

November 6, 2015

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

RE: Follow-up to our October 9, 2015 Letter to the Judicial Proceedings Panel

Madame Chair and Panel Members:

At the October 9, 2015 meeting of the Judicial Proceedings Panel, the Center for Prosecutor Integrity (CPI) presented testimony regarding the ongoing, multi-faceted efforts to curb sexual assault in the military. Our testimony:

- Commented on the presumption of innocence as a bedrock principle of the American criminal justice system.
- Outlined seven beneficial initiatives designed to reduce military sexual assault, and identified a number of areas where assault-reduction initiatives may be eroding the presumption of innocence of service members accused of sexual assault.
- Highlighted how these efforts may be producing unwanted effects of undermining fundamental principles of our nation's legal system, weakening unit morale, impairing recruitment and retention efforts, and ultimately harming military preparedness.

Subsequent to the October 9 meeting, CPI representatives held face-to-face meetings with 26 staffers who work for members of the House Armed Forces Committee or the Senate Armed Forces Committee, both Democrats and Republicans. The purpose of these meetings was to share our October 9 letter to the Judicial Proceedings Panel, and to elicit staffers' perspectives and areas of concern.

This letter highlights and summarizes the viewpoints of these Congressional staffers in seven related areas:

1. **Fundamental Fairness:** Staffers expressed widespread support for the notion of assuring fairness to both the complainant and the accused.
2. **Presumption of Innocence:** Staffers shared our concern that while the specific NDAA provisions, viewed in isolation, have reasonable justifications, the aggregate effect of these mandates has been to erode the presumption of innocence.
3. **"Always Believe the Victim:"** One staffer volunteered his concern about the inappropriate use of the phrase, "Always believe the victim." This staffer pointed out that

this point of view does not account for the problem of false allegations and undermines due process.

4. **Sexual Assault Training:** One staffer commented on the irony that the number of required sexual assault briefings seemed to outweigh the educational sessions directly related to military preparedness. Another staffer who had recently left active military service recalled his feeling of being “terrified” by the repeated messages that insinuated a person accused of sexual assault would be presumed to be guilty.
5. **Commander Over-Referral:** Staffers generally agreed with our assessment that commanders’ routine referral of sexual assault allegations serves to remove the presumption of innocence, and replace it with the presumption of probable cause.
6. **Special Victims Counsel:** While staffers generally viewed the SVC program as beneficial, many also recognized the potential problem of competing interests when two attorneys are purporting to represent the interests of the same complainant.
7. **Hostile Environment:** Some staffers expressed concern how repeated directives, frequent training programs, and over-wrought media coverage have served to create an environment hostile to the deliberative exercise of due process and thoughtful discussion of issues.
8. **False Allegations:** One staffer shared the fact that he knew of several stories of service members who had been falsely accused of sexual assault and treated unfairly during the adjudication, which had serious adverse effects on their careers.

Edified by these perspectives, the Center for Prosecutor Integrity reiterates the recommendations from our October 9 letter:

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.
- 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

- Clarify the ethical and disclosure obligations of the Special Victim’s Counsel to avoid potential conflicts of interest. (This recommendation has been modified from the Oct. 9 letter).

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.

Conclusion

In 2006 midshipman Lamar Owens was charged with raping a fellow classmate. Prior to the trial, Naval Academy superintendent Rodney Rempt distributed several emails to the general naval community referring to the complainant as a “victim.” After a 10-day trial, Owens was found innocent. The military judge later observed that Rempt’s pre-trial e-mails were “rather damnable; they insinuate or suggest guilt” creating “the appearance of unlawful command influence.” Later asked about his actions in the case, VADM Rempt explained:

“I had no other choice. If I did not take him to a [General Court Martial], we would have had every feminist organization and the ACLU after us.”

We append to this letter the article published in *The Atlantic* that documents the numerous irregularities in the Lamar Owens case.

As the Judicial Proceedings Panel continues its deliberations and formulates its recommendations, we invite you to be cognizant of the perceptions and concerns of Congressional staffers, as well as media accounts detailing how political pressures may be compromising fundamental legal principles in the military.

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

Sincerely,

Christopher J. Perry, Esq.
Program Director

Enclosure:

Stuart Taylor: ‘Rape’ and the Navy’s P.C. Police. *The Atlantic* April 2007.

<http://www.theatlantic.com/magazine/archive/2007/04/rape-and-the-navys-pc-police/305857/>

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'Rape' and the Navy's P.C. Police

A bogus rape charge shouldn't derail the Navy career of 23-year-old Lamar Owens Jr., the former quarterback of the Naval Academy's football team.

STUART TAYLOR JR.

APRIL 2007

This is a story about a 23-year-old African-American midshipman who has limitless potential to serve his country but now faces a grave risk of seeing his Navy career derailed because of a bogus rape charge by a white woman whose violations of Navy rules were worse than his.

Lamar Owens Jr., the star quarterback, captain, and MVP of the Navy football team through the 2005 season, was resoundingly *acquitted* of rape last July 20, after the evidence presented to a military jury of five naval officers showed clearly that his sexual encounter with a female midshipman six months before was consensual and that the rape prosecution was a travesty.

More broadly, this is a story about how overreaction to the bad old days when real rape victims were not taken seriously has fostered a politically correct presumption of guilt in many rape cases, leading to wrongful prosecutions of innocent men and, probably, the convictions of some.

In the now-infamous Duke lacrosse rape fraud, the falsely accused men are white, the lying accuser is black, and racial demagoguery has fueled the prosecution. In other cases, such as that of Lamar Owens, the races have been reversed and suspicions of racially selective prosecution muted. In most, the men and women have been of the same race.

Owens endured a court-martial that should never have been convened, in the face of powerful evidence of innocence, thanks to the "leadership" of the Naval Academy's superintendent, Vice Adm. Rodney Rempt. He has led a much-publicized crackdown on sexual assault and harassment, but has badly overshot the mark.

Owens's acquittal on the rape charge did not end Rempt's campaign to ruin the young man. On February 12, the superintendent urged Navy Secretary Donald Winter to deny Owens the Naval Academy diploma and officer's commission for which he had fully qualified, with flying colors. Rempt's reason was that Owens was convicted on two relatively minor charges. These were consensual sex in Bancroft Hall ("conduct unbecoming an officer"), the huge dorm in which all midshipmen live, and forgetfully walking past the accuser's door contrary to an order to stay out of her area of the building ("failure to obey a lawful order").

Rempt's crackdown gives off an odor of sacrificing due process to appease feminists who have appropriately assailed the service academies' sometimes appalling trivialization of serious rape allegations.

According to an affidavit sworn by prominent Naval Academy alumnus and football player Peter Optekar, he privately asked Rempt—then a dinner guest at Optekar's home, four days after the rape acquittal—why he had subjected Owens to a general court-martial. Rempt's reported response:

"Pete, I had no other choice. If I did not take him to a GCM, we would have had every feminist organization and the ACLU after us."

According to another affidavit, this one sworn by three other Navy alums who attended Optekar's dinner party, Rempt also said that the consensual-sex and failure-to-obey convictions would be considered felonies, and that they would bar Owens from voting and require him to notify any future employer, for the rest of his life, that he was a convicted felon. (Rempt has disputed the affidavits.)

This despite the fact that the military jury, after a 10-day trial, not only acquitted Owens of rape but also determined after careful deliberation that there should be "no punishment" for his two minor convictions. And despite the fact that but for the bogus rape charge there would have been no general court-martial at all—only administrative discipline under an often-violated regulation prohibiting sex in Bancroft Hall. And despite football coach Paul Johnson's characterization of Owens as the "outstanding leader" of his team, one who "cares about people that are around him" and has "a natural ability that draws people."

To brand this young man a felon or deny him his commission, on the facts established at the court-martial, would be an outrage. If Navy Secretary Winter upholds Rempt's recommendation, he, like Rempt, is unfit for his job.

Here is what happened. According to Owens's well-corroborated testimony during his court-martial, he found an instant message on his computer from the accuser upon returning to his room after 3 a.m. on January 29, 2006. Owens responded, and after more IM's back and forth the 20-year-old junior invited him to her room in Bancroft Hall. He went. She climbed into her upper bunk and motioned him to follow. He did. They had sex until he noticed that she was no longer responding. Thinking this "bizarre," he withdrew and left the room.

The accuser, whose name has not been published, told a somewhat different story: After returning to her room very drunk from an Annapolis bar, she went to sleep and awoke to find Owens standing alongside her bunk trying to kiss her. She tried "scrunching" her lips to ward off the kisses and "scooted my body up to the headboard so he would stop," she said. But Owens managed to have sex with her for several minutes and then left.

The military judge, Cmdr. John Maksym, said that her credibility had been "eviscerated" on cross-examination by Owens's defense lawyer.

She never claimed that Owens had threatened her or used force. Owens had propped the door to the lighted corridor open with a trash can the whole time to comply with a regulation banning closed-door, male-female visits. A roommate was sleeping some 10 feet away. The accuser admitted that she "did nothing to let her [the roommate] know that I needed assistance." After Owens left, the accuser talked briefly with her roommate and the accuser's boyfriend, who had visited with her earlier that evening, and the three went back to sleep. Owens called her the next morning to ask whether she was OK. There was no official report of the event for more than a week.

The prosecution's best—but far from good—evidence was a secretly taped phone call with the accuser in which Owens sounded apologetic about his conduct. At his trial, he persuasively explained that he had felt contrite about a sexual encounter gone bad with a woman whom he had not then known to be seriously impaired by alcohol.

Not only did Adm. Rempt convene a general court-martial, the most serious form of military trial, but he and his staff also sent a series of prejudicial pretrial e-mails to the Naval Academy community, from which all members of the court were to be drawn. Several referred to the woman as the "victim" or "sexual assault victim," rather than as the "alleged victim" or the "accuser."

The military judge later observed that "some of these e-mails are rather damnable; they insinuate or suggest guilt," creating "the appearance of unlawful command influence" over the members of the court.

While Owens still faces grave consequences for his minor convictions, his accuser is on her way to graduating and being commissioned. This despite the military jury's implicit finding that she was as guilty as Owens of having sex in Bancroft Hall. Not to mention her serial, admitted underage binge drinking and other violations of Naval Academy rules.

The accuser will go unpunished because Rempt granted her broad testimonial immunity. From behind this shield, she admitted at the trial that she had left Bancroft Hall "about four times" after having signed a muster sheet that she was there, and that hours before the incident with Owens she had consumed "three rum and Diet cokes, two shots of tequila, one shot of Southern Comfort, and a Kamikaze."

In addition, she had occasionally blacked out in a party house in Annapolis that she rented with male and female friends. Sperm—not from Lamar Owens—was found on her comforter in Bancroft Hall. It "could have been the sperm from some guy I was with that was on that blanket," she later said. She was known to have been sexually aggressive with multiple men. Some "victim."

The assessment of all this offered by Reid Weingarten, Lamar Owens's defense lawyer, seems more than fair: "This is a case of political correctness gone totally awry. The academy's otherwise laudable effort to protect its women broke down when their charges proved to be demonstrably and palpably untrue and their target proved to be a young man of uncommon integrity, strength, and character. They tried to make Lamar a poster child, but they picked the wrong case and the wrong kid."

So when will they stop hounding him for a two-minute mistake less serious than many a blunder committed by many a successful officer?