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# **Is It Too Late for the Federal Government to Reverse Course on How We Legally Recognize Gender?**

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**Departmental Honors Thesis  
The University of Tennessee at Chattanooga  
Accounting**

**Examination Date: March 19, 2019**

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## **ABSTRACT**

This paper focuses on the definitions and interpretations that govern the protections of transgender American citizens as defined by the Civil Rights Act as well as how the Trump Administration's agenda might impact the transgender community. Included in this paper is a study of historical events and case law that illustrate the protections heterosexual American citizens have compared to that of transgender Americans.

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## **INTRODUCTION**

Over the recent decades, efforts to move toward gender equity and increased acceptance for transgender persons has ebbed and flowed as the political pendulum has swung from right to left and back to the right again. In more recent years, gender and sex have become increasingly more difficult to categorize and legislate as more Americans are not identifying their gender to the anatomy of body parts with which they were born. The broad term for referring to these individuals who do not conform to the traditional expectations of their biological sex or whose expression of their gender does not fit into a singular category is gender non-conforming.

Currently, this topic of transgender issues has continued to generate increased attention. In 2018, President Donald Trump declared that he was considering a proposal to issue an Executive Order that would redefine gender as “male or female based on genitalia at birth” thereby legally eliminating the recognition of transgender persons. While the author of this paper is not attempting to endorse or oppose President Trump’s proposed Executive Order, there are questions as to whether such an order is viable or constitutional. This paper will attempt to address those questions.

## **SECTION I: HISTORY**

### **BACKGROUND OF TRANSGENDER ISSUES**

Over the decades, people have tended to use the terms sex and gender interchangeably even though the two terms are not the same. A person's sex is biological, it is based on the anatomy that makes up the reproductive system. Historically, our society has generally assumed that sex is binary and that every person is either male or female. Gender, on the other hand, is the psychological, behavioral, or cultural traits associated with an individual's sex.<sup>1</sup> Gender dysmorphia is a medical term used to describe those who identify as a different gender than their assigned sex at birth. An individual can be classified as one sex but identify as another gender making them transgender. While most transgender individuals are either a male or female at birth but strongly believe themselves to actually be of the opposite sex, there are some transgender individuals who do not identify as either male or female. Those individuals who do not identify in one of the typical categories are referred to as genderqueer, or non-binary. The non-binary is a category that acts as a catch-all for those gender identities that are not strictly masculine or feminine but rather could be a combination of the two or neither one.<sup>2</sup>

The precise population size of individuals who identify as transgender in the United States is not an easy statistic to measure. This difficulty arises largely from the fact that in the United States Census, there is not a section that asks about gender identity. There is only

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<sup>1</sup> *Gender*. [www.merriam-webster.com/dictionary/gender](http://www.merriam-webster.com/dictionary/gender).

<sup>2</sup> *Nonbinary*. [www.merriam-webster.com/dictionary/gender](http://www.merriam-webster.com/dictionary/gender).

a question pertaining to the sex of the person with the options being ‘male or female’.<sup>3</sup> To estimate the current transgender population in the United States there are more surveys being administered to attempt to collect transgender-inclusive gender-identity data. Based on these types of surveys, research suggests that about 1 in every 250 (0.4%) United States adults are transgender.<sup>4</sup> That is almost one million Americans that do not identify as being the same gender they were assigned at birth.

## **TREATMENT OF THE LGBTQ COMMUNITY**

Throughout the 1950s and 1960s the United States Federal Bureau of Investigation (FBI) kept lists of known homosexuals that included facts about who their friends were and places they frequented. These lists were used by federal, state, and local governments to shut down homosexually-oriented bars or parks, as well as arrest and expose, in the media, the people the governments found at those places.<sup>5</sup> Many cities would also conduct raids on neighborhoods, parks, restaurants, and stores to intimidate or get rid of the gay population in those areas. The local governments even went as far as making it illegal for people to wear clothing of the opposite gender. Universities would also expel professors and faculty who were suspected of being a homosexual.<sup>6</sup> These public displays of humiliation, assaults, and arrests caused many gay men and women to hide themselves or shield their authentic selves from their professional or work lives. Much of this secrecy still exists to this day for both

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<sup>3</sup> [https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018\\_02\\_questionnaire.pdf](https://www2.census.gov/programs-surveys/decennial/2020/program-management/memo-series/2020-memo-2018_02_questionnaire.pdf) U.S. Census Bureau (2018). U.S. Department of Commerce Economics and Statistics Administration 2018 Census Test.

<sup>4</sup> Meerwijk, E. L., & Sevelius, J. M. (2017). Transgender Population Size in the United States: A Meta-Regression of Population-Based Probability Samples. *American Journal of Public Health*, 107(2), e1-e8.

<sup>5</sup> Edsall, Nicholas (2003). *Toward Stonewall: Homosexuality and Society in the Modern Western World*. University of Virginia Press. Page 278

<sup>6</sup> Adam, Barry (1987). *The Rise of a Gay and Lesbian Movement*. G. K. Hall & Co. Page 59

homosexual and transgender persons, which makes identifying the number of people in these categories hard to count. In addition, it creates a misunderstanding of the homosexuality and transgender topics that is caused by the fear of the unknown. It is the belief of some researchers that many laws that target homosexual and transgender persons are not based on factual information but merely on the fear of what non-homosexual or non-transgender persons do not understand. This paper will attempt to address a few of those issues.



## **SECTION II: LANDMARK EVENTS**

### **STONEWALL INN REBELLION**

The start of the Congressional interest in transgender discrimination started out of a reaction to increasing activism that appeared in a series of protests across the nation.<sup>7</sup> In these protests, the protestors fought, often violently, for their voices to be heard by law makers. The most notable riot, often referred to as ‘the riot that sparked the gay revolution’, was the Stonewall Inn Rebellion in 1969.<sup>8</sup> The Stonewall Inn Rebellion started as a police raid that was ordered by the Bureau of Alcohol, Tobacco, and Firearms due to the Stonewall Inn not having a liquor license at the time. During this time, it was illegal for people to wear clothing that was associated with the opposite sex and since the Stonewall Inn was one of the only gay bars in New York City, there were many cross-dressing people at the bar on the night of the riot. The police started to round up the cross-dressing people to be arrested<sup>9</sup> while they let everyone else leave. Most of the people who were allowed to leave stayed outside the bar where a crowd slowly started to form. This crowd quickly became angry at the situation occurring inside the bar and began to lash out in violence. When the crowd’s anger escalated the fight within and around the bar, the police barricaded themselves and the several people they had detained inside the Stonewall Inn for their safety. Later in the night, the Tactical Patrol Force (TPF) of the New York City Police Department arrived to assist the

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<sup>7</sup> Greenblatt, Alan (2018). *Citizen Protests: Do Mass Demonstrations Lead to Policy Changes?* CQ Research <https://library.cqpress.com/cqresearcher/document.php?id=cqresre2018010500>; see also, <https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/>

<sup>8</sup> Carter, David. *Stonewall: The Riots That Sparked the Gay Revolution*. 1st ed. New York: St. Martin’s Press, 2004. Print.

<sup>9</sup> Cross-dressing people were arrested because ordinances that outlawed homosexuality often also prohibited cross-dressing.

police inside the bar. The TPF attempted to clear the streets outside of the Stonewall Inn, but the crowd continued to grow larger in number. Eventually, the streets were cleared of pedestrians. New York City officials sought to have the Stonewall Inn officially shut down, but it was not closed.<sup>10</sup>

After the Stonewall Inn Rebellion, the New York Police thought that they had heard the last of the Stonewall Inn riot until a tip was called in to The New York Times to inform them that there was a planned riot in Greenwich Village, that was to take place the night after the original riot.<sup>11</sup> Thousands of people gathered in the streets in front of the Stonewall Inn, which was open again for business, in support of the demonstrators from the night before. There were leaflets that were distributed that called for the mayor of New York City to investigate the “intolerable situation” from the events at the Stonewall Inn a day earlier.<sup>12</sup> In addition to the leaflets, the crowd became much more violent than the first night of the riot. Due to the amount of press coverage of the two-night riot, the Stonewall Inn violence quickly became nationally recognized for the gay community. The Stonewall Inn Rebellion is now seen as the tipping point in the gay community that started a gay revolution.

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<sup>10</sup> Carter, David (2004). *Stonewall: The Riots that Sparked the Gay Revolution*. St. Martin's Press.

<sup>11</sup> "Police Again Rout Village Youths: Outbreak by 400 Follows a Near-Riot Over Raid". *The New York Times*. June 30, 1969. p. 22.

<sup>12</sup> Teal, Donn (1971). *The Gay Militants*. St. Martin's Press; See also, Duberman, Martin (1993). *Stonewall*. Penguin Books.

### **SECTION III: LEGAL PROTECTIONS**

While many Americans may still either not agree with the concepts of homosexuality or with being transgender or non-binary, social movements and even scientific research have contributed to the increasing acceptance of the construct for recognizing that society must recognize certain sexual orientations or gender identities that we may not completely understand or agree with. While socially, many Americans may be working toward acceptance, the law offers a bit more of a mixed bag. This paper attempts to examine a few of the legal concepts that affect protections for persons with various sexual orientations and/or gender identity issues.

#### **THE CIVIL RIGHTS ACT**

The Civil Rights Act of 1964 was enacted in June of 1963, and it was signed by then United States President John F. Kennedy. President Kennedy's support for the legislation was largely because it gave "all Americans" the right to frequent public facilities in addition to having protection for the right to vote. The Civil Rights Act of 1964 sought to end the segregation of blacks and other minorities from white people in public places as well as prohibiting employment discrimination on the basis of religion, race, color, national origin, or sex.

Within the Civil Rights Act there are 11 "major features" or Titles that seek the equal treatment of all Americans. Title I banned the unequal voter registration requirements of black or other minorities compared to that of white voters. Title II made it illegal to discriminate on the basis of religion, race, color, or national origin in public facilities such as hotels and motels, restaurants, and theaters. Much like Title II, Title III prohibited the state

and municipal governments from refusing people access to public facilities on the basis of religion, race, color, or national origin. Title IV advocated for the end of segregated public schools and authorized the United States Attorney General to file suits to enforce the act. Title V expanded the Civil Rights Commission, with the addition of more rules, procedures, and powers, than was originally created in the Civil Rights Act of 1957. Title VI prohibited discrimination on the basis of religion, race, color, or national origin for programs and other activities that receive Federal financial assistance and funding. Title VII banned employment discrimination on the basis of religion, race, color, national origin, or sex. Title VIII required a collection of voter registrations as well as voting data in specific geographic areas. Title IX allowed for easier transfers of civil rights court cases from the state courts to the federal courts. Title X created the Community Relations Service that has the responsibility of assisting in disputes where discrimination is involved. Title XI gives a defendant the right to a jury trial if accused of criminal contempt in matters that arise under Title II, III, IV, V, VI, or VII of the Civil Rights Act.

## **TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**

Under Title VII the Civil Rights Act of 1964, the discrimination in areas of employment by covered employers on the basis of religion, race, color, national origin, or sex is prohibited. Title VII also prohibits the discrimination of an individual based on his or her associations with another individual of another religion, race, color, national origin, or sex,<sup>13</sup> although this type of discrimination can be difficult to prove, according to some courts.

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<sup>13</sup> Civil Rights Act of 1964 – CRA – Title VII – Equal Employment Opportunities – 42 US Code Chapter 21

For decades after enactment of Title VII, case law interpreted the law as prohibiting discrimination based on sex as relating to treating men and women differently in the workplace based on their being male or female. Title VII has also been construed to protect pregnant women as well as women who could become pregnant. It has been understood that sexual orientation and transgender status were not protected. This began to change in 1989 when Ann Hopkins sued her former employer, Price Waterhouse, after they declined to make her a partner in the firm because she did not conform to how they believed a woman should look and act.<sup>14</sup> In the Supreme Court's decision for Hopkins recognizing that Price Waterhouse failed to meet its burden of proving that the firm did not discriminate, the Court recognized that her "gender played a motivating part in an employment decision," and further introduced the idea that Price Waterhouse was using gender stereotypes in making its discriminatory decisions.<sup>15</sup> This case marked the first time the case law began to move into the area of recognizing and discouraging discrimination based on sex stereotyping.

More recently, the Equal Employment Opportunity Commission (EEOC) heard the case *Baldwin v. Foxx* in 2012. In this case, David Baldwin was employed as a Supervisory Air Traffic Control Specialist in Miami, Florida. He filed an EEOC complaint alleging discrimination after he was denied a permanent position as a Front-Line manager (FLM) in the Miami Tower (TRACON) facility.<sup>16</sup> Baldwin did not officially apply for the FLM position, but it was his understanding that all temporary FLMs (like him) were automatically considered for the permanent positions.<sup>17</sup> Baldwin argued that he was well-qualified for the

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<sup>14</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)

<sup>15</sup> *Id.* at 250.

<sup>16</sup> *Baldwin v. Foxx*, EEOC, Agency No. 2012-24738-FAA-03

<sup>17</sup> *Ibid.*

FLM position, but that he was not selected because he was gay. He noted that his supervisor made repeated negative comments related to Baldwin's homosexual status.

The EEOC stated in its discussion in pertinent part:

*When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination — whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.<sup>5</sup> In the case before us, we conclude that Complainant’s claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.<sup>18</sup>*

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<sup>18</sup> *Ibid.*

Taken to its logical conclusion, the reasoning set forth in *Price Waterhouse v. Hopkins* and *Baldwin v. Foxx* seems to lead to the conclusion that gender stereotyping would include not only sexual orientation but also transgender persons. In fact, it stretches credibility to imagine that it would not. The Sixth Circuit Court of Appeals seems to agree. In 2018, this court reviewed the case of *EEOC and Aimee Stephens v. R.G. and G.R. Harris Funeral Homes, Inc.* Stephens had been a funeral director for Harris for 6 years when she revealed that she was transgender and that she planned to transition from male to female, at which point her employment was terminated.<sup>19</sup> In the duration of her time at the funeral home, she used her then-legal name, William Anthony Beasley Stephens, and presented herself as a man. Thomas Rost, who owned 95% of the funeral home company, identified himself as a Christian follower who “[did] not endorse his employees’ beliefs or non-employment-related activities”.<sup>20</sup> While the funeral home was operated as a closely-held for-profit corporation it had no official religious affiliations or purpose in its articles of incorporation. The funeral home enforced a dress code for all of its employees. Public-facing male employees were required to wear a suit and tie while female public-facing employees were required to wear a skirt with a business jacket. The funeral home provided all of their client-interacting male employees with suits and ties for free in addition to replacing the suits and ties on an as needed basis. In addition, the funeral home provided full-time public-facing male employees with a clothing allowance of \$470 per year and part-time public-facing male employees \$235 per year.<sup>21</sup>

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<sup>19</sup> *EEOC and Aimee Stephens v. R.G. and G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6<sup>th</sup> Circuit, March 7, 2018)

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

On July 31, 2013, Stephens provided Rost with a letter that stated that Stephens has been struggling with a gender identity disorder (GID) for her entire life and she wanted to inform Rost that she had “decided to become the person that [her] mind already is.” The letter went on to state that she intended to undergo the sex reassignment surgery, from male to female, and that the first steps she had to take was to live and work full-time as a female for one full year. In the letter Stephens stated that she would return from a vacation, on August 26, 2013, dressed “in appropriate business attire” as her “true self,” Aimee Australia Stephens.<sup>22</sup> After Stephens gave Rost the letter she postponed her vacation while continuing to work for two weeks. Right before Stephens left for her scheduled vacation, Rost terminated her employment with the funeral home. Rost offered Stephens a severance agreement on the terms that she “agreed not to say anything or do anything.” Stephens declined the severance agreement.<sup>23</sup> As a self-identified Christian, Rost declared that he believes that the Bible teaches that a person’s sex is a gift from God and that he would be violating a command from God if he allowed a funeral home employee to “deny their sex” while representing the organization at work. Rost also believes he would be in violation of God’s commands if he allowed an employee to wear the uniform of the opposite sex while at work for the funeral home.<sup>24</sup>

Following the termination of employment, Stephens filed a sex-discrimination complaint with the Equal Employment Opportunity Commission (EEOC). Stephens alleged that the funeral home’s management terminated her employment with the explanation of “the public would [not] be accepting of [her] transition.”

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<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*



In its analysis on appeal, the Sixth Circuit Court of Appeals opined that the funeral home was guilty of discrimination under Title VII because “discrimination based on a failure to conform to stereotypical gender norms was no less prohibited under Title VII of the Civil Rights Act of 1964 than discrimination based on the biological differences between men and women. And no reason has been found to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. Thus, a transgender plaintiff (born male) who suffers adverse employment consequences after he began to express a more feminine appearance and manner on a regular basis could file an employment discrimination suit under Title VII because such discrimination would not have occurred but for the victim's sex. Title VII proscribes discrimination both against women who do not wear dresses or makeup and men who do. Under any circumstances, sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination.”<sup>25</sup>

In another case, *Glenn v. Brumby*, Vandiver Elizabeth Glenn was assigned the sex of male at birth, but Glenn states that since she went through puberty she mentally and emotionally felt that she was a female and not a male.<sup>26</sup> In 2005, Glenn was diagnosed with gender identity disorder (GID) and began the transition from male to female. Before Glenn could undergo the sex reassignment surgery, she was legally required to live as a female outside of the workplace for a year. In October 2005, while Glenn was presenting as a man and known by the name of Glenn Morrison, Glenn was hired by the Georgia General Assembly’s Office of Legislative Counsel (OLC)<sup>27</sup>.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Glenn v. Brumby*, 663 F.3d 1312 (2011)

<sup>27</sup> *Ibid.*

In 2006, Glenn notified Beth Yinger, Glenn's direct supervisor, that she was a transsexual and was transitioning from being a male to a female. Later in October 2006, the OLC employees were allowed to wear their Halloween costumes to work. Glenn, who at the time was still presenting as a male in appearance while at work, went to work on Halloween dressed as a female. When Sewell Brumby, the head of the OLC and person in-charge of OLC personnel decisions, saw Glenn's costume Brumby asked Glenn to leave the office by stating that Glenn's appearance was inappropriate for the workplace.<sup>28</sup> Brumby stated that Glenn was not appropriate in appearance due to her being dressed in clothing of the opposite sex. Brumby continued by stating that it is unnatural and was unacceptable to him (Brumby) to imagine a person in female clothing having male sexual organs under the female clothing. Following the Halloween costume events, Brumby had a meeting with Yinger where they discussed Glenn's appearance and Brumby was informed of Glenn's transitioning status.<sup>29</sup>

In 2007, Glenn notified Yinger that she was continuing with her transition and would be changing her legal name and presenting herself as a female in the workplace. Shortly after that meeting took place, Yinger shared with Brumby the information that Glenn had previously shared with Yinger regarding her gender transition. After learning this information, Brumby terminated Glenn's employment with OLC, stating that Glenn's transition was inappropriate, that it would cause disruption, uncomfortable situations, and moral issues for other employees at OLC.<sup>30</sup>

Following the termination, Glenn sued Brumby by alleging two claims of discrimination: one, due to her sex, that included Glenn identifying as a female and failing to

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

conform to the stereotypes; the second was that Brumby discriminated against Glenn due to her Gender Identity Dysphoria medical condition.<sup>31</sup>

The district court ruled in favor of Glenn on the claim of sex discrimination while the district court ruled in favor of Brumby on the claim of medical discrimination. The district court's reasoning for the mixed ruling was that in 2010, the legal guidance on whether transgender persons who were preparing for sex reassignment surgery were guaranteed protection under the law was uncertain. There was no definite legal precedence that mandated that the district court should find that that Brumby has engaged in illegal medical discrimination against Glenn.<sup>32</sup> The other question the district court had to answer was whether or not discriminating against a person based on their gender non-conformity constituted sex-based discrimination under the Equal Protection Clause.<sup>33</sup> In other words, the district court found Brumby guilty of sex discrimination because he terminated Glenn because she refused to conform to gender stereotypes. "The employee's first claim for relief was premised upon discrimination on the basis of sex. The employee contended that she did not conform to defendants' sex stereotypes regarding males because of her appearance and behavior at the time of her employment and because of her intended future appearance and behavior and was terminated for this reason. The court found that the employee's desire to present as a woman at work did not comport with the one defendant individual's stereotype of how a biological male should dress or behave."<sup>34</sup> The district court ruled in favor of Glenn because, according to the court, all persons are protected from gender stereotype

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<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

discrimination, regardless of whether they are transgender. Further, the court declared that persons should not be treated differently simply based upon gender stereotypes or their nonconformity with such stereotypes.<sup>35</sup> The court noted that this case was not a Title VII case<sup>36</sup>, but if it were, the evidence was clear that Brumby terminated Glenn based upon Glenn's gender-nonconformity, and in doing so would have been an illegal violation of the law.<sup>37</sup>

In yet another case, *Evans v. Georgia Regional Hospital*,<sup>38</sup> Jameka Evans (hereinafter "Evans") was employed as a security officer at Georgia Regional Hospital from August 1, 2012, until she "voluntarily" left on October 11, 2013. Evans filed a complaint against the Hospital, Chief Charles Moss, Lisa Clark, and Jamekia Powers (hereinafter "Powers") claiming employment discrimination under Title VII of the Civil Rights Act. While in the employment of the Hospital, Evans states that she was denied equal pay and/or equal work, harassed by fellow employees, and physically assaulted and battered.<sup>39</sup> Evans noted that she was a gay female. She did not advertise her sexuality, but she did identify as a male, which included dressing in a male uniform and wearing a short male haircut.<sup>40</sup>

Powers, the senior human resources manager, had never met Evans before the harassment began nor was she aware that Evans identified as male. Nevertheless, Evans argued that she was subjected to a hostile work environment due to her gay female status not

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<sup>35</sup> *Ibid.*

<sup>36</sup> This was not a Title VII case because the plaintiff filed her complaint as a Constitutional complaint alleging her employer had denied her Equal Protection rights guaranteed her under the Fourteenth Amendment. She did not file the complaint as a Title VII claim.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (2017)

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

conforming with the employer's idea of gender stereotypes.<sup>41</sup> Evidence of the employer's intentions to create a hostile work environment and/or terminate Evans's employment were found in internal e-mails. After Evans initiated an investigation into her employer's violation of regulations and policies, Powers asked Evans about her sexuality and gender identity.<sup>42</sup> As a result of Powers' inquiry, Evans was led to infer that the harassment was based on her sexuality.<sup>43</sup> Evans also claimed that she experienced more harassment and retaliation after she met with human resources about Moss's discriminatory behavior. Attached to Evans's complaint was a "Record of Incidents" that reported that a less qualified individual was appointed as Evans's direct supervisor, she experienced issues with her work scheduling, and changes in shifts. Evans also alleged she was treated rudely on multiple occasions, and that her equipment was tampered with.<sup>44</sup>

A magistrate judge ruled against Evans, declaring that Title VII was never intended to protect people from discrimination based on sexual orientation or gender stereotypes.<sup>45</sup> What is important to note from this case is that, on appeal, the Eleventh Circuit Court of Appeals asserted that "discrimination based on gender-nonconformity is actionable."<sup>46</sup> While the court recognized this type of discrimination IS actionable, the court further opined

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<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> While this result may seem surprising considering much of the discussion in this paper, it may be important to note two items here. First, magistrates are often different from other judges in that they typically hear more basic cases in limited areas. The magistrate who authored the opinion in this case may not have been well-versed in this area of law. Second, the Eleventh Circuit tends to be far more conservative than many other circuits, so the magistrate who authored the lower-level opinion may not have just been ill-informed about this area of law, but may also have had personal ideas that made reaching an unbiased conclusion difficult.

<sup>46</sup> *Ibid.*

that in the present case, Evans had not presented enough evidence to prove that discrimination had occurred in this particular instance.<sup>47</sup>

## **TITLE IX OF THE EDUCATION AMENDMENTS OF 1972**

Under Title IX of the Education Amendment of 1972, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>48</sup> The Office of Civil Rights enforces this law, and there have been various interpretations of this provision of the law as different Presidential administrations have taken charge in the White House. Initially, Title IX was widely applied to athletics so that schools from K-12 to post-secondary institutions that received any Federal funds at all were required to ensure that male and female students had equal opportunities to participate in athletics. How “equal opportunities” is defined continues to evolve 47 years after the enactment of Title IX.

Over the decades, equal opportunities for male and female students has been legally interpreted to also require access to all extra-curricular activities as well as ensuring that all victims of alleged sexual assault or domestic abuse feel safe to attend classes and other school activities. What continues to raise questions is whether Title IX merely protects persons who are male and female at birth, or whether it also protects transgender persons. The Federal case seems to indicate that Title IX does extend protection not only on the basis of sex, but also on the basis of gender identity.

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<sup>47</sup> *Ibid.*

<sup>48</sup> 20 U.S.C.A. §1681 ET.SEQ.

For example, in *Whitaker v. Kenosha Unified School District*, in 2016, a transgender boy named Ash Whitaker was denied the right to use the boys' restroom because he had been born a girl. Consequently, he sued the Kenosha Unified School District for the right to the restroom that conformed to his gender identity.<sup>49</sup> This district court ruled in Whitaker's favor, and the school district appealed. The Court of Appeals unanimously upheld the district court's ruling declaring that "a policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX."<sup>50</sup> In *Evancho v. Pine-Richland School District*, transgender students were required to use bathrooms that were either single-user bathrooms or those that matched the students' sex at birth.<sup>51</sup> As in the earlier case, the court ruled that this restriction affecting only transgender students was a violation of Title IX. The court opined that Title IX prohibits discrimination based on sex in the "provision of educational programs funded by or with the assistance of the Federal government."<sup>52</sup> To establish a *prima facie* case of discrimination under Title IX, a plaintiff must allege:

- (1) that he or she was subjected to discrimination in an educational program,
- (2) that the program receives Federal assistance, and
- (3) that the discrimination was on the basis of sex."<sup>53</sup>

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<sup>49</sup> *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 2016 U.S. Dist. LEXIS 136940 (United States District Court for the Eastern District of Wisconsin, October 3, 2016, Filed)

<sup>50</sup> *Ibid.*

<sup>51</sup> *Evancho v. Pine-Richland*, 237 F. Supp,3d 267 (2017)

<sup>52</sup> 20 U.S.C.S. § 1681(a)

<sup>53</sup> *Evancho v. Pine-Richland*, 237 F. Supp,3d 267 (2017)

The court declared that “use by students of school restrooms is part and parcel of the provision of educational services covered by Title IX. By formal regulation, the Department of Education has stated that segregating school restroom and locker room/shower room facilities based on ‘sex’ is not prohibited by Title IX so long as those facilities are fundamentally equal.

The Trump Administration’s proposed change to Title IX would limit the interpretation of “on the basis of sex” to biologically male and female individuals. Over the years the interpretation of the Title IX law has, for the most part, included transgender persons under its protection. If the Trump Administration’s proposed changes were to go into effect, it would be legal to discriminate against transgender persons, absent judicial review of the proposed changes by the courts. Previously stated court cases show that discrimination against transgender individuals occurs too often. When this discrimination occurs, those individuals deserve the right to fair and equal protection just like non-transgender persons.

## **EQUALITY ACT**

In the wake of the 1974 Stonewall Inn Rebellion, the United States Representatives created the Equality Act that sought to amend the Civil Rights Act of 1964. The 1974 revision would have included prohibiting the discrimination on the basis of gender identity and sexual orientation in employment opportunities, federally assisted programs, education, and public accommodations. The Equality Act Bill was given to the House Committee of the Judiciary in June of 1974 where it died. In 2017, the Equality Act was reintroduced in the House of Representatives. This bill defines the term ‘sex’ to include sexual orientation or



gender identity. The bill includes definitions for ‘sexual orientation’ as homosexuality, heterosexuality, or bisexuality; and ‘gender identity’ as gender-related identity, mannerisms, appearance, or characteristics, regardless of the individual’s designated sex at birth.

## **SECTION IV: ADMINISTRATIVE RULINGS:**

### **TRUMP ADMINISTRATION IMPACT**

In United States Federal law, individuals are protected from discrimination and harassment based on protected classes that include religion, race, color, national origin, and sex. Throughout the years, presidents have signed executive orders that amend and extend protections for individuals against discrimination and harassment. In 1998, then President Clinton amended President Nixon's Executive Order from 1969<sup>54</sup> to include sexual orientation<sup>55</sup>. Then again in 2014, then President Obama added gender identity<sup>56</sup> to the growing list. However, in March of 2017 the Trump Administration announced that they would be rolling back some of the major components of President Obama's workplace protections for the lesbian, gay, bisexual, and transgender (LGBT) communities. In addition, the roll back removed efforts that went toward the collection of LGBT statistics in the United States. With the decrease in statistical collections, the United States Census Bureau removed questions from the 2020 Census and the American Community Survey that would have asked about gender identity and sexual orientation<sup>57</sup>. The Trump Administration has nothing to gain by retracting protections from individuals nor by reducing efforts to advance statistical knowledge.

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<sup>54</sup> Executive Order. No. 11478, 1969.

<sup>55</sup> Executive Order. No. 13087, 1998.

<sup>56</sup> Executive Order. No. 13672, 2014.

<sup>57</sup> Wang, Hansi Lo. "U.S. Census To Leave Sexual Orientation, Gender Identity Questions Off New Surveys." *NPR*, NPR, 29 Mar. 2017.

In 2016, the Obama Administration altered existing policies and practices in addition to issuing new policies and practices that would be used as guidance, to schools and universities all across the United States, in order to clarify how Title IX also protected transgender students the same as non-transgender students. In 2018, the Trump Administration proposed changes to Title IX that would alter how the law would be interpreted by redefining transgender peoples out of existence in addition to withdrawing the guidance the Obama administration provided in 2016. Currently, Title IX prevents discrimination on the basis of sex but with the proposed changes to Title IX “sex” would be limited to biologically male and female individuals. This change would exclude any individual who identifies as anything other than what they were assigned at birth or any individuals who are transgender by way of cross-dressing and/or the sex reassignment surgery.

Throughout President Trump’s presidential term, he has made it clear that he intends to “Make America Great Again” for all Americans. However, his actions towards the transgender community make it seem as though he only wants to make America great for certain Americans. With the reduction of protections against discrimination towards transgender individuals, the Trump Administration is not only making transgender citizens worry about their legal protections, but it may be challenging established common law. President Trump’s proposal for transgender persons to identify with the sex given to them at birth may conflict with both years of case law as well as years of science. Is the current Trump Administration demonstrating a pattern of discrimination against transgender persons as more of a political agenda than a policy agenda?

## TRANSGENDER MILITARY BAN

In August 2017, President Trump signed a directive that would prevent transgender people from becoming military recruits.<sup>58</sup> This policy would also prevent the military from paying for gender-affirming surgeries and procedures with the exception of “protecting the health” of someone who has previously begun the transition process. The Pentagon has stated that it would pay the medical expenses for these individuals. The main reason why President Trump has decided to ban transgender military personnel “in any capacity” is due to the American forces not being able to financially afford the “tremendous medical costs and disruption” of the transgender military service members.<sup>59</sup> However, the *Scientific American* has published results from studies that have found that the costs associated with transgender military service members would be “minimal”.<sup>60</sup> Prior to President Trump signing the directive to put the transgender military ban into effect, Trump announced his intentions via Twitter. The Pentagon had stated that President Trump’s Twitter announcements could have the potential for lawsuits down the line.<sup>61</sup>

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<sup>58</sup> <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security/>, August 25, 2017.

<sup>59</sup> Davis, Julie Hirschfeld (July 26, 2017). "Trump Says Transgender People Will Not Be Allowed in the Military". *The New York Times*.

<sup>60</sup> Joseph, STAT, Andrew. "Cost of Medical Care for Transgender Service Members Would Be Minimal, Studies Show". *Scientific American*.

<sup>61</sup> Cooper, Helene (July 27, 2017). "Transgender People Can Still Serve for Now, U.S. Military Says". *The New York Times*.



**Donald J. Trump**

✓ [@realDonaldTrump](#)

After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow.....

114K  
[8:55 AM - Jul 26, 2017](#)

....Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming.....

124K  
[9:04 AM - Jul 26, 2017](#)

....victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you

128K  
[9:08 AM - Jul 26, 2017](#)

Just as the Pentagon predicted, President Trump’s policy change was met with conflicting opinions and ultimately legal challenges. In the court case *Doe v. Trump*, the court ruled to prohibit the enforcement of the transgender military ban. The judge ruled in the plaintiffs’ favor stating that “all of the reasons proffered by the President for excluding transgender individuals from the military in this case were not merely unsupported, but were actually *contradicted* by the studies, conclusions and judgment of the military itself”.<sup>62</sup> By banning a specific group of individuals from serving in and being employed by the military, President Trump is directly discriminating against those individuals.

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<sup>62</sup> Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.C. 2017).

## **CONCLUSION**

Regardless of whether President Trump and his administration are supporters of the transgender community or not, the issue of transgender rights (and the accompanying issue of homosexual rights) is of growing concern across many sectors of the American landscape. Even Americans who are not transgender or homosexual have loved ones or friends who are transgender or homosexual, so an increasing segment of the population appears to be accepting of trans persons and homosexual people. More importantly, this emergent societal acceptance has been accompanied by expanded protection in the Federal courts. Consequently, any Federal legislation to deny basic rights to transgender persons will continue to face serious Federal legal scrutiny. Moreover, while it has not been addressed in this paper, it should be noted that state laws that attempt to limit transgender rights have frequently been met with serious commercial consequences for these states when major organizations and conferences boycott states with these types of laws.

Admittedly, with only an estimated 1 out of 250 persons (or .4%) being transgender may seem like a nominal portion of the overall population, chances are that everyone will have a family member or loved one who falls into this category at one time or another. While taxpayers may argue that their tax dollars should (understandably) not be used to help people are transgender, especially when they comprise a small sector of the population, there may be much more at stake. Why? Well, as more states undertake legislation that is perceived to be discriminatory to transgender persons, large organizations in the entertainment, travel, sports and convention industries are protesting these laws by refusing to hold major events in these states. The economic impact of these boycotts can affect small

businesses, large business and tax revenues for the states in questions, so this issue has the potential to affect even those who are never otherwise personally affected.

It is clear that there is still inequality in the Federal laws that allow for legal discrimination towards a large group of individuals. The likelihood that more Americans identify as transgender in the future years is likely to increase, making this a growing topic of concern. The developments and alterations in how the Federal government addresses this issue of discrimination towards transgender individuals can only come from new court cases, changes in Federal laws and policies, and time. There will likely always be conflicting opinions, but for the overall well-being of our nation and society, we should work together to try and find the best solutions for all of us.

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