

December 11, 2015

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

RE: Recommendations to restore due process and protect the presumption of innocence in military sexual assault matters

Madame Chair and Panel Members:

The American system of legal justice is characterized by fundamental precepts that distinguish our system from the approaches utilized in totalitarian societies. These principles include the rule of law, separation of powers, and the presumption of innocence.

The presumption of innocence is implicit in the Fifth, Sixth, and Fourteenth amendments to the Constitution, and has been explicitly affirmed by the U.S. Supreme Court. In *Coffin v. United States*, the Court wrote, “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.” In *Estelle v. Williams* the Court highlighted the presumption of innocence as “a basic component of a fair trial under our system of criminal justice.”

Unfortunately, the presumption of innocence has come under siege in recent decades. Countless laws have been enacted that have enabled a growing number of prosecutions, convictions, and incarcerations. Now, the United States leads the world in terms of the largest number and the greatest percentage of the population behind bars.

In the past 10 years, a powerful social force called the Innocence Movement has emerged to counter the pernicious effects of over-criminalization and overly aggressive prosecutorial actions. As a result, in 2013 the U.S. House of Representatives established a bi-partisan Over-Criminalization Task Force. Earlier this Fall, the bi-partisan Smarter Sentencing Act (S. 502/H.R. 920) was introduced in the Senate.

So it is no surprise that CPI’s concerns about the erosion of the presumption of innocence, which we have shared with staff members of the House Armed Services Committee and Senate Armed Services Committee, have been met with a generally favorable response.

In the military context, there is no doubt that some of the initiatives designed to address the problem of sexual assault have been beneficial, including:

1. Climate surveys

2. Bystander training programs
3. Provision of medical treatment, legal advice, and counseling services to complainants.

But there is a growing concern that essential due process protections have been eroded and far too often, the presumption of innocence lost. From 2012 to 2015, the National Defense Authorization Act (NDAA) included 85 new provisions addressing the issue of military sexual assault. These provisions have had the general effect of increasing the number of prosecutions and convictions:

1. Complainants are afforded a series of “victim’s” rights throughout the adjudication process. (2014 NDAA – Sec. 1701).
2. The focus of Article 32 assessments was narrowed from an investigation to a preliminary hearing to find probable cause, which results in more cases proceeding to court martial. (2014 NDAA – Sec. 1702).
3. Interviews of the complainant must take place in the presence of trial counsel of the victim advocate. (2014 NDAA– Sec. 1704).
4. Command officers are expected to refer sexual assault cases to court martial at the risk of losing their command position. (2014 NDAA – Sec. 1751 and 1752).
5. Complainants are represented by Special Victim’s Counsel (SVC) who advocate on behalf of the complainant and are permitted to appeal decisions by the trial judge regarding admissibility of certain evidence. (2015 NDAA – Sec. 533 and 534).

None of these provisions have served to expand, protect, or reaffirm the presumption of innocence.

There are some who have asserted the focus of the Judicial Proceedings Panel should be to increase the number of convictions. Having undertaken extensive research on the extent and devastating consequences of wrongful convictions, the Center for Prosecutor Integrity (CPI) believes that logic is fundamentally flawed. Instead, the focus of the JPP should be to *enhance the accuracy and efficiency of the judicial proceedings*. The goal is to develop an adjudicatory system that is characterized by fundamental fairness for all parties.

To this end, the Center for Prosecutor Integrity has developed a number of recommendations to restore the presumption of innocence and assure the adjudication process for allegations of sexual assault arrives at a just result:

1. **Proper use of the term “victim” and “perpetrator.”** All military adjudications should maintain proper use of terms for the parties involved in a sexual assault case. The complainant shall not be referred to as a “victim” unless and until there is a determination of guilt on the part of the accused. Similarly, the accused shall not be referred to as a “perpetrator” or “offender” unless and until a determination of guilt by judge or panel. Such use by the prosecution during a legal proceeding is conclusory, improper, and unfair.
2. **Clear delineation of the role of Special Victim’s Counsel (SVC).** A criminal trial should involve two parties, not three, to determine innocence or guilt. The role of the SVC should be limited to guiding the complainant through the criminal justice system

and providing assistance in acquiring civil protection orders. In some cases the SVC has proven to be an actual obstacle to justice, as they do not have the obligation to disclose exculpatory evidence to defense counsel.

3. **Repercussions for false reports.** A person who is falsely accused of a crime, particularly sexual assault, is harmed by the allegation. The damage can be professional, personal, financial, and emotional. As such, there should be consequences for accusers who lie to investigators, the panel, or the court. Trial Counsel should pursue charges against accusers when it is determined that there is clear and convincing evidence that the accusations were fabricated or false.
4. **Same standards for admissibility of evidence.** Under Federal Rule of Evidence 413, trial counsel in sex cases are permitted to introduce evidence of prior bad acts by the defendant. However, such evidence is not permitted for any other offense because evidence of prior bad acts is irrelevant to the charges at hand. It is fundamentally unfair to allow such evidence in sexual assault cases, when it is prohibited for all other crimes.
5. **Expertise of investigating officers.** The investigating officer at the Article 32 hearing should have experience as both Trial Counsel and a Defense Counsel.
6. **Unanimous verdict.** Any conviction at a court martial should require a unanimous verdict. In a situation in which the defendant faces such severe restrictions on his liberty, the verdict should not be based on a split decision by a majority. This is a basic tenet of adjudication of cases in the civil criminal justice system.

The Judicial Proceedings Panel now stands at a legal crossroads. Will the military justice system work to respect hundreds of years of legal precedent and work to restore the presumption of innocence in sexual assault cases? Or will it go down the dangerous path that totalitarian societies have pursued by presuming the guilt of the defendant and removing fundamental due process protections?

The undersigned thanks you for your continued attention to this matter.

Sincerely,

Christopher J. Perry, Esq.
Program Director