Center for Military Readiness — Policy Analysis —

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Supreme Court Ruling Does Not Make Case for Repeal of 2018 DoD Policy Re Transgenders in Military

On June 15, the **U.S. Supreme Court** handed down a ruling that unilaterally enacts controversial legislation to bar employment discrimination on grounds of **"sexual orientation"** or **"gender identity."** (*Bostok v. Clayton County*) This decision, which does not apply to the military, should not be interpreted as a reason to include in the **National Defense Authorization Act (NDAA) for 2021** legislation to repeal the **2018 Defense Department Policy** regarding persons who identify as transgender or have been diagnosed with gender dysphoria.

Proposed legislation may be like an NDAA amendment that ***Rep. Jackie Speier*** (D-CA) sponsored last year, which would have added **"gender identity"** to **Military Equal Opportunity (MEO)** non-discrimination categories. For several reasons, Congress should continue to *oppose* the Speier legislation and *support* the 2018 DoD policy. For example:

Supreme Court Got It Wrong: **Justice Neil Gorsuch**, who wrote the (6-3) majority opinion, found that "*An employer violates **Title VII** when it intentionally fires an individual employee based in part on sex."* He added, *"…[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."* (p. 9) In other words, Justice Gorsuch found that when Title VII of the **1964 Civil Rights Act** was enacted, a reasonable person would have understood that banning discrimination based on sex necessarily banned discrimination based on sexual orientation and transgender status. Justice Gorsuch's conclusion that a reasonable person would have so understood Title VII in 1964 is belied by his opening line in the opinion where he noted that legislation of this type can have *"unexpected consequences."* If the consequences were unexpected it strains credulity to claim that a reasonable person in 1964 would have understood Title VII to prohibit discrimination based on sexual orientation and transgender status. And, of course, there is no evidence that Congress intended to include those as protected categories in Title VII.

The majority opinion also ignored five decades of prior cases in which 30 out of 30 courts refused to equate *"sex"* with *"sexual orientation,"* much less *"gender identity."* **Justice Sam Alito** and **Justice Clarence Thomas**, who joined Alito's dissent, described the majority opinion as *"preposterous. . . [T]he majority's argument is not only arrogant, it is wrong."* **Justice Brett Kavanaugh** added, *"Like many cases in this Court, this case boils down to one fundamental question: Who decides? . . . The Court's ruling comes at a great cost to representative self-government."*

Justice Alito's dissent noted that repeated attempts over 45 years failed to pass legislation like the **Employment Non-Discrimination Act (ENDA)** and the pending **Equality Act**. In the *Bostock* case, the Supreme Court exceeded its authority by imposing an extreme policy on Americans without the consent of legislators who represent the people.

There were and are many good reasons why Congress should stand its ground and refuse to ratify the Supreme Court's usurpation of legislative power.

If misguided legislation to impose all aspects of the transgender agenda on our military should pass in the House and the Senate concurs, President Trump should veto the National Defense Authorization Act for 2021.

Civilian Employment Law Does Not Apply to the Military

As the **Presidential Commission on the Assignment of Women in the Armed Forces** determined in its 1992 report, ***"Title VII of the Civil Rights Act of 1964, which governs civilian employment law, does not apply to the military."*** This recognizes the fact that *"[civil rights] provisions could impose constraints on the United States by which potential military opponents, not operating under the same constraints, might derive an advantage. . . unilateral policies adopted to promote* ***principles other than military necessity*** *may place the adopting party at increased risk of defeat."* (Commission Report Finding 1.32, p. C-40)

2018 DoD Policy About Medical Condition, Not Transgender Status: Contrary to claims the **2018 DoD Policy** is a "ban," the policy is not based on gender identity and it does not bar enlistment or retention of transgenders as a class. The 2018 policy is based on a medical condition, **gender dysphoria**, which affects personal readiness to deploy and other factors. Except for certain "grandfather" provisions related to the 2016 policy, the 2018 policy accommodates transgender persons who serve in their **biological sex** if they meet deployability requirements and have been stable (without gender dysphoria) for **36 months**.

Congress Should Assert Constitutional Power Over Legislation: The majority opinion states that the Court was not deciding all cases related to transgender status, conceding that other cases involving "gender identity" as a non-discrimination category will be heard in the future. Congress has *not* passed legislation mandating inclusion of persons suffering from gender dysphoria in the military, and there is no compelling reason to do so now.

Individual members voting to repeal the 2018 DoD policy would be putting themselves on the record in in favor of the unscientific notion that gender is *"designated"* or *"assigned at birth."* On the contrary, gender is naturally determined long *before* birth, in human DNA that exists from the moment of conception in every cell of a person's body. Such a change would be more extreme that the previous administration's 2016 transgender policy, which required a person to get their official **"gender marker"** changed before recognition in their **"preferred gender."**

Unresolved Legal Inconsistencies: The armed forces sponsor many sports activities, including separate-gender teams and facilities at all the military service academies. (See dropdown list at the **USMA**.) The **Title IX** prohibition on sex discrimination is based on the formerly unquestioned proposition that males and females are different in strength, endurance, athletic prowess, and other physical attributes. The **Departments of Justice and Education** have officially endorsed the right of **female athletes** to compete against other females, not biological males claiming to be female.[1] Congressional repeal of the 2018 policy would reject well-established scientific knowledge about immutable DNA, human genetics, development, and physiology. While fairness to female athletes is important, avoiding confusion and controversy within the military, which may hinder combat effectiveness, is more important.

Consequences of Repealing Standards: The 2018 DoD policy states that military persons identifying as transgender are expected *'to adhere to* ***all applicable standards, including the standards associated with their biological sex.'*** Open-ended legislation requiring *"equality of treatment in service,"* without regard to sex or gender identity, would repeal and replace this key provision. Harmful effects on readiness and morale would include the following, and more:

- Mandates directing **military doctors and nurses** to provide expensive, long-term hormone or surgical treatments for persons identifying as transgender, regardless of concerns about medical ethics and deeply held personal convictions. (Transgender activist groups are demanding coverage for **veterans** and **dependent children** as well.)

- "Equal opportunity" for **biological men seeking access** to private sleeping, bathroom, and shower facilities that are currently reserved for women.

- The end of **separate-gender athletic teams** at all military service academies, colleges, and schools for dependent children, and denial of women's accomplishments or scholarships when men gain access to female-specific teams and locker rooms.

- Violations of rights of **religious liberty** for chaplains and people of faith.

- Forced acceptance of LGBT ideology in all **military training** and **educational programs**, including politically correct **pronouns** that deny biological realities.

- Liberalized military personal conduct rules to accommodate unusual forms of sexual expression by both men and women while off-duty (As *Navy Times* reported in August 2018, a male sailor performed a "drag queen" strip dance on the USS *Ronald Reagan.*)

- Mandatory **"preferred-gender" pronouns** that are inconsistent with biological sex.

- Negative effects on **recruitment** and **retention** of personnel and families in the **All-Volunteer Force**.

Cost and Consequences for Readiness: The DoD panel of experts, which produced the comprehensive study and report leading to adoption of the 2018 policy, cited data and information from the **Military Health System Data Repository**, based on actual DoD experiences with **937** active-duty service members who had been diagnosed with gender dysphoria. Repeal of the 2018 policy would reintroduce costs comparable to these, which are cited in the February 2018 **DoD Final Report and Recommendations**, on the pages noted:

- From October 1, 2015 to October 3, 2017, **994** active duty Service members diagnosed with gender dysphoria accounted for **30,000** mental health visits. (p. 22)

- Since implementation of the previous 2016 policy, medical costs for Service members with gender dysphoria increased nearly **three times** – or **300%**. (p. 41)

- Transitioning Service members in the **Army** and **Air Force** cumulatively averaged **167** and **159** days of limited time on duty, respectively, over a one-year period. (p. 33)

- Of the **424** approved Service member treatment plans available for study, almost all of them – **91.5%** – include the prescription of cross-sex hormones. (**Endocrine Society** guidelines for cross-sex hormone therapy recommend quarterly blood work and laboratory monitoring of hormone levels during the first year of treatment. (p. 33)

Elevated Mental Health Risks: According to the February 2018 DoD Report and Recommendations, *"Transgender persons with gender dysphoria suffer from high rates of mental health conditions such as anxiety, depression, and substance use disorders."* (p. 21)

- *"**High rates of suicide ideation, attempts, and** completion among people who are transgender are also well documented in the medical literature, with lifetime rates of*

*suicide attempts reported to be as high as **41%** (compared to **4.6%** for the general population).”* (p. 21)

- *“A review of the administrative data indicates that Service members with gender dysphoria are **eight times** more likely to attempt suicide than Service members as a whole.”* (**12%** versus **1.5%**). (p. 21)

- Furthermore, *“Service members with gender dysphoria are also **nine times** more likely to have mental health encounters than the Service member population as a whole.*” (**28.l** average encounters versus **2.7** average encounters per service member) (p. 22)

- Remedies for gender dysphoria have not been proven effective, and studies have not *“account[ed] for the **added stress** of military life, deployments, and combat.”* (p. 24)

- *“Given the scientific uncertainty surrounding the efficacy of transition related treatments for gender dysphoria, it is imperative that the Department proceed cautiously in setting accession and retention standards for persons with a diagnosis or history of gender dysphoria.”* (p. 27)

Elimination of All Standards: Under previously sponsored repeal legislation, eligibility to serve in the armed forces would rely on an individual’s ability to meet gender-neutral occupational standards without any criteria relating to the race, color, national origin, religion, or sex (including gender identity or sexual orientation). Enactment could nullify *all* accession qualifications, including those related to medical conditions and biological sex.

Legal Status of 2018 Policy: On January 22, 2019, the **U.S. Supreme Court** effectively overruled four district judge preliminary injunctions against President Trump’s call for changes in military transgender policies, pending ongoing litigation. Following that 5-4 ruling, the Department of Defense announced plans to begin implementation of the 2018 policy on April 12, 2019. Absent congressional action to repeal the 2018 policy, there is still strong Supreme Court precedent to uphold the policy should the cases currently in litigation get that far.

Conclusion: Unnecessary and extreme congressional action to repeal the 2018 policy would do nothing to support the troops or to strengthen mission readiness and morale. If the defense bill includes such legislation, President Trump would have no choice but to veto the NDAA.

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The Center for Military Readiness is an independent non-partisan public policy organization, founded in 1993, which reports on and analyzes military/social issues. More information is available at www.cmrlink.org.

[1.] In ongoing litigation brought by female athletes in **Connecticut**, pro-transgender attorneys are relying on the unscientific notion that a person’s DNA, genetic development with XX or XY chromosomes, and testosterone levels *in utero* and during puberty have nothing to do with a person’s strength, endurance, muscle mass, and other physical attributes. Both the DoJ and the DoE have taken the position that biological science, not political science, should determine whether an individual is male or female.