



Women's Human Rights Campaign

March 17, 2021

Michael Carvajal, Director,
Bureau of Prisons
320 First St., NW
Washington, DC 20534

RE: Executive Order 13988 on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation

Dear Director Carvajal:

As Chair of the Women's Human Rights Campaign USA, I am writing to express my organization's concerns regarding President Biden's Executive Order 13988, 86 C.F.R. 7023 (2021), on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, and ask you to implement it in such a way that does not conflict with the sex-based rights of women and girls.

The Women's Human Rights Campaign (WHRC) is a global nonpartisan group of volunteer women dedicated to protecting women's sex-based rights, and WHRC USA is the U.S. chapter of WHRC. Our volunteers include academics, writers, organizers, activists, lawyers, and health practitioners. The Declaration on Women's Sex-Based Rights was created by the founders of WHRC to lobby nations to maintain language protecting women and girls on the basis of sex rather than "gender" or "gender identity". The Declaration has over over 2,000 US signatories and more than 15,000 worldwide.

As you conduct your review ordered by President Biden, WHRC USA requests that the Bureau of Prisons (BOP) (both in its own capacity and as a leader for non-federal institutions) determine that EO 13988 should not be applied to BOP operations or, if BOP is not prepared to make that determination, that it pause any proposed changes to regulations, policies, and guidances pending a thorough impact assessment. The use of "gender identity" in EO 13988, rather than "sex", should not be applied to BOP operations, either for inmate housing placement, for hiring of staff in "contact positions" or for assignment of staff for searching/observing inmates.

THE EXECUTIVE ORDER

EO 13988 requires BOP, along with other federal agencies, to conduct a review of your agency's regulations, rules, policies, guidance, actions, etc. to carry out the EO's policy of incorporating "gender identity" into BOP's policies on sex discrimination.

In conducting this review and developing plans going forward, the EO requires you to

take into account whether the laws BOP administers “do not contain sufficient indications to the contrary.” (Section 1.) Further, the EO requires that the plan you develop is “consistent with applicable law” (Section 2(d)) and that Order will “be implemented consistent with applicable law.” (Section 4(b)) As BOP is part of the Department of Justice and as the EO requires the agencies to perform their review and planning “in consultation with the Attorney General,”

Additionally, as other federal agencies (such as the Department of Education) may, via funding mechanisms, have an impact on whether the EO applies to non-federal incarceration facilities, we urge BOP to take a leadership role in those determinations as well.

AREAS OF CONCERN FOR BOP TO CONSIDER

BOP has three broad areas of concern in relation to the EO:

- the housing of biologically male inmates with female inmates, based on “gender identity,”
- the hiring of biologically male employees for jobs for which there is a sex-based bona fide occupational qualification (BFOQ) reserved for female employees,
- requiring your female employees to perform searches on biologically male inmates per their requests based on “gender identity.”

THE LAW

The law precludes BOP from relying on “gender identity” rather than “sex” for all three categories of concern identified above.

The Eighth Amendment

The female inmates in your custody are protected under the Eighth Amendment of the U.S. Constitution. Their Eighth Amendment rights may be violated should BOP apply the policy of EO 13988 to determinations regarding housing of biologically male inmates and to hiring of biologically male employees to positions for which being female is a BFOQ.

Prison officials can be found liable under the Eighth Amendment when the official knows of and disregards an excessive risk to inmate health or safety. Farmer v. Brennan, 511 U.S. 825 (1994). Based on the data in the following sections, prison officials are, and will be aware, of the dangers to female inmate health and safety were they to be housed with male inmates.

“A condition which has not caused any present injury may still violate the Eighth Amendment if it ‘is sure or very likely to cause serious illness and needless suffering.’ Helling v. McKinney, 113 S.Ct. 2475 (1993)...In these situations a Court must then determine whether society considers this risk to be so serious that it violates contemporary standards of decency.” Women Prisoners v. District of Columbia, 877 F.Supp. 534 (D.D.C. 1994). Housing biological males in sleeping quarters with women

and requiring women to share shower and bathroom facilities with men could itself be considered an invasion of bodily privacy rising to the level of an Eighth Amendment violation. In one case, even the mere presence of male guards who failed to announce their presence in the living areas of women prisoners contributed to an Eighth Amendment violation. As did “routine invasions of bodily privacy, such as men peering into women’s cells.” Id.

Even clothed body searches by the opposite sex have been found to violate the Eighth Amendment where the searches led the female inmates to experience severe emotional harm. In one particular prison, where 85% of the inmates had experienced physical abuse by men during their lives, and the superintendent was aware of those statistics and that pat-downs could lead to trauma in this prison population, the court found the search policy to be “wanton and unnecessary” and held it unconstitutional. Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993). BOP cannot be unaware of the history of sexual abuse and violence experienced by its female inmates. A 2012 study submitted to the Bureau of Justice Assistance at DOJ found that 86% of women in jail had experienced “sexual violence” prior to incarceration. Knowing reports such as this, BOP must be aware of the extraordinary high percentage of prior abuse and sexual violence experienced by women in its care. Once BOP is aware of this, placing biologically male inmates in female sleeping quarters, in female shower and bathroom facilities and having biologically male staff perform physically or visually invasive tasks involving female inmates are all potential Eighth Amendment violations.

Eighth Amendment violations do not require physical pain. Furman v. Georgia, 408 U.S. 238 (1972) established four basic principles in determining whether punishment should be considered cruel or unusual.

Punishment which *degrades human dignity* can be violative of the Eighth Amendment. Forcing women to shower, urinate, defecate and sleep near men is a degradation of their dignity. This is particularly true given the extremely high percentage of incarcerated women who have experienced sexual violence as discussed above. Further, as discussed below, women who are incarcerated with males experience sexual harassment when they are housed together. Experiencing sexual harassment, or even the fear of sexual harassment, for merely engaging in routine hygiene matters is a degradation of human dignity.

Further, action which “arbitrarily inflicts a severe punishment” is also problematic under the Eighth Amendment. If women are subjected to exposure to males in prison simply by happenstance, this bears no relationship to their crimes. It is inflicted on these women for circumstances beyond their state punishment. This is arbitrary additional punishment of experiencing fear and anxiety and being subjected to potential sexual harassment or assault.

Punishment that would be rejected by society is also a factor. A recent poll was conducted which asked whether respondents agreed or disagreed with this statement: “Someone who was born male but identifies as a woman commits a crime and is

sentenced to prison should serve their sentence in a women's prison." Of the respondents, almost 20% were unsure, but 48% disagreed with this statement while less than 35% agreed. So of the 80% who responded well over half disagreed. When the question was adjusted to ask about sex offenders or domestic abusers, over 77% disagreed that those males should be housed in women's prisons.

For more on the question of what society finds unacceptable, please see below discussion on the United Nations Standards and the Geneva Conventions, both of which mandate separating men and women in confinement and which require searches be conducted by the same sex. If BOP has a confinement policy inconsistent with the UN Standards and Geneva Conventions and which is unsupported by a majority of the US public, it is not managing confinement (the punishment) in a manner which is accepted by society.

- The last principle goes to "necessity." It is not "necessary" to house biological males - even those who identify as women - in women's prison facilities. If the concern is the safety of these males, they can be housed separate from other males in a unit with other vulnerable men. Affirming the subjective "gender identity" of these men by placing them with traumatized and vulnerable women is not a necessity. Women are not required to be further punished (by having their privacy invaded, by being subjected to sexual harassment and assault) so these men can feel affirmed in their self-declared "gender identity". There are other ways to protect those men which do not include violating women's Eighth Amendment rights.

A few other comments on Eighth Amendment issues: Prison officials have a duty to take reasonable measure to guarantee the safety of the inmates. Farmer v. Brennan, 511 U.S. 825 (1994). This includes protecting prisoners from violence at the hands of other prisoners. Id. at 828, 833. Where there is an excessive risk to inmate health or safety known to prison officials and it is disregarded, this is a deliberate indifference to inmate safety and can constitute an Eighth Amendment violation. "While Estelle establishes that deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purposes of causing harm or with knowledge that harm will result." Id. at 835, citing Estelle v. Gamble, 429 U.S. 97 (1976). Given the data provided below, BOP and its officials are aware that placing males in women's prisons is an excessive risk to the mental health and well being of female inmates and is a threat to their physical safety.

In terms of searches being conducted by male staff, BOP opens itself up to challenges under the principle that "Sexual harassment or abuse of an inmate by a corrections officer is a violation of the Eighth Amendment." Wood v. Beauclair, 692 F.3d 1041, 1046 (9th Cir. 2012).

The Penumbra of Privacy

Some of the above violations of the Eighth Amendment would also be considered to be intrusions on the penumbra of privacy emitting from the Bill of Rights and the First,

Third, Fourth, Fifth and Ninth Amendments and developed in Griswold v. Connecticut, 381 U.S. 479 (1965) and the subsequent line of cases. There is no greater privacy than the privacy of and within one's own body. To apply EO 13988 in an incarceration context results in unconstitutional intrusions of privacy of female bodies. To permit biological males to conduct intrusive searches on females and to require women to share sleeping quarters, showers, and toilet facilities with males is an intrusion on privacy sufficient to rise to a constitutional violation.

Employment laws

Hostile work environment claims by your female staff forced to search male inmates

In regard to your staff: You have female staff who are tasked with contact with inmates, including visual observation, pat downs and strip searches. To permit a male inmate to request, and be granted, the right to be searched by female staff is a violation of your staff's right to be free of a discriminatory hostile work environment on the basis of sex under Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. While your staff is hired with an understanding of what the job entails, your female staff is not expected to withstand sexual harassment and exposure to erections during the course of their job.

Inability to Use BFOQ to limit hiring of some staff positions in women's facilities to female applicants.

US courts have found that some jobs, particularly in women's prisons, could be permitted to be occupied only by female staff. For example, the Seventh Circuit has found that male guards might harm female prisoners' rehabilitation. Torres v. Wisconsin Dept. of Health and Human Services, 859 F.2d 1523 (7th Cir. 1988). A similar result occurred in the Sixth Circuit despite males seeking to be employed in women's prisons. Everson v. Michigan Dept of Corrections, 391 F.3d 737 (6th Cir. 2004).

Application of EO 13988 to hiring and job assignment decisions within BOP will eliminate BOP's ability to utilize sex as a BFOQ in identifying some positions to be reserved for men or women. Aside from this potentially causing harm and disruption within the facilities, it is also likely to lead to more litigation against BOP with claims of harassment, abuse or failure to protect following more frequent contact between prisoners and guards of different sexes.

The United Nations Standard Minimum Rules ("the Mandela Rules")

United Nations Standard Minimum Rules speak both to the housing of inmates by sex and to the searching of inmates by sex. Were BOP to apply the policy of EO 13988 to its actions in housing inmates and staffing its facilities, the United States would be in violation of these United Nations Rules.

Housing

Rule 11 *“The different categories of prisoners shall be kept in separate institutions or parts of institutions, taking account of their sex, ... thus:*

(a) Men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women, the whole of the premises allocated to women shall be entirely separate.”

This rule is based on the reality of sex differences between men and women. It is a violation of this United Nations Rule to force female inmates to be housed with male inmates. There is no exception provided for male inmates who “feel” or “believe” themselves to be women contrary to biological reality. They remain males and, as such, under United Nations Rules, women are entitled to be protected from them.

Given the leadership role the United States takes at the United Nations, it would be extraordinary for its official government policy to be contrary to these Rules based solely on self-identification by male inmates.

Intrusive searching of inmates

Rule 52 *“... Intrusive searches shall be conducted in private and by trained staff of the same sex as the prisoner.”*

Were BOP to hire males for staff positions which - due to the nature of contact with inmates - previously had been reserved for female applicants and employees, it could easily find itself in violation of this Rule. Males who “identify” as women could be in positions to engage in intrusive searches of female inmates. Again, to establish official United States policy in violation of the standards would be an extraordinary position to take.

Geneva Convention

In addition to application of EO 13988 violating UN Standard Rules, it also violates multiple provisions under the 1949 Geneva Conventions. Women held in wartime conditions, including as prisoners of war, are entitled to be housed separate from male prisoners, to have access to hygiene/sanitary conveniences separate from male prisoners and to be supervised by female guards. There is no way to apply EO 13988 in the incarceration context and still maintain consistency with the Geneva Conventions. While it may be true that these provisions are not directly applicable outside of armed conflict and to a country incarcerating its own civilian population, for the United States to have an official government policy of treating its incarcerated female citizens and residents worse than the terms of the Geneva Convention would be extraordinary and an abdication of its leadership on the world stage.

The Articles covering prisoners of war include:

Article 25: “...In any camps in which women prisoners of war, as well as men, are accommodated, separate dormitories shall be provided for them.”

Article 29: [regarding sanitary measures] “...In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.”

Article 97: “...Women prisoners of war undergoing disciplinary punishment shall be confined in separate quarters from male prisoners of war and shall be under the immediate supervision of women.”

Article 108: “...A woman prisoner of war on whom such a sentence has been pronounced shall be confined in separate quarters and shall be under the supervision of women.”

The Articles covering civilian persons in time of war include:

Article 76: “Women shall be confined in separate quarters and shall be under the direct supervision of women.”

Article 83: “Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.”

Article 124: “Women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women.”

It would be shocking if wartime female prisoners and internees are entitled to a higher level of protective care in custody away from males, with separate sleeping and bath accommodations, than the female United States citizens and residents in the care of BOP. Further, that even the 1949 Geneva Conventions contained these dictates indicate that it is a universally recognized standard of decency to house women separately from males.

SOCIOLOGICAL CONSIDERATIONS

In addition to the legal constraints which preclude housing men in women’s facilities, demographic characteristics, patterns of offending, and trends among male offenders “identifying” as female also indicate risks for women prisoners. These risks are so obvious, so serious and so likely to occur that it puts BOP on notice for potential Eighth Amendment violations discussed above.

Demographic Characteristics

There are significant differences between male and female prison populations and these have remained stable over time. Most incarcerated individuals are male and men commit most of the violent crime. Women comprised just 7% of the federal prison population in

2019 and a majority of these were convicted of drug trafficking offenses (59%).

In contrast, men committed 100% of the sexual abuse crimes by prisoners held in federal prison and 98% of the state prisoners sentenced for rape or sexual assault.

Of those in state prison, men committed 94% of the murder and non-negligent homicide. In federal prisons, of those sentenced for homicide, 93% were men. In federal prisons, 19.6% of men were convicted of weapons charges compared with 4.7% of women.

With the potential for the EO to result in states or counties being forced to house men in women's correctional facilities (in order not to lose federal funding), and in following any lead that BOP provides, it is worth noting that in those systems, the percentage of violent men is even higher than in the federal system. Over 60% of the male inmates in state prison systems were convicted of violent or weapons offenses. More than 14% of male state prisoners are there for rape or other sexual offenses, while only 2.5% of female prisoners are incarcerated for sexual crimes.

Among men claiming female identity, research indicates that better than 85% retain their male genitalia. The 2015 US Transgender Survey reports that a majority retain their sexual interest in women. Further, a 2010 California inmate study found that males "identifying" as women in men's prisons were more frequently classified as sex offenders than were other men. Specifically, 20.5% of men claiming female "identity" in men's prisons were registered sex offenders, compared with 14.6% of the general male population.

Patterns of Offending Among Men Identifying as Women

It is difficult to find detailed data about male prisoners who "identify" as women in U.S. prison systems as the various levels of government often cite privacy concerns. Based on studies elsewhere, criminal behavior by males "identifying" as women is similar to that of other males. A Swedish study that followed several hundred individuals for a median of two years after they had "gender reassignment" surgery found:

[M]ale-to-females had a significantly increased risk for crime compared to female controls (aHR 6.6; 95% CI 4.1–10.8) but not compared to males (aHR 0.8; 95% CI 0.5–1.2). This indicates that they retained a male pattern regarding criminality. The same was true regarding violent crime.

Similarly, statistical analysis in the U.K. of male prisoners "identifying" as women indicates male patterns of offenses. That is, the type of crimes they committed were the types of crimes commonly committed by men, rather than those committed by women. For example, data from 2019 indicate that 81 of 163 male prisoners "identifying" as women had at least one conviction for a sexual offense. In sum, crime committed by males who "identify" as women are consistent with those committed by other men; the crimes are more frequently violent and/or of sexual nature than those committed by women.

Trends Among Incarcerated Males Who Identify As Women

Housing the prison population based on “gender identity” may result in significantly higher claims of males identifying as female than for the population as a whole. In the UK, a report by Her Majesty's Chief Inspector of Prisons found that 1 in 50 males prisoners “identified” as women compared with 1 in 200 males in the general population.

Were the male federal prison population to have the same (not more, just the same) percentage of prisoners “identifying” as women as the young adult general population, that would be approximately 1139 prisoners. If all 1139 of those prisoners sought to be moved to a women’s facility under rules established under EO 13988, they would comprise approximately 8% of the federal women’s prison population. A change of this magnitude would impact the physical space, the availability of programs and the culture of women’s prison.

Examples of Incidents When Males Are Housed in Women’s Prisons

Providing male prisoners with access to female inmates potentially incentivizes claims of female “gender identity” or “transgenderism”. In the UK, women prisoners and female prison officers have been sexually assaulted by males claiming “female identity”. In a particularly egregious case, Karen White, formerly known as Stephen Wood, who had previously been convicted of indecent exposure at a child’s playground, indecent assault of boys aged 9 and 12, rape of a pregnant woman, and threatening to kill his 66 year old neighbor, began “gender realignment” while in prison and was moved into the women’s estate. There he attacked several women before he was finally jailed for life. “Prosecutor Chris Dunn described White as an ‘alleged transgender female’ who has used her ‘transgender persona to put herself in contact with vulnerable persons’ whom she could then abuse.”

In Texas, women prisoners at Federal Medical Center Carswell filed multiple complaints in 2017 reporting that men claiming “female identity” had sexually harassed them in communal areas such as showers and bathrooms, intentionally exposing themselves, expressing sexual desire for the women, and subjecting them to lewd comments. The women successfully filed for a temporary injunction blocking President Obama’s prison guidance.

In 2019, Janiah Monroe (aka Andre Patterson) was moved into the Logan Correctional Center, the largest women’s prison in Illinois. A female inmate [alleged that she was raped](#) by Monroe, reported the incident, and was pressured by prison officials to deny that it had happened. She says she was then punished for filing a false claim under the Prison Rape Elimination Act (PREA). The woman subsequently filed a federal lawsuit against prison officials at Logan.

Housing biological males who “identify” as women in women’s prisons shifts a fear of violence from males to women

It should be clear that everyone deserves to be physically safe in prison. There are many groups of vulnerable men in prison: the elderly, the disabled, the gay, the effeminate, the small or physically weak. For none of these visibly vulnerable groups do we suggest that they should be housed in a female prison to protect them. However, the EO contemplates that, based on an internal “gender identity” belief that anyone may claim, this one group of men should be placed in a women’s prison. There is no necessity to place this one group in women’s prisons, jeopardizing female safety. The mechanisms available to protect other vulnerable men in prison should be available to these men as well.

Male Strength

Men, even those who have undergone medicalization to try to obtain female characteristics, are, on average, objectively significantly stronger than women. The average woman’s upper body strength is between 25%-55% of that of a man’s. Lower body strength is between 70%-75% of a man’s. Men average 4.5 inches taller than women. Men have higher bone density.

Even males who have undergone hormone treatment show significantly higher muscle area than women even if it is reduced from pre-treatment. Post treatment there is no reduction in height or in bone density.

Housing men (even men who have engaged in feminizing medical treatment) with women places women in physical danger as, on average, they will be extremely disadvantaged in a physical altercation or confrontation and are far more likely to be injured.

* * *

Given the multiple legal concerns and vulnerabilities which BOP would face were EO 13988 to be applied to its management of its facilities and the sociological concerns outlined above, we urge BOP to inform the White House that the policies of EO 13988 are not appropriately applied to BOP. If BOP is not prepared to take that step at this point, we seek that BOP request a delay in order to conduct an impact assessment of how such policies would impact BOP’s management, litigation risk and, most importantly, the incarcerated women in its facilities. We would ask that women’s groups who have studied this issue, groups of incarcerated and formerly incarcerated women and experts from other countries (such as the U.K.) who have grappled with this issue be involved in an impact assessment.

WHRC USA appreciates the opportunity to to raise our concerns about EO 13988 and its application to your agency. I would be happy to answer any questions you might have about the necessity of protecting the sex-based rights of women and girls. Please contact me at info@womensdeclaration-usa.com if I can be of further assistance.

To learn more about our organization, visit www.womensdeclaration.com

Best regards,

A handwritten signature in black ink, appearing to read "Vajra Ma". The signature is fluid and cursive, with the first name "Vajra" being larger and more prominent than the last name "Ma".

Vajra Ma

Chair Women's Human Rights Campaign USA

Women's Human Rights Campaign-USA is the US chapter of an international organization dedicated to protecting women's sex-based rights. Our founding document, the Declaration on Women's Sex-Based Rights, re-affirms women and girls' sex-based rights as enumerated in the 1979 Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) and subsequent international agreements, and challenges the discrimination we experience from the replacement of the category of sex with that of 'gender identity'. The Declaration has more than 2,000 signatories in the United States and more than 15,000 worldwide.

The Declaration is a clear call to law and policymakers to retain the sex-based biological definition of woman. WHRC is a nonpartisan organization.