



What the administration's shifting arguments against transgender military service reveal

BY DIANE MAZUR, OPINION CONTRIBUTOR — 12/24/18 07:30 PM EST

There's a new twist in the Trump administration's effort to stop transgender Americans from serving in the military. In a Dec. 10 hearing before the D.C. Court of Appeals, a Justice Department lawyer highlighted information about the number of transgender troops serving—about 9,000, based on survey answers from active-duty members.

One would think this an odd way to open the argument, because it shows the significant contribution transgender Americans are making in our defense, despite efforts to demean their service. A lot of people serving in uniform will be affected by whether federal courts let the ban take effect.

But then the government pivoted to a smaller number—the 937 transgender service members who have come forward to begin the rigorous administrative and medical process, set up more than two years ago, to qualify to serve in a gender consistent with their gender identity. But this emphasis is odd too. In 2017, Republicans in the House pushed a bill to ban transgender service based on the argument that too many people would want to transition gender, and that this was too disruptive and too expensive. Research disproved their claims—and they lost the vote anyway—but why emphasize now that relatively few people had, at least so far, sought to transition gender?

The Trump administration's new tack was to argue that this relatively low number to date meant that the ban wasn't even a ban, and so courts should allow the new policy crafted by Defense Secretary Jim Mattis to go into effect. The government argued that Mattis had actually eased Trump's tweeted ban, and so the injunctions protecting trans troops were no longer justified.

It wasn't really a ban, so went the argument, because the Trump/Mattis plan said that people who identify as transgender can serve provided they don't have gender dysphoria (the medical term for divergence between birth sex and gender identity) and they agree to serve for the duration in birth sex. The government's pitch was, in essence, "Look at the thousands of transgender troops who are happy serving in birth gender. They won't mind if new policy prohibits gender transition." (One of the other judges on the panel reasonably noted that it seemed a contradiction in terms to state that transgender people were not impacted by a ban on gender transition.)

This new argument ignores, of course, why there might be some daylight between the number of service members who identify as transgender and the number who seek to transition gender. Not everyone will immediately take those legal and medical steps. Reasons could vary—fear of discrimination, career concerns, a desire to wait until a later time, or uncertainty about whether gender transition is the right path for them.

"Whenever you see shifting justifications and contradictory rationales like this, that's a clear sign that the real reason is a bare desire to discriminate. It's the contradiction itself that is so revealing."

But this veer in how the government chose to justify a return to a ban caught the attention of the conservative judge on the panel, Judge Stephen F. Williams, a Reagan-era appointee. He battled for more than 10 minutes (an eternity in oral argument time) with the plaintiffs' lawyer, pushing her to concede that the 90 percent of transgender troops who had not yet come forward were unaffected and welcome to serve. Therefore, he insisted, the policy was far different from Trump's original direction, and so the original injunctions should be dissolved. She would not concede, much to his frustration.

But in the end, what difference does it make what percentage of people who identify as transgender wind up transitioning gender? Whether 0 percent or 100 percent transition gender, the following three facts remain the same.

First, the Trump/Mattis policy is a ban on a defining characteristic of transgender people, not an even-handed regulation of medical fitness. On the day the ban takes effect, no one will ever again be able to come forward to transition gender. All will be required to serve in a gender with which they do not identify, for as long as they serve. When you ban gender transition, that is a proxy for banning transgender people, effectively forcing them to give up their transgender identity as a condition of service, or at least a means to keep them silent. In other words, a new "don't ask, don't tell."

Second, transgender troops will be subject to separate standards that apply only to them, even under the rosy spin offered by the government. Transgender personnel will be the only military personnel denied their statutory entitlement to proper medical care as determined by military doctors, and they will serve under a policy that stigmatizes their contribution to our defense.

Third, the government has yet to produce any specific evidence that transgender service has undermined readiness during the now two-and-a-half years of inclusive policy. In fact, military leaders agree that there have been no problems with unit cohesion whatsoever. The only way Mattis has defended Trump's tweets is by issuing a report that speculates how open service could undermine readiness.

Apparently, according to the Justice Department, transgender troops are a problem no matter what the facts say. If too many of them need to transition gender, that's a problem. If too few of them need to transition gender, that's a problem too.

Whenever you see shifting justifications and contradictory rationales like this, that's a clear sign that the real reason is a bare desire to discriminate. It's the contradiction itself that is so revealing.

*Diane Mazur is Legal Research Director at the Palm Center and served previously as an Air Force officer and law professor. Her book *A More Perfect Military: How the Constitution Can Make Our Military Stronger* was published by Oxford University Press in 2010.*