

October 9, 2015

The Honorable Elizabeth Holtzman, Chair
The Judicial Proceedings Panel
One Liberty Center
875 N. Randolph St., Suite 150
Arlington, VA 22203

RE: Military Sexual Assault Programs Have Had Mixed Effects; Judicial Proceedings Panel Needs to Refocus and Redirect Military Sexual Assault Initiatives

Madame Chair and Panel Members:

The Center for Prosecutor Integrity (CPI) is a 501(c)(3) organization dedicated to strengthening prosecutorial ethics, curbing over-criminalization, and improving the overall criminal justice system. CPI has monitored developments in the military and civilian justice systems that have an impact on due process, the presumption of innocence, and wrongful convictions, particularly in regard to sexual assault.

While some military sexual assault initiatives have been demonstrably helpful in curbing sexual assault, other initiatives have undermined fundamental legal precepts, harmed morale, and weakened military preparedness. The Judicial Proceedings Panel now faces a historical opportunity to refocus and redirect future military sexual assault initiatives.

Presumption of Innocence

This letter is broadly informed by what is considered to be a central pillar of American jurisprudence: the presumption of innocence. The presumption has been hailed as a “basic tenet of a democratic society.”¹ In *Coffin v. United States*, the Supreme Court would write, “the presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”² But legal commentators have expressed a worry that the presumption of innocence has been compromised, and even removed altogether in many areas of the law.^{3,4,5}

This trend is especially apparent in state laws governing rape and sexual assault. Since the 1970s, a series of statutory changes have been implemented in civilian laws that were ostensibly

¹ Oregon Constitution, Article XV § 10(2).

² *Coffin v. United States* 156 U.S. 432 (1895).

³ Baradaran S. Restoring the Presumption of Innocence. *Ohio State Law Journal* Vol. 72:4 (2011).

⁴ Quintard-Morenas F. The Presumption of Innocence in the French and Anglo-American Legal Traditions. 58 *American Journal of Comparative Law* 124-125 (2010).

⁵ Hanna C. The paradox of hope: The crime and punishment of domestic violence. *William and Mary Law Review* Vol. 39, 1998.

designed to remove unfair obstacles to rape complainants.⁶ Among the most prominent changes have been a removal of requirements for corroborative evidence, reasonable physical resistance, and prompt reporting. These changes and others dramatically changed the landscape of sexual assault adjudications. Professor Richard Klein worries that in the process of making the playing field “fairer” for the accuser, has fundamental fairness for the defendant become compromised?⁷

Concerns over the erosion of the presumption of innocence are not theoretical. In *United States v. Prather*,⁸ the Court of Appeals for the Armed Forces determined that the 2007 revisions to UCMJ Article 120 unconstitutionally shifted to the defendant the burden to disprove an element of the offense. With this ruling, the Court protected the presumption of innocence of the accused.

This letter first identifies several of the beneficial initiatives designed to prevent and control sexual assault. Then we identify areas where sexual assault initiatives have been found to be harmful. Finally, we make recommendations for consideration by the Judicial Proceedings Panel.

BENEFICIAL INITIATIVES

Over the past decade, numerous salutary initiatives have been implemented to reduce the number of sexual assaults and increase reporting of such incidents. Examples of these exemplary policies and programs include:

1. Climate surveys that gauge the frequency and severity of sexual assaults.
2. Bystander training programs that educate service members to intervene in at-risk situations.
3. Policy that allows complainants to make their own choice whether to file a restricted or unrestricted report.
4. Provision of mental health treatment, medical treatment, legal advice, and counseling services to complainants.
5. Commanding officers responsibility for conducting timely investigations of allegations of sexual assault.
6. Commanding officers responsibility for curbing social and private retaliation.
7. Increased expertise of sexual assault prosecutors, due to specialized training.

Such efforts should be continued and, as appropriate, expanded.

AREAS OF CONCERN

In contrast to the beneficial initiatives enumerated above, certain sexual assault programs and policies have had effects that are demonstrably deleterious:

1. Command over-referral
2. Special Victims Counsel program
3. False allegations

⁶ Klein, Richard, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 Akron L. Rev. 981 (2008).

⁷ Id. at 1055.

⁸ *United States v. Prather*, 69 M.J. 338 (C.A.A.F. 2011)

4. Use of the term “victim”
5. Affirmative consent

These concerns are elaborated upon in the following sections.

1. Command Over-Referral

A decade ago, reform advocates began to make the claim that Commanders were consistently failing to appropriately refer sexual assault cases. These advocacy efforts appear to have met with resounding success. A 2013 report noted that Commanders were finding an allegation to be baseless in only 4.5% of all sex cases reported to them.⁹

But the high level of referrals appears to have created a new set of problems:

- According to one media account, “Military lawyers said the Pentagon leadership has the right intentions, but these prevention campaigns have flooded military court rooms with so many sexual assault cases, it’s made it harder to prosecute guilty sexual predators.”¹⁰
- Philip Cave, a retired Navy lawyer, averred the number of non-meritorious cases were “getting to the point that they are getting counterproductive on the legal side. We are going to have a situation where [the prosecution] is going to lose cases because of it.”¹¹
- Retired Navy Cmdr. John B. Wells has claimed, “due process has been diminished by a ‘faux outrage’ surrounding military sexual assault allegations that has cowed military commanders into pursuing every sexual assault case, no matter how questionable.”¹²

2. Special Victims Counsel Program

The Special Victims Counsel (SVC) Program was established in 2014 for the purpose of “providing legal assistance to military victims of sexual assault.” According to regulations, “The primary duty of an SVC is to zealously represent his or her clients’ rights and interests, including during the criminal investigation, preliminary hearing, pretrial litigation, plea negotiations, court-martial proceedings, and post-trial phase of a court-martial.”¹³ Despite the best of intentions, the

⁹ Innocent Warrior Project. Sex Assault Hysteria and Grandstanding Politicians Undermine Military Justice. June 2013. http://www.innocentwarrior.org/uploads/1/2/2/9/12293769/military_justice_mailer_-_june_2013_-_sex_assault_hysteria_and_grandstanding_undermines_military_justice.pdf

¹⁰ Sarah Blansett and Michael Hoffman. Sexual Assault Cases Flood Military Courts. August 13, 2012. Military.com <http://www.military.com/daily-news/2012/08/13/sex-assault-cases-flood-military-courts.html>

¹¹ Sarah Blansett and Michael Hoffman, Sexual Assault Cases Flood Military Courts, August 13, 2012. <http://www.military.com/daily-news/2012/08/13/sex-assault-cases-flood-military-courts.html>

¹² Jim Mustian, *New Orleans-based Coast Guard officer acquitted of sexual assault charges; convicted on lesser count*, September 3, 2015, available at <http://www.theneworleansadvocate.com/news/crime/13350082-123/new-orleans-based-coast-guard-officer>.

¹³ See, e.g., Air Force SVC Rules, *supra* note 198; see also Army SVC Handbook, *supra* note 198, ch. 4 (Nov. 1, 2013), available at http://responsesystemspanel.whs.mil/Public/docs/meetings/Sub_Committee/20140226_VS/Materials_Related/03a_USA_SpecialVictimsConsel_Handbook.pdf.

SVC program operates under the implicit premise that prosecutors are insensitive to complainants' concerns, a claim for which there is no systematic supportive evidence.

The involvement of an SVC lawyer in a case can portend worrisome problems:

- According to LCDR Nate Gross, US Navy, Senior Defense Counsel at NAS Jacksonville and Naval Station Mayport: “[W]hile a trial counsel or even a member of a military criminal investigation organization has an obligation to turn over any exculpatory material to the defense, the victim’s legal counsel has no such obligation.” Counsel said an SVC could argue that such material is protected by privilege, which “creates an issue with respect to fundamental fairness and whether material is being filtered through the victim’s legal counsel organization.”¹⁴
- One Air Force defense counsel testified that the SVC’s role during defense interviews has “shift[ed] the balance of fairness when it comes to defense interviews of victims.” He explained that during pre-trial interviews, SVCs actively participate and even coach complainants as to the “preferred” answer.¹⁵

3. False Allegations

The problem of false allegations has been well documented in sexual assault cases:

- The *Washington Post* reported on the results of a study from between 1999 and 2003, which revealed that the number of “unfounded” cases of sexual assault tripled from 48 to 157.¹⁶
- More recently, the 2014 SAPRO report analyzed the disposition of sexual assault allegations. Of the 2,586 cases involving service members under military jurisdiction, 495 cases – representing 19.1% of the total – were classified as “unfounded.”¹⁷ The report defined the term “unfounded” as “false or baseless.”¹⁸
- Concerns about false allegations have been documented in the service academies, as well. In 2004, an extensive survey to measure opinions on sexual harassment and assault found that fraudulent complaints are perceived as a problem by 72% of men and 73% of women at the three academies.¹⁹

¹⁴ Transcript of JPP Public Meeting 331, 365–66 (Nov. 14, 2014) (testimony of LCDR Nate Gross, U.S. Navy, Senior Defense Counsel).

¹⁵ Transcript of JPP Public Meeting 323–25 (Nov. 14, 2014) (testimony of Maj William Babor, U.S. Air Force, Senior Defense Counsel)

¹⁶ Sexual Assaults in Army on Rise. June 3, 2004. See: <http://www.washingtonpost.com/wp-dyn/articles/A10959-2004Jun2.html>

¹⁷ Report of the Response Systems to Adult Sexual Assault Crimes Panel, Figure 13, page 127. See: http://140.185.104.231/Public/docs/Reports/00_Final/RSP_Report_Final_20140627.pdf.

¹⁸ *Id.* at 120.

¹⁹ OFFICE OF THE INSPECTOR GENERAL OF THE DEP’T OF DEFENSE, REPORT OF THE SERVICE

False allegations can lead to wrongful convictions. According to the National Registry of Exonerations, perjury or false allegations contributed to 34% of all wrongful convictions of sexual assault.²⁰

4. Use of the Term “Victim”

One of the commonly expressed rationales to support the restructuring of Article 120 was to “shift the focus from the victim to the offender,” an explanation that on its face appears designed to remove the presumption of innocence.²¹

Particularly in the adjudication context, use of the terms “victim” and “offender” is illogical. The complainant cannot be deemed to be a “victim,” and the defendant cannot be viewed as an “offender,” until the adjudication process has been completed and a final determination made. Inappropriate use of the word “victim” also ignores that fact that in the case of a false allegation, the true victim is the wrongfully accused person who must struggle to overcome the social stigma of being publicly accused as a sex offender.

Referring to the complainant as a “victim” undermines the presumption of innocence and taints the impartiality of the military justice system.

5. Affirmative Consent

Affirmative consent refers to the practice of persons giving their explicit, voluntary, and conscious agreement to engage in sexual activities on an ongoing basis. Affirmative consent has become the focus of controversy in recent months:

- An affirmative consent provision was incorporated into a proposed revision to the American Law Institute’s (ALI) Model Penal Code for Sexual Assault and Related Offenses. Over 80 ALI members have co-signed a memorandum criticizing the proposal as unworkable and contributing to the problem of over-criminalization.²²
- In a recent ruling involving an institution of higher education, Judge Carol McCoy overturned a decision of the University of Tennessee at Chattanooga to expel a student on allegations of sexual assault. McCoy ruled that under its affirmative consent policy, the university “improperly shifted the burden of proof...Absent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party’s consent strains credulity and is illusory.”²³

ACADEMY SEXUAL ASSAULT AND LEADERSHIP SURVEY xi n.15 (Mar. 4, 2005), available at <http://www.dodig.mil/Inspections/IPO/reports/Final%20Survey%20Report.pdf>

²⁰ National Registry of Exonerations, *1600 Exonerations*, University of Michigan Law School, 2015. See: http://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf at 11.

²¹ Jim Clark, *Analysis of Crimes and Defenses 2012 UCMJ Article 120, effective 28 June 2012*, 2012 Emerging Issues 6423, http://jpp.whs.mil/Public/docs/03_Topic-Areas/02-Article_120/20140807/07_Art120_UCMJ_Crimes_Defenses_Analysis_Clark_2012.pdf.

²² See: <http://lcbackerblog.blogspot.com/2015/05/sexual-assault-at-american-law.html>.

²³ *Mock v. The University of Tennessee at Chattanooga*, Tennessee Chancery Court, 2015. See: <https://kcjohnson.files.wordpress.com/2013/08/memorandum-mock.pdf>.

- Several witnesses have testified before the Judicial Proceedings Panel to express their reservations with affirmative consent. These witnesses include Colonel William Orr,²⁴ Colonel Terri Zimmermann,²⁵ Lieutenant Colonel Julie Pitvorec,²⁶ and Ms. Lisa Friel.²⁷

Implementation of an affirmative consent policy in the military would exacerbate existing problems with lack of due process and contribute to the erosion of the presumption of innocence.

SUMMARY AND RECOMMENDATIONS

As a result of the initiatives described above, many believe military morale and recruitment/retention efforts have begun to suffer:

- One witness testified to Congress about a “pervasive prejudice” in the military: “Unless legal proceedings substantiate allegations of a crime, it is premature to label one of the two parties a ‘victim.’ Constant use of the loaded, emotionally charged word ‘victim,’ without the modifier ‘alleged,’ reflects a pervasive prejudice against men that is common among victim advocates.”²⁸
- Following a recent court-martial trial acquitting a Coast Guard Petty Officer of sexual assault charges, defense attorney John B. Wells accused the prosecution of fomenting what he called a “witch-hunt atmosphere,” which he claimed has come to permeate the Armed Forces in recent years.²⁹ Such a climate cannot be viewed as conducive to military morale.
- Marine Corps officer and judge advocate Lindsay Rodman wrote in a *Wall Street Journal* editorial, “In the past year or so...potential female recruits have grown increasingly wary, asking...whether women are treated fairly and respectfully. I tell them that serving in the military doesn’t turn a woman into a victim.”³⁰
- A survey of 53,000 male Marines found that being falsely accused of sexual harassment or sexual assault was the top concern relating to women in combat positions. Thousands of survey respondents indicated the change might cause them to leave the service altogether.³¹

As a result, military readiness is compromised and our nation’s ability to defend itself is harmed.

²⁴Transcript of JPP Public Meeting at 190, April 9, 2015, (testimony of Colonel William Orr).

²⁵ Transcript of JPP Public Meeting at 224-225, May 7, 2015, (testimony of Colonel Terri Zimmermann).

²⁶ Transcript of JPP Public Meeting at 238-240, May 7, 2015, (testimony of Lieutenant Colonel Julie Pitvorec).

²⁷ Transcript of JPP Public Meeting at 240, June 25, 2015, (testimony of Ms. Lisa Friel).

²⁸ Statement for the Record of Elaine Donnelly. Presented to the Committee on Government Reform, Hearing on Sexual Assault and Violence Against Women in the Military and at the Academies. June 27, 2006.

²⁹ Jim Mustian, *New Orleans-based Coast Guard officer acquitted of sexual assault charges; convicted on lesser count*, September 3, 2015, available at: <http://www.theneworleansadvocate.com/news/crime/13350082-123/new-orleans-based-coast-guard-officer>.

³⁰ Lindsay Rodman. The Pentagon’s Bad Math on Sexual Assault. *Wall Street Journal* May 19, 2013. <http://www.wsj.com/articles/SB10001424127887323582904578484941173658754>.

³¹ Julie Watson, *Marine survey lists concerns on women in combat*, February 1, 2013, available at <http://news.yahoo.com/marine-survey-lists-concerns-women-combat-002047180.html>.

Over the past decade, the over-riding presumption behind efforts to reform sexual assault policies has been the belief that the military was not taking allegations of sexual assault seriously enough, and that an ever-increasing number of defendants needed to be charged, prosecuted, and convicted.

This assumption has not been met with universal agreement. According to a Heritage Foundation report, “there is no systemic evidence that commanders are refusing to refer sexual assault cases to court-martial; in fact, the evidence points to the opposite conclusion.”³²

The Judicial Proceedings Panel was established “for the purpose of developing recommendations for improvements” to judicial proceedings for adult sexual assault and related offenses.³³ The word “improvements” denotes measures designed to enhance the *accuracy and reliability* of the adjudicatory process. Improving the system does not refer to removing fundamental due process protections, dispensing with the presumption of innocence, or imposing a guilty verdict on the innocent.

Given the recognized problems of over-criminalization and over-incarceration in our society, the zealous focus on some quarters to achieve an ever-expanding number of convictions must be rectified. The Judicial Proceedings Panel should pursue an approach that balances the legitimate interests of both the complainant and the defendant. The Response Systems Panel articulated the challenge this way:

“An allegation of sexual assault against a Service member has profound impacts, even absent a prosecution and conviction. Effective response systems to sexual assault in the military require appropriate measures to hold offenders accountable. It is equally important, however, to ensure that the rights of those Service members who are suspected or accused of sexual assault are not denigrated and the presumption of innocence is not degraded.”³⁴

Based on this analysis, the Center for Prosecutor Integrity makes these recommendations to the Judicial Proceedings Panel:

Command Over-Referral

- Recommend repeal of National Defense Authorization Act (FY14), Section 1752, which states that it is the sense of Congress that any charge of rape, sexual assault, or forcible sodomy should be disposed of by court-martial, rather than by non-judicial punishment or administrative action.
- Encourage commanding officers to apply their independent judgment to make decisions concerning probable cause of sexual assault.

³² Charles D. Stimson. Sexual assault in the military: Understanding the problem and how to fix it. November 6, 2013. Page 12. <http://www.heritage.org/research/reports/2013/11/sexual-assault-in-the-military-understanding-the-problem-and-how-to-fix-it>.

³³ Charter: Judicial Proceedings Panel, available at http://jpp.whs.mil/public/docs/Charter_JPP_20140624.pdf.

³⁴ Report of the Response Systems to Adult Sexual Assault Crimes Panel (2014) at page 8.

- Redefine the meaning of “healthy command climate” in fitness reports so a Commanding Officer is not evaluated on the rate at which he or she refers cases for possible court-martial.

Special Victims Counsel

- Reform the Special Victims Counsel program to utilize social workers or counselors who work with the prosecution team, not independent lawyers with sometimes competing objectives.

False Allegations

- Pursue criminal charges against the complainant when it is determined that he or she filed a false report and/or gave perjured testimony.

Use of the Term “Victim”

- Unless and until a finding of guilt has been reached, the words complainant or accuser should be utilized.

Affirmative Consent

- Refrain from incorporating affirmative consent policies in the military justice system that serve to shift the burden of proof to the defendant.

The undersigned thanks you for your kind attention to this matter. We commend you for the significant investments of time and effort that you have devoted to this project.

Sincerely,

Christopher J. Perry, Esq.
Program Director

Cc:

Mac Thornberry, Chairman, House Armed Services Committee
Adam Smith, Ranking Member, House Armed Services Committee
John McCain, Chairman, Senate Armed Services Committee
Jack Reed, Ranking Member, Senate Armed Services Committee