., INSTRUCTION 6130.03-V2, MEDICAL STANDARDS FOR MILITARY SERVICE: RETENTION (2022).
[58] *Id.* at 20.

fact, most of the circuit court cases that discuss whether there is or is not a right consist primarily of *dicta*. Since any discussion surrounding a constitutional right to serve in the military is located in *dicta*, any dictum conclusions are not mandatory or binding. The First Circuit Court of Appeals in *Pauls v. Secretary of Air Force* wrote in dictum that there is no constitutional right to "be promoted or retained in service and the services of an officer may be terminated with or without reason."[59] In that dictum, the First Circuit cited a string of cases that the majority claimed supported their contention that there is not a right to serve in the military. However, that expansion of these cases' holdings seems disingenuous. The First Circuit cited cases that provide well-established precedent that the judicial branch cannot mandate the military to *promote* service members—in no way, shape, or form do those cases assert that there is no constitutional right to service.[60] The right to be promoted in the military is unrelated to whether you have the right to serve in it in the first place.

The Third Circuit Court of Appeals in *Dillard v. Brown* held that even though rights in the military differ from those of civilians, the military is not exempt from constitutional safeguards, and it is the role of the courts to define those rights.[61] Military life certainly differs from civilian life, as there are operational security concerns, amongst other factors. However, just because the military has significantly more on the line if they make a mistake (and therefore, they are allowed to restrict enlistment in ways that civilian organizations could never do), the military cannot use this as a talisman. They cannot declare themselves exempt from constitutional safeguards simply because their mistakes might have larger impacts. In fact, the Third Circuit Court held in *Dillard v. Brown* that:

> [Article I, Section 8 and Article II, Section 2] unquestionably reveal that the operation of the military is vested in Congress and the Executive. It

[59] Pauls v. Sec'y of Air Force, 457 F.2d 294, 297 (1st Cir. 1972).
[60] *See generally,* Reaves v. Ainsworth, 219 U.S. 296, 306 (1911); Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Cortright v. Resor, 447 F.2d 245, 253–54 (1st Cir. 1972).
[61] Dillard v. Brown, 652 F.2d 316, 320 (3d Cir. 1981).

> is not for the court to establish the criteria governing the composition of the armed forces. Yet these sections of the Constitution do not provide or intimate that, when statutes or regulations regarding the composition of the military trench upon other constitutional guarantees, the courts are powerless to act. Neither section, expressly or by implication, prevents a federal court from entertaining an appropriate constitutional claim brought against the military. The military has not been exempted from constitutional provisions that protect the rights of individuals, even though the rights of those in the armed forces may differ from those of civilians. It is the role of the courts, not the military, to define these rights.[62]

In other words, although the military's authority to operate lies in the province of Congress and the President, the Constitution does not limit or preclude the courts from acting when a constitutional guarantee (such as a constitutional right to military service) is violated.

Similarly, the Eighth Circuit of Appeals in *Nieszner v. Mark* held that persons had no constitutional right to a *commission* in the Air Force Reserve or military at large.[63] Notably, the case did not hold that persons had no constitutional rights to enlist and serve in the Air Force Reserve or military. In *Nieszner* the constitutional rights of enlisted officers are not discussed in either dictum or in any legal holding. The Eighth Circuit was reluctant to interfere with what it viewed as "military affairs[,]" and affirmed the lower court's decision that there was no constitutional right to be commissioned in the military.[64] However, since the focus of this Article is whether *enlistees* have a constitutional right to serve in the military, one

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[62] *Id.* (internal citations omitted).

[63] Nieszner v. Mark, 684 F.2d 562, 564 (8th Cir. 1982). This article focuses on the rights of enlistees, not commissioned officers (who are appointed by the president with advice and consent of the Senate). This article leaves unaddressed the question as to whether commissioned officers have a constitutional right to be commissioned.

[64] Nieszner, 684 F.2d at 565.

circuit court holding that affirms a lower court's finding that there is no constitutional right to be *commissioned* in the military is not relevant for a finding that *enlistees* have a constitutional right to serve in the military.

The Fifth Circuit Court of Appeals in *West v. Brown* stated that "the reviewability of military enlistment criteria is an area littered with unanchored dicta, most of which argue against review of matters of the selection of enlistees." However, the Fifth Circuit continued the trend, stating in dicta that there is no constitutional right to military service, declining to review a challenge brought by a plaintiff, an unwed mother, alleging that the government denied her enlistment based on her marital and parental status.[65] Since the Supreme Court has not granted certiorari for cases involving a right to serve in the military, and there is no agreement between Circuits that largely discuss the issue in dicta, no case law that definitively rules on the issue. Because no definitive case holds that there is no constitutional right to serve in the military, the door is open for a constitutional right to serve in the military encompassed in other rights, such as the Second Amendment.

B. *THE SECOND AMENDMENT, MILITIA CLAUSES, AND 10 U.S.C. § 246 SUPPORT A CONSTITUTIONAL RIGHT TO MILITARY SERVICE.*

Some scholars have found a constitutional right to serve in the military through the Second Amendment.[66] The Second Amendment bestows the right to keep and bear arms, an individual right. However, engrained in that is a collective right to enlist in militia to respond to public emergencies. 10 U.S.C. § 246 categorizes the militia into two distinct sections: (1) the organized

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[65] West v. Brown, 558 F.2d 757, 759–60 (5th Cir. 1977); *see also* Charlie Dunlap, *Does the Constitution Really Require the Military to Induct Everyone Who Wants to Join?*, LAWFIRE (Aug. 4, 2017), https://sites.duke.edu/lawfire/2017/08/04/does-the-constitution-really-require-the-military-to-induct-everyone-who-wants-to-join/ (discussing, once again in dicta, that there is no constitutional right to service).

[66] Carl Riehl, *Uncle Sam Has to Want You: The Right of Gay Men and Lesbians (and All Other Americans) to Bear Arms in the Military*, 26 RUTGERS L. J. 343, 343–44 (1995).

militia and (2) the unorganized militia.[67] The organized militia is made up of the National Guard and Naval Militia, while the unorganized militia is compiled of "members of the militia" that are not a part of the National Guard or the Naval Militia.[68] Further, the Militia Clauses give Congress the authority to call forth the militia,[69] which, under the "dual enlistment" system, means that people who are enlisted in the state National Guard are simultaneously enlisted in the United States National Guard.[70] When state militia members are called up to the federal militia, they are "relieved of their status in the state militia."[71] Individual states' National Guards, when functioning in a solely state capacity, are the "constitutional militia[;]" however, when they are called forth they become "federal regulars[.]"[72]

Further, in *District of Columbia v. Heller* the Court held that the Second Amendment's reference to arms does not mean that only arms available at the drafting of the Second Amendment are protected.[73] In fact, the Court explicitly said "[w]e do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications . . . and the Fourth Amendment applies to modern forms of search. . . [,]"[74] other constitutional rights are interpreted in modern contexts.

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[67] 10 U.S.C.S. § 246(b)(1)–(2).

[68] 10 U.S.C.S. § 246(b)(1)–(2); Randy E. Barnett, *Saved by the Militia: Arming an Army Against Terrorism*, VOLOKH CONSPIRACY (Sept. 11, 2021), https://reason.com/volokh/2021/09/11/saved-by-the-militia-arming-an-army-against-terrorism/ ("'unorganized militia'" will be available when domestic or foreign terrorists chose their next [act]").

[69] *The Militia Clauses*, JUSTIA, https://law.justia.com/constitution/us/article-1/58-the-militia-clauses.html#:~:text=The%20Congress%20shall%20have%20Power%20*%20*%20*%20To%20provide%20for%20organizing,training%20the%20Militia%20according%20to (last visited Oct. 25, 2023).

[70] *Id.*

[71] *Id.*

[72] Steve Vladeck, *The Draft, the Constitutional Militia, and the Most Important Supreme Court NSL Case You (Probably) Haven't Heard of…*, LAWFARE INST., (July 10, 2012) https://www.lawfareblog.com/draft-constitutional-militia-and-most-important-supreme-court-nsl-case-you-probably-havent-heard.

[73] District of Columbia v. Heller, 554 U.S. 570, 582 (2008).

[74] *Id.*

The prefatory clause of the Second Amendment, "a well regulated militia, being necessary to the security of a free State," is the justification for the operative clause, the right to bear arms.[75] In other words, the justification for the individual right to bear arms is the collective right of a militia that functions to keep the State free.[76] Therefore, implicit in the Second Amendment is that the individual right to bear arms *supports* the right to serve in some manner in an organized collective force. Title 10 of the United States Code sets forth the classes of the militia: (1) the organized militia and (2) the unorganized militia.[77] The unorganized militia are the "members of the militia" that are not a part of the National Guard or the Naval Militia.[78] Since the Militia Clauses give Congress the authority to call forth the militia,[79] and there is a "dual enlistment" system in place, people who are enlisted in the state National Guard simultaneously enlist in the United States National Guard.[80] Subsequently, if the state militia members are called up to the federal militia, they are "relieved of their status in the state militia."[81] Therefore, implicitly, the Second Amendment supports a constitutional right to serve in some form of a collective force, which taken in conjunction with the Militia Clauses and 10 U.S.C. § 246, at the very least do not preclude a constitutional right to serve in the military.

In other words, because the Second Amendment's prefatory clause provides a collective justification for the individual right to bear arms in the operative clause, the individual right is justified by the collective right to serve in some sort of organized collective force—the state militia. The state militia, which is an unorganized militia under 10 U.S.C. § 246, can be called forth by Congress because of the Militia Clauses and the "dual enlistment" system (which enlists state National Guard members simultaneously in the

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[75] U.S. CONST. amend. II.

[76] Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814 (1998).

[77] 10 U.S.C.S. § 246(b)(1)–(2) (West).

[78] *Id.*

[79] *The Militia Clauses*, *supra* note 69.

[80] *Id.*

[81] *Id.*

United States National Guard).[82] Further, since when state militia members are called up to the federal level they are "relieved of their status in the state militia" and become "federal regulars," the right to join the militia inherent in the prefatory clause of the Second Amendment necessarily results in a constitutional right to join the military.[83]

Additionally—absent a conclusive ruling from the Supreme Court—the Second Amendment, Militia Clauses, and 10 U.S.C. § 246 provide a right to serve in the military, making it far more difficult for Congress to infringe upon that right. If the president or Congress wishes to infringe on this constitutional right, then they must follow the rules laid out in *Green v. McElroy* and speak explicitly.[84]

V. CONGRESS AND THE PRESIDENT MUST SPEAK EXPLICITLY TO INFRINGE ON THE CONSTITUTIONAL RIGHT TO MILITARY SERVICE

> The right to serve in the military is a fundamental political right. It demands the same respect accorded to other rights protected by the Bill of Rights. If a vibrant democracy is to be maintained, and if the risk of political or military tyranny by a peacetime standing army is to be avoided, the right to bear arms of gay men, lesbians, women, and every other group must not be infringed.[85]

Supreme Court precedent establishes that if a delegation of authority to an agency from the President or Congress infringes upon a constitutional right, that the delegation of authority must explicit.[86] In other words, Congress and the President must speak clearly, because implicit acquiescence is not enough when there is

[82] *Id.*; Vladeck, *supra* note 72.
[83] *The Militia Clauses*, *supra* note 69; Vladeck, *supra* note 72.
[84] Greene v. McElroy, 360 U.S. 474, 507 (1959).
[85] Riehl, *supra* note 66, at 394.
[86] *Greene*, 360 U.S. at 507.

a violation of a constitutional right.[87] In the Court's seminal case establishing this precedent, *Greene v. McElroy*, the Court held that agencies cannot take action or promulgate a regulation that infringes on a constitutional right if there is no explicit authorization from Congress or the President.[88] Essentially, if explicit authorization was not required, "administrators" could infringe upon any constitutional right solely through acquiescence or simply inaction.[89] Specifically in *Greene*, the Court held that "in the absence of explicit authorization" from the president or Congress, the agency did not have the authority to "deprive" the petitioner of their constitutional rights.[90] If there is no explicit authorization, then the Court need only hold that the congressional or presidential acquiescence was not sufficient to provide authorization to the agency to infringe on a constitutional right.[91] However, if the language is explicit, then the Court could address any legal challenges that challenge the constitutionality of the rule, regulation, or directive in question.[92]

The Supreme Court clearly established the requirement for explicit authorization in case law before the seminal decision in *Greene*. In *Aptheker v. Secretary of State* the Court held that a law that denied passports to all Communist Party members was unconstitutional because the statute was too broad and indiscriminately infringed on constitutional rights.[93] In *Kent v. Dulles*, the Court held that if a delegated power infringes on a constitutional right, the standards for the power must pass the test in *Panama Refining Co.*[94] Additionally, when constitutional rights are infringed on, courts must construe any delegated powers narrowly, because implied approval is not enough.[95] The Court in *Panama Refining Co. v. Ryan* held that the President's Executive Order prohibiting excess petroleum transportation in interstate and

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[87] *Id.*
[88] *Id.* at 507.
[89] *Id.*
[90] *Id.* at 508.
[91] *Id.* at 507.
[92] *Id.*
[93] Aptheker v. Sec'y of State, 378 U.S. 500, 505 (1964).
[94] Kent v. Dulles, 357 U.S. 116, 129 (1958).
[95] *Id.*

foreign commerce was unconstitutional because Congress could not delegate legislative power without providing policies and standards for creating the legislation.[96] In other words, Congress was not explicit—Congress needed to provide specific policies and standards in order for the legislation to be created without an unauthorized violation of legislative power. Therefore, if a delegated power infringes on a constitutional right, the authority must be pursuant to specific policies and standards provided by Congress, as held in *Panama*.[97]

Additionally, in *Peters v. Hobby*, the Court held that dismissing Plaintiff from employment was invalid because that power and decision was beyond the Board's jurisdiction pursuant to Executive Order 9835, and amounted to an invalid assumption of power; further, the lack of presidential disapproval could not be deemed as acquiescence.[98] In other words, if an agency assumes that lack of active disapproval implicitly granted the agency authority to infringe on a constitutional right, that assumption is invalid. Just because the President or Congress has not spoken on an issue does not mean that any action not explicitly disapproved is inherently approved.[99]

Further, in *Ex parte Endo*, the Court held that the United States government could not keep detaining a citizen who was loyal to the United States because neither Congress nor executive order explicitly mentioned detention.[100] There are certainly differences between *Ex parte Endo*, which discriminated based on race, and policies that ban transgender people from military service. However, there are substantial similarities between the two that outweigh any differences. Both situations involve an executive order or policy lacking explicit mentioning of what the agency may do and why they may do those things. In *Endo*, the claimed purpose of the detention was to detain citizens that could commit espionage and sabotage against the United States.[101] However, Mitsuye Endo had never been to Japan, only spoke English, and had a brother that

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[96] Panama Refin. Co. v. Ryan, 293 U.S. 388, 420–30 (1935).
[97] *Kent*, 357 U.S. at 129; *Panama Refin. Co*., 293 U.S. at 420–30.
[98] Peters v. Hobby, 349 U.S. 331, 347–49 (1955).
[99] *See id.*
[100] *Ex parte* Endo, 323 U.S. 283, 297 (1944).
[101] *Id.* at 285–88.

was serving in the United States military.[102] The War Relocation Authority, the Court held, did not provide the authority "to subject citizens who are concededly loyal[.]"[103]

Since there is a constitutional right to serve in the military inherent in the Second Amendment, the Militia Clauses, and 10 U.S.C. § 246, if an agency promulgates a regulation that infringes on this right, that authorization from either Congress or the President must be explicit. Agencies cannot use implicit authorization, such as a presidential memorandum, simply providing authorization to promulgate regulations regarding transgender individuals. Instead, the authorization must be so explicit as to actually include language providing explicit authority. For example, the language used in 10 U.S.C. § 654 (colloquially known as Don't Ask Don't Tell. Don't Ask Don't Tell), while morally reprehensible, certainly granted explicit authority to the Secretary of Defense to promulgate regulations banning gay and lesbian individuals from military service.[104]

Any future policy from a future administration that attempts to exclude any group from military service must be pursuant to a grant of authority that explicitly states what group the agency can exclude, and why they can exclude that particular group. This does not preclude the promulgated rule from facing equal protection and due process challenges (given that most likely, any future policy will exclude groups of people based on immutable characteristics). However, by providing authorization with explicit language, the agencies at the very least are infringing on a constitutional right pursuant to an explicit grant of authorization. The policy would have to not only explicitly mention who the agency may exclude (ex. transgender individuals) and why they may be excluded (ex. for

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[102] Stephanie Buck, *Overlooked No More: Mitsuye Endo, a Name Linked to Justice for Japanese-Americans*, N.Y. TIMES (Nov. 15, 2019), https://www.nytimes.com/2019/10/09/obituaries/mitsuye-endo-overlooked.html.

[103] *Ex parte Endo*, 323 U.S. at 297. "A citizen who is concededly loyal present no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized." *Id.* at 302.

[104] 10 U.S.C. § 654 (repealed 2011).

unit cohesion), it must also mention who in the original excluded community it may exclude. For example, to satisfy the standard set in *Greene*, the policy must mention the specific individuals it seeks to exclude. In former President Trump's situation, this would be the individuals who have already transitioned prior to enlisting, those who are currently transitioning while attempting to enlist, or those considering transitioning after enlisting. Then, the policy at the very least would satisfy the test required by *Greene* because the language both clearly states who is being excluded, and why—no implicit acquiescence is required.

President Trump's ban is analogous to *Endo*, where the executive order did not explicitly mention whether individuals such as Mitsuye Endo could be detained, because President Trump, in the context of a ban on transgender people from serving in the military, did not explicitly mention by what means the military may promulgate rules related to transgender individuals. The executive order did state why the President believed such a group of people could be banned in the first place: military effectiveness and lethality, unit cohesion, and taxing military resources.[105] However, there are aspects of the executive order that were not explicit. For example, the executive order did not explicitly mention whether the transgender individuals that had already transitioned before the policy came into effect would be exempted from the service ban.

The Trump administration memorandum instructing the Secretary of Defense and the Secretary of Homeland Security to promulgate regulations regarding transgender individuals did not rise to this same level of explicitness. It did not explicitly grant authority to the Departments of Defense and Homeland Security to promulgate legislation against transgender individuals from enlisting. Importantly, the memorandum did not provide explicit instruction on how the new policy would affect transgender troops already enlisted. While the memorandum explicitly instructs the Secretaries on who they may ban (openly transgender individuals); for what they may ban them for (being openly transgender or undergoing "sex-reassignment surgical procedures"); and why they may ban them (military effectiveness and lethality, unit cohesion, and taxing military resources)—it importantly does not address the

[105] DOD Instruction 1300.28, *supra* note 48.

specifics on whether certain transgender individuals could be banned.[106] Under *Greene*, the Court established that the President or Congress must specifically authorize the implementing agency on what rights they may infringe. Therefore, even though the Trump memorandum provides explicit authorization on how to treat transgender individuals attempting to enlist or already enlisted troops that seek gender-affirming medical treatment, the memorandum does not provide explicit instruction on how to treat already enlisted transgender troops who have already transitioned prior to this exclusion being passed.[107]

Given that the rights of transgender individuals (minors and adults alike) are up for debate in states such as Tennessee and Florida (among others)—and *Greene v. McElroy* provides a basic level of authorization to discriminate—the Court will likely have to address whether banning transgender individuals from military service is unconstitutional sometime soon.[108] Or, at the very least, the Court will have to determine which level of scrutiny applies to challenges of discrimination against transgender individuals.

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[106] Military Service by Transgender Individuals, 82 Fed. Reg. 41319, 41320 (Aug. 25, 2017).

[107] *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals*, WHITE HOUSE (Mar. 23, 2018), https://trumpwhitehouse.archives.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals/.

[108] Greene v. McElroy, 360 U.S. 474, 507 (1959). Anti-trans legislation and anti-trans sentiment are rising, so it is likely that any future Republican presidential administration would reverse anti-discrimination protections that the Biden administration has achieved. *See e.g.*, *Tennessee Governor Signs Laws Banning Gender-Affirming Care for Minors and Restricting Drag Shows*, CBS NEWS (Mar. 2, 2023), https://www.cbsnews.com/news/tennessee-ban-gender-affirming-care-trans-youth-drag-shows/ (discussing that Governor Bill Lee of Tennessee signed legislation that banned gender-affirming care for minors, as well as "restricting drag shows from taking place in public or in front of children."); *see also* Melissa Block, *Parents Raise Concerns as Florida Bans Gender-Affirming Care for Trans Kids*, NPR (Feb. 20, 2023), https://www.npr.org/2023/02/20/1157493433/florida-bans-gender-affirming-care-trans-kids (discussing that Florida Governor Ron DeSantis, Florida's Board of Medicine, and Florida's Board of Osteopathic Medicine banned "gender-affirming care such as puberty blockers and cross-sex hormones, as well as surgical procedures," for individuals under eighteen).

VI. EQUAL PROTECTION CHALLENGES STEMMING FROM *GREENE V. MCELROY*

Just because a policy satisfies the requirements set out in *Greene* does not preclude the policy from being challenged on other grounds. The Fourth Circuit held in *Grimm v. Gloucester County School Board* that a policy requiring students to use their "'corresponding biological gender' violated" Title IX and the Equal Protection Clause.[109] This holding relied on *Bostock v. Clayton County*, which provides protections for LGBTQIA+ employees from being fired based on their sexuality because of the "on the basis of sex" language found in Title VII of the 1964 Civil Rights Act.[110] Using *Bostock*, the Fourth Circuit in *Grimm* held that "precluding Grimm" from using the bathroom corresponding to his gender identity discriminated against him based on his sex.[111] Essentially, this policy acted as a classification on the basis of sex, requiring intermediate scrutiny.[112]

Levels of scrutiny, which establish how much deference the respective court gives to the policy that is being challenged, consist of rational basis review, intermediate scrutiny, and strict scrutiny.[113] The most deferential level of scrutiny is rational basis. Policies that deal with economics, age, disability, zoning, lifestyle, and education are all subject to rational basis review, and only require the policy to be rationally related to a legitimate governmental interest.[114] Policies that have gender-based classifications receive intermediate

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[109] Silver Flight, *Gender: The Issue of Immutability*, UNIV. CIN. L. REV. (Nov. 12, 2021), https://uclawreview.org/2021/11/12/gender-the-issue-of-immutability/ (quoting Grimm v. Gloucester City Sch. Bd., 972 F.3d 586, 593 (4th Cir. 2020)).
[110] *Id.*; Grimm v. Gloucester City Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020) (citing Bostock v. Clayton Cit., 140 S.Ct. 1731, 1741 (2020)).
[111] Flight, *supra* note 109 (citing *Grimm*, 972 F.3d at 616).
[112] *Id.* (citing Grimm v. Gloucester City Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020)).
[113] Mariam Morshedi, *Levels of Scrutiny*, SUBSCRIPT LAW (Mar. 6, 2018), https://subscriptlaw.com/levels-of-scrutiny/.
[114] *Id.*

scrutiny; this requires the policy to be substantially related to an important government interest.[115] Classifications based on race, noncitizen status,[116] and fundamental rights receive strict scrutiny, the least deferential standard of review; this requires the policy be narrowly tailored to a compelling governmental interest.[117]

The level of scrutiny that applies in future challenges to a military ban on transgender people that has the highest chance of success has yet to be made explicit. One might argue that prohibiting transgender people from serving is discriminating on the basis of sex, which would result in intermediate scrutiny. Necessarily, if this was the case, a policy that bans transgender people from serving in the military must be substantially related to an important government interest to satisfy intermediate scrutiny.[118]

The Court held in *United States v. Virginia* that the exclusion of women from the Virginia Military Institute (VMI) was unconstitutional because it denied women an opportunity available only for men and was based almost entirely on gender stereotypes.[119] As a result, any challenge to a future ban operates in a gray area in terms of precedent. Although military interests are indisputably an important government interest, policies based on gender stereotypes have been held as unconstitutional, even in the context of military academies.[120] Additionally the Court in *Virginia* held that the government must establish an "exceedingly persuasive justification" in order for the policy banning women from VMI to be constitutional.[121] Therefore, if policies discriminating against

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[115] *Id.*

[116] The word noncitizen is used because the current statutory language of "alien" is dehumanizing. Further, the Biden administration has pushed for the word "alien" to be changed to "noncitizen" in immigration law. *See* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350; *see also Some States Dropping 'Dehumanizing' Terms for Immigrants*, WTTW NEWS (Nov. 26, 2021), https://news.wttw.com/2021/11/26/some-states-dropping-dehumanizing-terms-immigrants.

[117] Morshedi, *supra* note 113.

[118] *Id.*

[119] United States v. Virginia, 518 U.S. 515, 534 (1996).

[120] *Id.*

[121] *Virginia*, 518 U.S. at 533.

transgender individuals are held to be discriminating on the basis of gender, any future policy that bans transgender individuals from serving in the military must be substantially related to an important government interest with an exceedingly persuasive justification.[122] Intermediate scrutiny is a likely level of scrutiny to apply in future cases since any exclusion would likely be on the basis of gender and outdated gender stereotypes.[123] Further, lower court precedent has held that intermediate scrutiny applies to discrimination on sex, and synonymously applies to discrimination based on gender identification.[124]

Additionally, claiming unit cohesion or healthcare costs likely would not suffice unless the government could show that whatever the claimed interest is does not rely upon outdated gender stereotypes. A common justification for excluding both straight and queer women was unit cohesion, but that exclusion was later repealed.[125] Since excluding transgender individuals from the military would largely be based on the individual's gender, the policy would likely not be substantially related to an important government interest because of the Court's holding in *United States v. Virginia*.[126] Even though military readiness is an important government interest, the policy likely would not be substantially related because unit cohesion based on gender stereotypes has been held as not related enough to satisfy intermediate scrutiny.

Additionally, if the Second Amendment, the Militia Clauses, and 10 U.S.C. § 246 do grant a fundamental right to serve in the military, an infringement on any fundamental right is subject to strict scrutiny. Strict scrutiny review for violations of constitutional rights, such as the right to marry under the Equal Protection Clause or other fundamental rights, is a well-established

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[122] Morshedi, *supra* note 113.
[123] *Id.*
[124] Grimm v. Gloucester City Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020)
[125] Sandra Pike, *The Exclusion of Women from Combat: Is There a Legal Justification,* 24 UNIV. BALTIMORE L. FORUM 14, 18 (1993); 10 U.S.C. § 654 (repealed 2011).
[126] *Virginia*, 518 U.S. at 533.

precedent.[127] In order for something to be considered a fundamental right, it must be deeply rooted in the Nation's history and tradition.[128] The right to serve in the military is well established and deeply rooted in the Nation's history and tradition because the right is deeply rooted in the history of the Second Amendment (and therefore, the Nation's history). As a result, the Constitution protects the right to serve in the military as a fundamental right.[129] Therefore, any policy, order, or directive that infringes on this fundamental right must be narrowly tailored to a compelling governmental interest.[130] Given the present Court's conservative disposition, the Supreme Court would likely define the right to military service narrowly until the right was extinguished and the Court could then use rational basis review.

For example, the Court could narrowly define the right as a right for anyone to serve in the military, regardless of whether they have disqualifying medical conditions. In that specific situation, the right would not be deeply rooted in the Nation's history. People have been excluded for various disqualifying medical conditions since the creation of the modern-day military.[131] However, narrowly construing the right to the point that it no longer is deeply rooted in the Nation's history is a disingenuous conception of the argument actually being made. There are undoubtedly transgender individuals

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[127] *See generally* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that there is a fundamental right to marriage, and to deny it would be subversive to equality under the Fourteenth Amendment); Obergefell v. Hodges, 576 U.S. 644, 680–81 (2015) (holding further that there is a fundamental right to marriage for LGBTQIA+ couples); Meyer v. Nebraska, 262 U.S. 390, 402–403 (1923) (holding that parents have the fundamental right of custody and control of their children, specifically to teach their children whatever language they wanted).

[128] *See generally Obergefell*, 576 U.S. at 681 (defining the fundamental right of marriage broadly to encompass LGBTIA+ individuals); *cf.* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2284 (2022) (defining the right very narrowly to extinguish the fundamental right of abortion, therefore using rational basis review rather than strict scrutiny).

[129] *See* discussion *supra* Part III.B; *see also* Riehl, *supra* note 66, at 343–44.

[130] Morshedi, *supra* note 113.

[131] For example, asthma that requires treatment past age thirteen can disqualify an enlistee from the military. Caitlin O'Brien, *8 Surprising Medical Conditions that Could Bar You From Service,* ARMYTIMES (Apr. 9, 2021), https://www.armytimes.com/news/your-military/2021/04/09/8-surprising-medical-conditions-that-could-bar-you-from-service/.

that would be medically disqualified from the military for conditions unrelated to transitioning (such as individuals with food allergies, celiac disease, or motion sickness).[132] However, they still have the right to enlist, subject to any medical disqualifier. Military service, like most other fundamental rights, is not an absolute right.[133] Military service is, however, a fundamental right. Therefore, individuals cannot be excluded from serving without a policy, regulation, or directive that is narrowly tailored to a compelling government interest.

There is substantial history to support that the right to military service is in fact deeply rooted in the Nation's history, as discussed above in Parts III and IV. As a result, if the Court was to ever return to a liberal majority, the fundamental right of serving in the military would likely be subject to strict scrutiny when challenged in court. However, intermediate scrutiny, given lower court precedent, would provide the strongest basis for challenging.

VII. CONCLUSION

Even though President Biden has repealed the Trump administration's ban on transgender individuals from serving in the military,[134] the rights of transgender individuals are being stripped and decodified every day. As a result, former President Trump's ban on transgender individuals serving in the military will undoubtedly resurface during future administrations. The Department of Defense will likely continue to exclude certain groups from the military in the future, if given the chance. Since the Second Amendment, the Militia Clauses, and 10 U.S.C. § 246 collectively establish a constitutional right to military service, the Department of Defense must have explicit authorization to discriminate, as established in

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[132] *Id.*

[133] *See generally* Prince v. Massachusetts, 321 U.S. 158, 169–71 (1944) (holding that Massachusetts could interfere with the fundamental right of parental control over the upbringings of their children if there were other purposes at play, such as parents violating child labor laws when children engage in "street preaching").

[134] Military Service by Transgender Individuals, *supra* note 106.

Greene, since any regulation banning transgender individuals from military service infringes on a constitutional right.

Even if the regulation is promulgated pursuant to an explicit grant of authority, that does not insulate the regulation from legal challenges. Potential legal challenges that any future ban might face include challenges based on gender discrimination or challenges regarding violations of fundamental rights. Unfortunately, military bans on LGBTQIA+ are common, and bans such as those passed by former President Trump have a long history in the military. If the Department of Defense wants to limit the scope of the legal challenges that it might face if it promulgates a rule excluding groups of people from the military, it must promulgate that rule with an explicit grant of authority from Congress or the President. Even then, however, that policy is likely unconstitutional under intermediate scrutiny as an impermissible gender stereotype, or even unconstitutional under strict scrutiny as a violation of a fundamental right under a broad interpretation of the fundamental right to enlist in the military.