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THE LAW FIRM OF PUCKETT AND FARAJ, PC

November 21, 2011

Letter to the Editor re: Lawmaker: Commands Shouldn't Investigate Military Rape Cases

Dear Stars and Stripes:

I have been practicing law for over 27 years. I am a retired Marine Corps Judge Advocate and served as a military judge for five of my 20 years in uniform. I currently practice military criminal defense in the private sector, and have since 1999. I have been involved in many dozens of cases alleging rape and sexual assault either as a prosecutor, defense counsel or military judge.

Congresswoman Speier's (D-CA) proposed legislation to create a new, special interest bureaucracy in the Department of Defense (DoD) demonstrates a fundamental ignorance of and disrespect for military leadership in general and the modern military justice system in particular. It is naïve in the extreme to imagine that military commanders are capable of maintaining good order and discipline using a time-tested and court-supervised military justice system for all manner of misconduct, up to and including premeditated murder, EXCEPT sexual assault. To carve out that particular subject matter and declare that officers who have sworn to support and defend the Constitution of the United States are somehow unqualified to administer military criminal laws because some service members have been victims of sexual assault and were disappointed with the investigation and prosecution of their accused assailants is incongruous.

No criminal justice system is perfect. Objectively speaking, the military justice system usually reaches a just result. Occasionally it reaches an unjust result, because people are not infallible. But the concept of "justice" is never really viewed in the abstract or objective sense. Justice is viewed as unique to the facts of each individual case and purposely quite subjectively by the parties involved. It is a time-honored concept in the American criminal justice system that if your side wins, justice has been done, and the loser appeals the "unjust result." It is also true that what actually happened at the time and place of the commission of an offense is almost irrelevant to the fact finding process of a criminal prosecution. The most important thing in a criminal trial is what the admissible evidence shows happened. The prosecutor, and sometimes the defense counsel, introduces evidence, according to specific rules, to a fact finder (a judge or a jury) who applies the standard of proof beyond a reasonable doubt to that evidence, thereby reaching a legal conclusion as to guilt or innocence.

Much has been written about the increase in the number of sexual assault cases in the military. Much more has been written about the apparent inadequacy of the military justice system in producing adequate or acceptable results from investigations and prosecutions of allegations of sexual assault. Some of these stories originate from an anecdote about a female victim's perception of the wrong outcome after a trial. Sometimes the stories catalogue several anecdotes in an effort to show a "trend." A very learned and experienced clinical psychologist friend of mine once quipped, "The plural of "anecdote" is not "data."

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Our firm has never had a client convicted of rape. The reason is that not a single one of them (and there have been about twenty) was actually guilty of rape. Why is this important? Does that mean that there was justice or injustice? Well, I suspect that every single accuser in every single one of those cases believes to this day that her assailant "got away with it." If that is what she believes, then her friends and relatives will believe it, too. They will all then rally around the proposition that her assailant escaped justice. The critical component of this entire discussion is that what someone believes *becomes* "the truth" to that person. If a judge or a jury did not validate her "truth," then she did not receive justice.

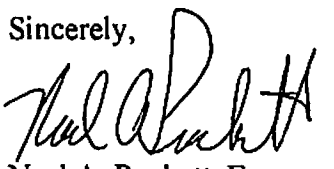
Now at this point the analysis becomes a little more nuanced. More often than not, well-meaning family members, friends, loved ones, and professional counselors nurture a confusing and unpleasant encounter with a man the night before into a "rape," by prodding her with questions that lead her to that conclusion. Once she accepts and adopts that label on what happened the night before, she takes on the feelings, countenance, belief and entitlements of a rape "victim." In response to widespread and continuous criticism, the DoD has created an entire infrastructure designed to identify, shelter, nurture and protect "rape" victims and vigorously prosecute their alleged assailants. Victims get nearly unlimited access to counseling, time off work, and the presence of a Sexual Assault Response Coordinator/Counselor (SARC) at any legal proceeding or interview. She also may be entitled to special Victim Witness Assistance Program (VWAP) benefits. In sum, she acquires a unique and special status that elevates and almost reveres her. But another thing happens in this process that is, for all intents and purposes, irreversible. Once she accepts and adopts the label of "rape victim," she likely can never be convinced that she was NOT the victim of rape, even in the face of irrefutable evidence to the contrary. That becomes her new reality. It relieves her psychological stress because everything unpleasant happened is someone else's fault. It thus can never be her fault. So she's able to learn to feel better about it by holding on to her status.

How does this happen? Why does it happen? Often this happens because well-meaning people close to the "victim" do not understand what "rape" really is. It is not "being taken advantage of." It is not morning-after regret. It is not, "I'm not really in the mood for this, but what the heck, it's gone this far, may as well get it over with." It is not, "Oh my God, did that just happen? What am I going to tell my (husband, dad, boyfriend)." It is not, as in a current case we're defending, "Well, OK I hit the Corporal, but did I mention that I was raped by someone else?"

Congresswoman Speier seeks to remove from military commanders the authority to investigate and prosecute sexual assault cases, apparently due to a perception that commanders' handling of these allegations are, "woefully inadequate" and "overly influenced by the chain of command." What she means is that she and others perceive that the system is not producing enough convictions and punishments. If she only knew how often sexual assault allegations have been DISPROVEN in preliminary evidentiary hearings, only to be sent to trial anyway for fear of family or public (read: Congressional) backlash if the commander simply and *justifiably* dismissed the charges. So young men are very often subjected to lengthy and personally expensive trials, only to be fully acquitted, because of the inaccurate public perception that the services "aren't doing enough." Our experience has been that the chain of command is overly influencing these cases, but not in the direction Congresswoman Speier believes. Commanders nowadays prosecute every case, even the ones lacking any credible evidence of guilt. Someone in DoD needs to do the case-by-case analysis in defense of the current system to point out that the squeaky-wheel noise that has given rise to the Congresswoman's demand for a new kind of

grease is not a squeaky wheel at all, but rather the product of individualized reaction to a system of justice that will always be viewed as "unjust" by the party whose position did not prevail.

Sincerely,



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