

**Bureau of Prisons and Executive Order 13988:
Legal Implications for Women Prisoners and Correctional Staff
March 11, 2021**

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

The use of “gender identity” in EO 13988, rather than “sex”, should not be applied to Bureau of Prison (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 the 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 taking into account whether the laws BOP administers “do not contain sufficient indications to the contrary.” (Section 1.) Further, the EO requires that the plan BOP develops 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.”

AREAS OF CONCERN FOR BOP TO CONSIDER

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

1. the housing of biologically male inmates with female inmates, based on “gender identity,”
2. the hiring of biologically male employees for jobs for which there is a sex-based bona fide occupational qualification (BFOQ) reserved for female employees,
3. requiring 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 custody of BOP 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.¹ 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.

¹ [EVENT-HISTORY MODELS OF FEMALE OFFENDING: ROLE OF SERIOUS MENTAL ILLNESS AND TRAUMA IN WOMEN’S PATHWAYS TO JAIL \(ojp.gov\)](#) Table 12.

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.²

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).³ 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 biological males in women’s prisons is an

² [Resources — Women's Liberation Front](#) Questions 9 and 10 of National Poll Overview

³ We are mindful that this case involved a “transsexual...incarcerated with other males in the prison system” who, after alleging he was beaten and raped by a cellmate, challenged his transfer to a more dangerous facility and being placed in its general population. The very same potential concerns for his safety apply to female prisoners who, under application of EO 13988, have a likelihood of being assaulted by males placed within their facilities.

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 biologically 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 biological 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 biologically male inmates

In regard to BOP staff: Biologically female staff who are tasked with contact with inmates, including visual observation, pat downs and strip searches. To permit a biologically male inmate to request, and be granted, the right to be searched by female staff is a violation of BOP 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 BOP staff is hired with an understanding of what the job entails, 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”)⁴

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 biological reality of sex differences between men and women. It is a violation of this United Nations Rule to force biologically female inmates to be housed with biologically male inmates. There is no exception provided for biologically male inmates who “feel” or “believe” themselves to be women contrary to biological reality. They remain biological 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 biological 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. Biological 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.

⁴ [The United Nations Standard Minimum Rules for the Treatment of Prisoners \(unodc.org\)](https://www.unodc.org/tandem/standard-minimum-rules-for-the-treatment-of-prisoners-revised-edition-2015/)

Geneva Convention⁵

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

⁵ [THE GENEVA CONVENTIONS OF 12 AUGUST 1949 \(icrc.org\)](https://www.icrc.org)

1949 Geneva Conventions contained these dictates indicate that it is a universally recognized standard of decency to house women separately from males.

* * *

Given the multiple legal concerns and vulnerabilities which BOP would face were EO 13988 to be applied to its management of its facilities 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.