

## Center for Military Readiness

### Analysis of Proposed Amendments to HR 2500, the NDAA for FY 2020, approved for Consideration by the House Rules Committee

Descriptions of the Amendments and links to them are from the [Rules Committee List](#) of Over 600 Amendments to HR 2500, the NDAA. Unless otherwise indicated, all have been deemed “in order” for consideration of the full House. Comments below analyze the proposed amendments, beginning with ones of greatest concern to the Center for Military Readiness:

#### Amendment # 399 SPEIER (CA) et al. - **OPPOSE**

“Requires that qualifications for eligibility to serve in an armed force account only for the ability of an individual to meet gender-neutral occupational standards and not include any criteria relating to the race, color, national origin, religion, or sex (including gender identity or sexual orientation) of an individual.”

*Comment:* Approval of the Speier amendment in both Houses would justify a veto of the NDAA, due to both unintended and intended consequences. If enacted and applied as written, the legislation would serve as grounds to eliminate virtually all enlistment requirements, provided that a person meets “gender-neutral occupational standards.” So, following years to develop "gender-neutral standards" for every MOS, a 15-year-old recruit or an applicant with otherwise-disqualifying diabetes could be enlisted if they can do whatever the MOS they are seeking requires. Individualized evaluation of every single enlistee against the specific job requirements of desired MOSs would create a logistical nightmare for the military to manage.

The stated goal here is to reverse the Trump/Mattis Policy regarding transgender personnel. That policy, however, is not based on gender identity and it does not bar enlistment or retention of transgenders as a class. The policy is based on a medical condition, gender dysphoria, which affects personal readiness to deploy and other factors.

Among other things, the Speier amendment would nullify a key element of the Trump/Mattis policy, which states that military persons identifying as transgender are expected “*to adhere to all applicable standards, including the standards associated with their biological sex,*” having been stable for at least 36 months.

Furthermore, the Speier amendment calls for universal application in *all* personnel policies. Among other things, enactment in law would a) Put the Congress on record in favor of the unscientific notion that gender is “designated” or “assigned” at birth. even though human DNA determines gender long before birth; b) Force medical personnel to provide controversial hormone or surgical treatments that many consider unethical; c) Allow biological males to share female-only private facilities; d) Violate religious liberties; e) Eliminate female-only athletic teams, f) Force the use of pronouns inconsistent with biological sex; g) Increase non-deployability and associated morale problems; h) Impose higher costs for medical visits, i)

Increase already-high rates of suicide; and j) Harm recruiting and retention in the All-Volunteer Force. <sup>1</sup>

Amendment #92 – TURNER (OH) (Submitted) – **OPPOSE**

“Amends the Uniform Code of Military Justice (UCMJ) to establish the offense of sexual harassment, affecting the duties, work, or career of a member of the Armed Forces, as a punitive article within the UCMJ.”

*Comment:* Problems could arise with the proposed statutory definition of “sexual harassment.” The Due Process clause of the Constitution requires that the criminal law, even in the military, give the accused fair notice of prohibited conduct. Because of the vagueness inherent in terms like “*comment of a sexual nature*” and “*gestures of a sexual nature*” the proposed language runs the risk of failing even the deferential standard of *Parker v. Levy*. <sup>2</sup>

The vague term “*unwelcome*” in the definition means that conduct toward one person may be perfectly acceptable while the same conduct toward another could be criminal. Not only does such a term place the criminal nature of the conduct clearly in the perception of a third party, the accused cannot know whether any given conduct is criminal until after the fact when the person to whom it is directed classifies it as “unwelcome.” While the proposed language requires that the conduct be connected to the military work setting, it does apply on-duty and off-duty.

Conduct that is sexually abusive and harassing should be criminalized, but there needs to be more precision in language defining the offense. Rather than leaving “unwelcome” undefined, it might be wise to specify that conduct or speech that a reasonable person in the position of the accused knew or should have known would be unacceptable in the military setting in which it occurred is prohibited.

If the proposed law is passed as written, the first time it is applied the accused will challenge it as unconstitutional under the Due Process clause and likely will win. It seems prudent to try and address the problem before enacting the bill, getting it right now rather than having it struck down later.

Amendment #41 POCAN (WI) - **OPPOSE**

“Requires review of the discharge characterizations of former members of the military who were discharged because of their sexual orientation. Requires boards to change discharge characterizations from dishonorable to honorable in such cases.”

*Comment:* The amendment is unnecessary because the law already provides for this. Discharge Review Boards (DRBs) have operated for years, but they have no jurisdiction to change a discharge resulting from a General Court-Martial – the only proceeding that can award a dishonorable discharge (DD). No one in the history of our military has ever received a dishonorable discharge “because of their sexual orientation.” Persons engaging in homosexual conduct who were court-martialed and given a DD were convicted by proof beyond a reasonable

doubt of some punitive offense under the UCMJ. "Being" a homosexual was not a crime under the UCMJ. Furthermore, those who received a DD had the full panoply of appellate rights available to them to challenge their conviction under the UCMJ and then to bring a collateral attack in the Federal Courts if they claimed their constitutional rights were violated. (Also see Amend. #102)

[Amendment #102](#) –SHALALA (FL) (Withdrawn) – **OPPOSE**

“Directs the Secretary of Defense to review the discharge characterization of former members of the Armed Forces who were discharged by reason of the sexual orientation of the member.”

***Comment:*** As with Amendment #41 above, remedies to appeal discharges already are available. A person receiving something other than an honorable discharge (except a discharge awarded by a General Court Martial) can apply to the service Discharge Review Board for a review of the characterization of that discharge. The amendment seems to require the Secretary of Defense to usurp the DRB’s role in the various services, and to review without prompting all discharges that were less than honorable whether the servicemember is seeking review or not. Without the servicemember’s application and active participation, this would be a fool’s errand. Since remedies are already available to those who wish to pursue them, it is not appropriate to include this or similar language in the NDAA. (Also see Amend. #41)

[Amendment #598](#) STEFANIK (NY) (Submitted) – **OPPOSE**

“Requires the Secretary of Defense to provide a report on the feasibility and advisability of expanding the Safe to Report program across all Services and components. Safe to Report is a current Air Force policy under which a sexual assault victim may report an assault without fear of reprisal for minor collateral misconduct.”

***Comment:*** This amendment is similar to a Senate measure sponsored by Sen. Martha McSally, which defines specific examples of “*minor collateral misconduct*” as factors that are known to increase misconduct, both voluntary and involuntary: alcohol, consensual intimate behavior, adultery or fraternization, presence in off-limits areas, and other misconduct specified in regulations. If a person engaging in these behaviors can count on effective immunity, it would seem that deterrence against these behaviors would be weakened, and in some cases, the lack of accountability for self-serving accusations following consensual misconduct would increase the number of such cases that create injustice for the accused.

CMR has requested but has not received additional information about how the AF Academy program is working and what impact it may have on good order and discipline: e.g., How many AFA cadets have been given “immunity” under the current program? What are the facts in each case where the commandant found “collateral misconduct” and no disciplinary action was taken? What is the impact on good order and discipline throughout the unit (or the academy) when one actor is granted immunity for “collateral minor misconduct” but the other actor, whose

offenses were no greater, is not? Absent answers to these questions, the amendment should not be adopted.

[Amendment #579](#) JACKSON-LEE (TX) (Submitted) - **OPPOSE**

“Requires that graduates of a military academy who are reviewed for a command shall receive notice when the assignment is denied and information relating to their rights to appeal the denial. In addition, the officer shall receive a direct response regarding why he or she was denied the position and what positions he or she may pursue.”

*Comment:* The amendment is bizarre. It is fine for a command selection board to notify someone that they weren't selected for command because there were other better-qualified candidates. Command selection process identifies those with the most potential, ranks them in order of merit, and looks for the best of the bunch based on their past records. The top ones get the available command slots. If someone doesn't get selected for command it is because, on the basis of their whole record, they were not high enough in the order of merit to get one of the few slots available. The military is not just another equal opportunity employer, and members are not entitled to choose where they will serve. Furthermore, this amendment limits this right to notice to graduates of military academies. Why limit it to that single source of officer commissions? More officers are commissioned from and serve on active duty from ROTC than the academies. This is a solution in search of a problem.

[Amendment #486](#) WAGNER (MO) (Submitted) - **SUPPORT**

“Prohibits amounts made available through this Act to an entity that provides abortions if, in the case of an abortion or attempted abortion that results in a child born alive, a health care practitioner present at the birth does not exercise the same degree of professional skill, care, and diligence to preserve the life and health of such child as would be rendered to any other child born alive at the same age.”

*Comment:* The amendment would lend support to military doctors and nurses who do not wish to participate in practices bordering on infanticide.

[Amendment #541](#) GOSAR (AZ) & GOHMERT (TX)(Submitted) - **OPPOSE**

“Amends the Uniform Code of Military Justice to assert that any prosecutor in a judicial proceeding held within the Uniform Code of Military Justice that willfully and corruptly withholds exculpatory evidence from the accused, is guilty of prosecutorial misconduct and shall be punished as court-martial may direct.”

*Comment:* The SCOTUS *Brady* decision requires prosecutors to disclose exculpatory evidence to an accused. Failure to do so could result in a Due Process violation and the reversal of a conviction. It would not be wise, however, to make *Brady* violations criminal offenses. The rules of legal ethics and the supervisory powers of the service Judge Advocate Generals (TJAGS) can handle this without adding it to the punitive articles of the UCMJ. Including the

"willfully and corruptly" language makes it very unlikely that anyone would ever be prosecuted under this, anyway. The vast majority of Brady violations are close calls over which reasonable people could disagree and it is never really known whether Brady was violated until an appellate court somewhere so holds. A better approach would be to require TJAGS to report to Congress on the number of Brady violations that have taken place under their respective services, what actions were taken to vindicate the rights of the accused and to appropriately sanction the prosecutor, and what policies were put in place to lessen the chances for further violations.

[Amendment #164](#) JACKSON-LEE (TX) (Submitted) - **OPPOSE**

"Bars the use of funds to implement the Presidential Memorandum entitled, "Military Service by Transgender Individuals," dated August 25, 2017."

*Comment:* President Trump cancelled this Memo when he agreed to recommendations made by then-Defense Secretary James Mattis, who cited the report of a Pentagon panel of experts in recommending a policy regarding persons identifying as transgender and persons diagnosed with gender dysphoria. The current Trump/Mattis policy was approved on March 23, 2018.

[Amendment #214](#) LAWRENCE (MI) -- **OPPOSE**

"States that the Secretary of Defense shall require each of the military departments to examine successful strategies in use by foreign military services to recruit and retain women, and to consider potential best practices for implementation in the United States Armed Forces, as recommended by the Defense Advisory Committee on Women in the Services."

*Comment:* Some foreign militaries (which rely on America's defense security umbrella) decided to gender-integrate their all-male direct ground combat units to promote "equal opportunity," not military readiness. In contrast, America's military must assign priority to mission readiness and combat lethality. Reviews of practices in other countries fail to consider priorities and practices used in the militaries of potential adversaries.

[Amendment #222](#) OMAR (MN) - **OPPOSE**

"Specifies that the DoD plan for diversity in hiring, promotion, and retention should include plans for hiring, promoting, and retaining racial minorities, women, religious minorities, immigrants, members of the LGBTI+ community, and people with disabilities."

*Comment:* This inserts a huge can of worms that will inevitably lead to quotas for various minority groups which the Supreme Court has held are unconstitutional. Currently, officer promotion boards have to be very careful to further diversity "goals" without slipping over into "quotas," which this amendment seems to demand.

[Amendment #283](#) KILDEE (MI) & SPEIER (CA) (Submitted) - **OPPOSE**

“Allows for a diversity of viewpoints and transparency in order to empower DoD leadership and the military chain of command by requiring the DoD to create a mechanism to allow service members and DoD civilians to privately voice contrary perspectives on DoD and national security policy like the State Department’s successful dissent channel.”

*Comment:* The options described already exist, in the offices of Inspectors General. Any servicemember can go to the IG and complain about anything. He or she also can write to his or her Congressman or Senator. The amendment appears to be an incremental step toward the Sen. Gillibrand legislation, which would circumvent the chain of command in cases involving sexual misconduct.

Amendment #213 LAWRENCE (MI) – **AMEND TO MAKE INFORMATION PUBLIC**

“Requires the Secretary of Defense to share lessons learned and best practices on progress of gender integration implementation in the Armed Forces.”

*Comment:* The Obama Administration ignored information about lessons learned during three years of research on the consequences of ordering minimally qualified women to serve in all direct ground combat (infantry) units on the same involuntary basis as men. Since then, there has been little specific information about readiness issues such as male/female injury rates, and gender-specific data on non-deployability, recruiting, retention, etc. All should be produced for public review by Congress and the general public. The House Armed Services Committee has not had an open hearing on the women-in-combat issue since 1979, 40 years ago.

Amendment #129 BROWN (MD) – **NOT NECESSARY**

“Directs the Secretary of Defense to produce a report on the number of certain waivers received by transgender individuals.”

*Comment:* Data can be useful for many purposes, but there are many disqualifying conditions that can be waived. If the purpose is to determine whether the waiver process is a good way to go, whether there should be no provision for waivers, or a condition should be dropped from the disqualification list, it would be necessary to obtain and review data on ALL waivable conditions, not just waivers for transgenders or persons diagnosed with gender dysphoria before or during military service.

Amendment #574 KING (IA) (Submitted) – **NOT NECESSARY**

“Ensures that no funds are used by the DOD to force servicemen and women to undergo transgender sensitivity courses or screen service members regarding gender reassignment surgery.”

*Comment:* Implementation of the Trump/Mattis policy makes this amendment unnecessary.

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*Prepared by the Center for Military Readiness, an independent, non-partisan public policy organization that reports on and analyzes military/social issues. CMR is grateful to Campbell Law School Professor Emeritus William A. Woodruff, a retired Army Colonel and former Judge Advocate General for his assistance in preparing this analysis. More information is available at [www.cmrlink](http://www.cmrlink), or call CMR President Elaine Donnelly at 734/464-9430.*

## **Endnotes:**

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<sup>1</sup> See CMR News Release, June 27, [House Should Reject Defense Bill Amendment for Transgenders in the Military Veto-Bait Measure More Extreme Than Obama Policies](#)

<sup>2</sup> The Supreme Court held in *Parker v. Levy*, 417 U.S. 733 (1974), that , UCMJ Articles 133 and 134 were not unconstitutionally vague because of the unique context of the military setting. On the facts of *Parker*, it was quite apparent that CPT Levy’s conduct in counselling enlisted men not to comply with orders to deploy to Vietnam was “prejudicial to good order and discipline” and in the military setting there was fair notice that such conduct was prohibited. The same argument could be made for sexual harassment arising in the military that impacts the military workspace. The problem is, however, that the conduct in *Parker* that passed the “void for vagueness” doctrine was clearly military-specific. An officer who counsels enlisted men to disobey the lawful orders of their superiors is, obviously, crossing the line. The line is not so clear when trying to determine permissible interaction between two adults and impermissible speech or conduct between those same two adults.

When is a request for a date an “*unwelcome sexual advance*” under the proposed statute? Similarly, “*comment of a sexual nature*” and “*gesture of a sexual nature*” may be in the eye of the beholder. The language is too broad and vague to give fair notice as to what is and what is not criminal behavior. Obviously, there will be conduct at both extremes that virtually all would agree would be either criminal behavior or not. On the criminal end of that spectrum the conduct would, most likely, arise to threatening, coercive, intimidating, and assaultive behavior that would easily fall under Art. 134 or other punitive articles and pass the *Parker v. Levy* standard. Thus, such behavior is already punishable.

Where the line is between those offenses and the new offense of “*sexual harassment*” is impossible to discern, which raises the “void for vagueness” problem. Statutes have been declared unconstitutional under the Due Process Clause if they failed to provide “fair notice” of what conduct is criminalized.