#MeToo deserves due process in the military

By David Struwe | May 22nd, 2020

Before leaving the military and becoming a civilian litigator, I served in the Army as one of its twenty-four world-wide Special Victim Prosecutors ("SVPs"). The Army established the SVP position in 2009 and selected individuals to become SVPs based on their experience and ability in the courtroom. The SVP's mission is to help prosecute all rape and sexual assault cases in each of their assigned geographic locations. While serving in the Army, I prosecuted rape and other sex-related offenses at Fort Stewart, GA, Fort Riley, KS, Fort Leavenworth, KS, and in Afghanistan. Despite having served as a prosecutor, I am concerned at the deterioration of Constitutional due process afforded to service members accused of sexual assault. Congress has attempted to overhaul the military justice system, and I applaud them for tackling this topic of immense importance. However, although undoubtedly motivated by a sincere desire to assist victims of horrible crimes, our legislators have potentially gone too far in their revisions of the protections afforded to an Accused by our Constitution.

Our criminal justice system is founded on the constitutional principle that one is "Innocent until Proven Guilty." Contributing to the protections given to an Accused in our Constitution by our Founding Fathers was their belief in the statement of English jurist William Blackstone: "It is better that ten guilty persons escape than that one innocent suffer."

Not satisfied with this ratio, Benjamin Franklin multiplied it by a factor of ten, when he pronounced "It is better 100 guilty Persons should escape than that one innocent Person should suffer." Perhaps even more forcefully, John Adams made the impassioned plea "It is more important that innocence should be protected, than it is, that guilt be punished," when representing British soldiers in a politically charged trial after the Boston Massacre.

Does the current Congress still agree with these foundational Constitutional principles when enacting legislation that limits constitutional due process? It is unclear.

Congress is correct in its belief that historically the military did not prosecute sexual assault allegations as vigorously as it should have. However, the reforms enacted by Congress in the annual National Defense Authorization Acts have swung the pendulum too far in the other direction, potentially depriving service members of their ability to obtain a fair trial.

I stress that these reforms, individually, might have been justified. However, collectively, they have created a system in which an Accused is potentially deprived of a fair trial. The potential failure of the current system to afford constitutional due process to an Accused is no secret. The Subcommittee of the Judicial Proceedings Panel published its "Report on Barriers to the Fair Administration of Military Justice in Sexual Assault Cases" in May 2017, and the report highlighted the system's unfairness and discussed the problematic reforms referred to in this article. Despite this damning report, Congress has taken little or no action on it.

Examples of reforms to the military justice system include:

1) no longer requiring purported victims to testify at preliminary hearings,

2) no longer allowing service members to utilize the "Good Soldier defense" (which allowed a Soldier to present evidence of his general good character and valorous service in combat to prove he could not have committed the alleged crime),

3) greatly expanding the definitions of what constitutes sexual assault and abusive sexual contact,

4) requiring service members to receive sexual assault training that unfortunately is at times legally incorrect: namely, that one cannot consent to sexual intercourse if one has had one alcoholic beverage,

5) making the prosecution of sexual assault allegations more difficult by allowing purported victims to receive transfers from unpopular duty stations like Kansas to more attractive assignments like Hawaii,

6) depriving commanders of their ability to overturn convictions when not convinced that the Accused was guilty,

7) creating and giving purported victims their own independent legal representation (Special Victim Counsel), who in turn at times, prevent prosecutors and defense counsel from interviewing the alleged victim in preparation for trial, and

8) depriving defense attorneys the ability to obtain a purported victim's mental health records, even when the constitution would otherwise require it.

These reforms, when coupled with the fact that a military Accused is already in a precarious position given that a military prosecutor does not need a unanimous jury to convict, as does a civilian prosecutor, have caused the scales of justice to become unbalanced in potential violation of the Constitution.

Commanders now refer seemingly every allegation of sexual assault, no matter how tenuous, to a court-martial because they are afraid that their careers would otherwise be terminated. The threat of career termination is not an empty one. Congress refused to confirm then Lieutenant General Susan Helms as Vice Commander of the Air Force Space Command because she did not handle a sexual assault case like certain Senators wanted her to. Lt. General Helms then retired.

The decision to prosecute arguably weak cases is highlighted by the fact that the military often prosecutes cases even though civilian jurisdictions, which have concurrent jurisdiction over the alleged crimes, determined that no probable cause exists and have declined to prosecute. Commanders also continue to refer cases to court-martial even after neutral and detached preliminary hearing officers have made findings that no probable cause exists. This is problematic on a variety of fronts, including, 1) potentially prosecuting an innocent service member and 2) forcing prosecutors to potentially violate their ethical responsibility to not prosecute cases that are not supported by probable cause.

Perhaps Congress' most problematic reform of constitutional protections was when it revised Military Rule of Evidence 513, which governs the discoverability of a purported victim's mental health records. Previously, this statute did not allow defense counsel to obtain these records unless a judge determined that the defense request met one of eight enumerated exceptions.

One of these exceptions allowed the defense to obtain mental health records, when "constitutionally required." President Obama and Congress revised the rule to no longer include the "constitutionally required" exception. Obviously, such an overt, brazen deprivation of evidence that is constitutionally required to be supplied to the defense is itself unconstitutional.

Recently, the Air Force court-martial of United States v. Vargas highlighted what has become of the military justice system. In Vargas, several prosecutors and Special Victim Counsel collaborated to get what they perceived as a defense-oriented judge removed from hearing any cases involving sexual assault. Why the Air Force allowed this judge to be removed from sexual assault cases is unclear; however, he was ultimately removed from presiding over the Vargas' court-martial.

Vargas was subsequently convicted of sexual assault and sentenced to 29 years of confinement. The Air Force appellate court, however, unsurprisingly, viewed the removal of the trial judge with disdain and reversed Vargas' conviction. Thankfully, Congressional reforms have not yet prevented appellate courts from applying the Constitution and ensuring due process is afforded to an Accused.

In times such as these, when political pressure is great, it is imperative that prosecutors remember the sage guidance of the Supreme Court, when it stated that the role of the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

The #MeToo movement has justifiably engendered a passionate uprising. Let us not forget, however, John Adams' passionate plea: "It is more important that innocence should be protected than it is, that guilt be punished."

Due Process for Title IX in the #MeToo Era

By David Struwe | May 12, 2020

Disclaimer: the views expressed in this article are those of the author, and should not be attributed to his employer.

The issue of due process came roaring back to the forefront of national discourse this week. First, the nation contemplated the sexual assault allegations made against Presidential candidate Joe Biden by Tara Reade and the resulting hypocritical response by Democratic politicians.

Hypocritical because when then Judge Kavanaugh was accused of sexual misdeeds, Democratic leaders were quick to adjudge him guilty as accused. Indeed, Democratic Senator Mazie Hirono stated that "men should just shut up …women like [Kavanaugh accuser] Dr. Ford need to be believed."

Additionally, Senator Richard Blumenthal indicated that there is no reason to doubt Dr. Ford. Senator Gillibrand, long self-proclaimed leader of women's equality, was especially harsh, stating

"Do we value women in this country? Do we listen to women when they tell us about sexual trauma? Do we listen to their stories about how their lives have been forever scarred? Do we take their claims seriously? Or do we disbelieve them as a matter of course?"

She continued

"I believe Dr. Blasey Ford because she's risking everything — her safety, her security, her reputation, her career — to tell this story at this moment for all the right reasons. If we allow women's experiences of sexual trauma to be second to a man's promotion, it will not only diminish this watershed moment of societal change we are in; it will bring shame on this body and on the court."

Senator Gillibrand then lambasted the Republican defense of Kavanaugh, saying

"This process is sending the worst possible message to girls — and boys — everywhere," Gillibrand said in her speech.

"It's telling American women that your voice doesn't matter. It's telling survivors everywhere that your experiences don't count, they're not important and they are not to be believed. We are saying that women are worth less than a man's promotion."

When confronted with similar allegations against Presidential candidate Biden, Gillibrand stated – "I stand by Vice President Biden. He has devoted his life to supporting women and he has vehemently denied this allegation."

Has Senator Gillibrand had an epiphany and suddenly realized the importance of due process when evaluating sexual assault allegations? Sadly, no. Senator Gillibrand simply chooses to apply one standard for her friends and one standard for her enemies.

Senator Gillibrand and Presidential candidate Biden's hypocrisy is exemplified by their continued opposition to Secretary of Education Betsy Devos' attempts to make Title IX disciplinary hearings fairer and equitable.

Indeed, Biden championed the 2011 Dear Colleague Letter to universities that eviscerated due process in Title IX hearings. Judges have been skeptical about the legality of Biden's standard for investigating sexual assault allegations, which has come to be emblematic of the "Believe All Women" mantra of the #metoo movement.

Repeatedly, courts have found the Biden Title IX standards fundamentally unfair. Indeed, one federal judge described Brandeis University's disciplinary process as being "closer to Salem 1692 than Boston 2015." He further stated:

"Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning… If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."

Even more hypocritical is that Biden and Gillibrand demand that Biden himself be afforded the benefit of the doubt in light of the allegations against him, but simultaneously oppose Secretary Devos' common sense Title IX revisions – including requiring that investigators be impartial and allowing the cross-examination of a complaining witness's credibility.

Thankfully, despite Biden and Gillibrand's hypocritical opposition, Secretary Devos announced the implementation of the revised Title IX regulations on Wednesday. As the Wall Street Journal stated,

"With accusations of sexual misconduct front and center for the second presidential election in a row, it may be hard to believe that the U.S. is making progress on this serious issue. But on Wednesday, the Education Department brought Americans a step closer to having such allegations tried more thoroughly and fairly—at least on college campuses.

More than a year after issuing a draft rule, the department released final regulations on how colleges and universities must treat students involved in disciplinary procedures under Title IX, the federal law that bans sex discrimination—and has been interpreted to include sexual misconduct—in federally funded education programs. Institutions will finally have to guarantee due process for students caught up in campus kangaroo courts."

The #metoo movement is our generation's Red Scare of the 1950s. How soon we forget that Americans were accused and vilified as Communists without being afforded due process.

Now Americans are accused and vilified as sexual assaulters without being afforded due process. Thankfully, lawyers that were lions of the bar rose to the occasion to thwart the government's attempts to nullify due process during the Red Scare.

These attorneys were zealous in their pursuit of justice, their reputations be damned. That is what is needed today.

Lawyers to similarly pursue justice in order to hold the government accountable and ensure that justice prevails, because even Joe Biden deserves due process.

#MeToo: 2018 v. 1800

By David Struwe | September 20th, 2020

As a former Army Special Victim Prosecutor, I proudly worked with victims and prosecuted numerous rape and sexual assault cases in the #MeToo movement. However, after spending five years prosecuting these types of cases, I also observed the weaponization and politicization of the #MeToo movement, which led purported victims to attempt benefitting from unprovable allegations. The politicization of the #MeToo movement has potentially struck again with Judge Brett Kavanaugh's confirmation to the United States Supreme Court. Specifically, Dr. Christine Ford has accused Judge Kavanaugh of attempted rape, 30 some years after the alleged incident occurred. This is a serious allegation, and should be investigated by the Judiciary Committee. Despite Dr. Ford's certainty in her accusation, she fails to remember key facts, specifically when and where the alleged incident exactly happened. She has also apparently told conflicting accounts of how many individuals were present, four or two. Although these inconsistencies do not mean that that alleged attack did not occur, it does mean that it is difficult to prove. Finally, there is at least a possibility that Dr. Ford has a motive to fabricate. Certain Democrats have previously promised to "stop at nothing" to prevent the confirmation of Judge Kavanaugh. Indeed, there are allegations that Dr. Ford, a registered Democrat who has donated to progressive causes, scrubbed her social media accounts prior to revealing her identity. These allegations include an unsubstantiated claim, which the New York Times has questioned, that Dr. Ford previously wrote "Scalia types must be banned from the law."

Despite these issues with her accusation, certain Democrats have rushed to her side, proclaiming that she is a "victim" and that she should not be questioned. Indeed, Democratic Senator Mazie Hirono stated that "men should just shut up …women like Dr. Ford need to be believed." Additionally, Senator Richard Blumenthal indicated that there is no reason to doubt Dr. Ford. These Democrats would be correct if we were living in France during the French Revolution, but this is the United States, where constitutional due process reigns supreme, including an Accused's right to confront and cross-examine their Accuser.

Although the #MeToo movement is a relatively recent phenomenon, it is not the first time that an alleged rape resulted in public condemnation of an Accused prior to the Accused being afforded the opportunity to present a defense. As retold by Ron

Chernow, in his New Times bestselling biography of Alexander Hamilton, there was a #MeToo uprising in the late 1790s. Alexander Hamilton, perhaps the greatest litigator in the history of this country, "was disturbed whenever public opinion howled for bloody revenge," according to Chernow. The public was howling for bloody revenge when twenty-two-year-old Gulielma Sands was raped and murdered. Standing accused was her fiancé Levi Weeks. The public was outraged and yelled "Crucify him! Crucify him!" outside of his trial. Alexander Hamilton, then the most acclaimed attorney in the country, was convinced that his client, Mr. Weeks, was innocent. As a result, Alexander Hamilton represented Mr. Weeks pro bono.

In his opening statement at Mr. Weeks' trial in 1800, Alexander Hamilton stated:

I know the unexampled industry that has been exerted to destroy the reputation of the accused and to immolate him at the shrine of persecution without the solemnity of a candid and impartial trial. … We have witnessed the extraordinary means which have been adopted to inflame the public passions and to direct the fury of popular resentment against the [accused]. In this way, … the public opinion comes to be formed unfavourably and long before the [accused] is brought to his trial he is already condemned.

Alexander Hamilton ultimately convinced the jury that his client was not guilty of rape or murder. In fact, Hamilton was able to identify the man actually responsible for the crime. So assured of the innocence of Hamilton's client, the trial transcript states: "The jury then went out and returned in about five minutes with a verdict – NOT GUILTY." (capitalization in the original transcript). Given the histrionics of the current #MeToo movement, any decent defense attorney would be well served by plagiarizing Alexander Hamilton's opening statement when defending those accused of sexual assault.

Unfortunately, false accusations still occur. How soon we forget the Duke Lacrosse debacle, where state prosecutors refused to turn over exculpatory evidence in their zeal to convict innocent players in response to pre-trial media and public opinion. Subsequently, the public again fell for the University of Virginia fraternity rape allegation as reported by the Rolling Stone magazine, but that was then proven demonstrably false by the Washington Post. More recently, Nikki Yovino, a Sacred Heart University female student, pled guilty to falsely accusing two African American college football players of raping her. She is currently serving a year in prison for her false accusations.

Admittedly, there are also Accuseds, who despite being convicted of heinous crimes beyond any doubt, continue to maintain their innocence.

Alexander Hamilton was obviously not the only founding father who believed in due process. Our criminal justice system is founded on the constitutional principle that one is “Innocent until Proven Guilty.” Contributing to the protections given to an Accused in our Constitution by our Founding Fathers was their belief in the statement of English jurist William Blackstone: “It is better that ten guilty persons escape than that one innocent suffer.”

Not satisfied with this ratio, Benjamin Franklin multiplied it by a factor of ten, when he pronounced “It is better 100 guilty Persons should escape than that one innocent Person should suffer.” Perhaps even more forcefully, John Adams made the impassioned plea “It is more important that innocence should be protected, than it is, that guilt be punished,” when representing British soldiers in a politically charged trial after the Boston Massacre.

Although Judge Kavanaugh’s confirmation hearing is not a criminal trial, it certainly seems like one. Kavanaugh stands accused of a heinous crime, and some Democratic senators are aligned trying to convict him of that heinous crime in the court of public opinion. Indeed, in the eyes of some of the media and the public, he is already convicted. They are not interested in the truth, but rather are interested in denying Judge Kavanaugh’s confirmation to the Supreme Court. In times such as these, when political pressure is great, it is imperative that prosecutors and Senators remember the sage guidance of the Supreme Court, when it stated that the role of the prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.”

Despite these Democratic Senators presumably knowing that in this country, an Accused is innocent until proven guilty, they have already branded Kavanaugh an attempted rapist by referring to Dr. Ford as the victim, instead of as the purported or alleged victim. If he is innocent, Judge Kavanaugh arguably already has a claim that these government representatives have violated his due process rights to life, liberty, and property. Indeed, in Wieman v. Udegraff, the Supreme Court discussed an individual’s constitutional interest in his reputation during the Red Scare. The Supreme Court subsequently stated in Paul v. Davis:

The words "liberty" and "property" as used in the Fourteenth Amendment do not in terms single out reputation as a candidate for special protection over and above other interests that may be protected by state law. While we have in a number of our prior cases pointed out the frequently drastic effect of the "stigma" which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible

interests such as employment, is either "liberty" or "property" by itself sufficient to invoke the procedural protection of the Due Process Clause.

Here, if innocent, Judge Kavanaugh's reputation, career and employment may be tarnished forever. Arguably, he would then have a potential claim against certain Democratic senators for depriving him of due process.

If the Democrats are successful in their desire of preventing the appointment of Judge Kavanaugh to the Supreme Court, I will feel no pity for the Republican Party, as they previously stonewalled eminently qualified Merrick Garland. However, if the attempted rape allegations are false or unprovable, there is no justification for the deprivation of Judge Kavanaugh's due process and constitutional right to confront and cross-examine his accuser. In any case, let due process be followed and the accusations proven or disproven through evidence and cross-examination.

Restricting Religion in the Age of Protest

By David Struwe | June 9th, 2020

"Congress shall make no law … prohibiting the free exercise [of religion] … or the right of people peaceably to assemble."

What does the First Amendment to the Constitution mean? Proposed in 1789, the First Amendment, along with the other Amendments comprising the Bill of Rights, sought to guarantee individual liberties in the vein of Patrick Henry's famous cry – "Give me liberty or give me death!"

Sadly, as the current Coronavirus pandemic has made clear, sometimes choosing liberty does in fact result in death.

We live in uncertain times. Uncertain because we still do not know the extent and severity of the current pandemic. What is clear, however, is that the virus can kill. Given that daunting fact, Governors have imposed restrictions designed to prevent the spread of the virus. What is also clear is that, to stymie the spread of the virus, the government has some ability to limit how its citizens practice religion. However, some restrictions may run afoul of the Constitution and the liberties that Patrick Henry and other Founding Fathers held so dear.

Among other restrictions, governments have prohibited worshipers from gathering in-person for religious services. Can the government do this? If so, for how long? This article provides an overview of how certain courts, including the Supreme Court, have addressed these questions during the current pandemic.

The reopening of churches is controversial. Indeed, recent reports detail how some churches immediately suspended services after reopening because parishioners and priests became ill. In Mississippi, an arsonist who left the message "Bet you stay home now you hypokrits (sic)," burned a church that continued to hold in-person services during the pandemic. Coincidentally, or perhaps not, the church had recently sued the city government over its restrictions on church activities, including Easter services.

Other religious organizations also have sued state and local governments, seeking to overturn restrictions on their religious practices. In Kentucky for example, Tabernacle Baptist Church sued Governor Andy Beshear, challenging the constitutionality of the Governor's order that "prohibit[ed] in-person church services" and threatened to impose criminal penalties on those who violated the order. A federal court agreed with the church. The court conceded that the Governor could, if justified by a sufficient reason, restrict in-person attendance –

The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.' Courts may ask whether the state's emergency measures lack basic exceptions for 'extreme cases,' and whether the measures are pretextual—that is, arbitrary or oppressive. At the same time, however, courts may not second-guess the wisdom or efficacy of the measures.

The Court continued –

A law that incidentally burdens religion, but 'that is neutral and of general applicability need not be justified by a compelling government interest[.]' If a law is not neutral or generally applicable, then it "must be justified by a compelling governmental interest and must be narrowly tailored to advance that interest.

Ultimately, the court found that the government had failed to sufficiently justify its restrictions on religion. In particular, the court noted that the government still allowed patrons to shop at a variety of retail stores including "hardware stores, laundromats and dry cleaners, law offices, and liquor stores, provided they adhere to social distancing and hygiene guidelines" This disparate treatment of retail businesses and religious organizations led the court to conclude

> *There is ample scientific evidence that COVID-19 is exceptionally contagious. But evidence that the risk of contagion is heightened in a religious setting any more than a secular one is lacking. If social distancing is good enough for Home Depot and Kroger, it is good enough for in-person religious services which, unlike the foregoing, benefit from constitutional protection.*

In contrast to the federal court in Kentucky, other federal courts, including the Court of Appeals for the Seventh Circuit, have upheld restrictions on congregating at houses of worship. In upholding the Governor of Illinois' restrictions on the exercise of one's religion, the Court stated –

The Executive Order does not discriminate against religious activities, nor does it show hostility toward religion. It appears instead to impose neutral and generally applicable rules... The Executive Order's temporary numerical restrictions on public gatherings apply not only to worship services but also to the most comparable types of secular gatherings, such as concerts, lectures, theatrical performances, or choir practices, in which groups of people gather together for extended periods, especially where speech and singing feature prominently and raise risks of transmitting the COVID-19 virus.

Worship services do not seem comparable to secular activities permitted under the Executive Order, such as shopping, in which people do not congregate or remain for extended periods.

Most recently, the Supreme Court of the United States, in a divided 5-4 opinion, upheld restrictions on religion implemented by the California governor. Although the Supreme Court's decision only pertained to the California restrictions, Chief Justice Roberts, in a concurring opinion upholding the California restrictions on religious exercise, adopted similar reasoning utilized by the Court of Appeals for the Seventh Circuit when it upheld the Illinois' governor's restrictions on religious exercise. Specifically, Chief Justice Roberts stated –

> *Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.*

Given the ill-defined parameters of government authority to restrict constitutional rights during a pandemic, more litigation will assuredly follow during this pandemic. Indeed, the ongoing civil unrest and protests in the aftermath of the police killing of George Floyd very well may further hinder governors' ability to restrict religious gatherings. Despite social distancing rules, governors have not stopped thousands of protestors from gathering.

As noted above, Chief Justice Roberts upheld California's restrictions on religion because those restrictions applied to "comparable secular gatherings, where large groups of people gather in close proximity for extended periods of time."

However, now that California has not prohibited protests, it seems unlikely that it still can restrict religious gatherings.

Title IX Disciplinary Process Unfair to Accused Students

By David Struwe | February 19th, 2020

Due process issues continue to be at the forefront of national discourse. Whether it be Justice Kavanaugh's confirmation or the Covington Catholic controversy, these issues are emotional and contentious. The next due process debate appears to be the U.S. Department of Education's proposed new Title IX regulations that would afford accused students additional due process protections. These reforms are needed given that universities currently employ inquisitorial type proceedings where the accused appears to be deemed guilty until proven innocent. Those willing to stand up for due process are unfortunately immediately labeled as "victim blamers."

This use of pejoratives is unfortunate given that courts have found Title IX disciplinary proceedings "fundamentally flawed" and inherently unfair to accused students. Indeed, one federal judge described Brandeis University's disciplinary process as being "closer to Salem 1692 than Boston 2015." He further stated:

"Whether someone is a 'victim' is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning… If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."

Similarly, California appellate courts have recently reversed three University of Southern California (USC) Title IX disciplinary decisions, finding that USC's Title IX investigations were unfair to the accused students.

In the earliest of the three recent appellate court reversals, John Doe filed a petition for a writ of administrative mandamus after USC expelled him for allegedly sexually assaulting a female student Jane Roe. *University of Southern California*, 2018 WL 6499696 (Cal. Ct. App. Dec 11, 2018). As alleged by Jane, she and John both attended a "paint party," where attendees splattered paint on each other and drank alcohol. Due to the amount of alcohol she consumed, Jane's memory of the alleged events leading up to and including the alleged sexual assault was fuzzy. Prior to attending the party, John and Jane had never met.

Ultimately, John and Jane ended up back in Jane's apartment, where they had sex. Initially, Jane could not recall with whom she had sex and whether she consented, but later identified John as the person with whom she had sex.

Jane reported the matter to the USC Office of Student Judicial Affairs and Community Standards and accused John of sexually assaulting her. Dr. Kegan Allee served as USC's Title IX investigator and initiated an investigation. Dr. Allee interviewed Jane. John chose to not make a statement. During the course of her investigation, Dr. Allee also relied on the preliminary, and in some instances, inconsistent statements given by a variety of witnesses to another USC investigator. Dr. Allee did not personally interview these witnesses. Instead, Dr. Allee made credibility determinations based upon her review of witness statement summaries prepared by the other investigator.

John's attorney requested that Dr. Allee retrieve Jane's clothing and bedding from the night of the alleged assault, so he could have them independently analyzed to determine whether they tested positive for the presence of blood as reported by Jane or, alternatively, paint from the "paint party." The attorney also requested Jane's medical records. Dr. Allee secured neither the clothing and bedding nor the medical records. Further, Jane asserted that the clothing and bedding had been discarded and could not be produced.

At the conclusion of her investigation, Dr. Allee found "Mr. Doe responsible for violating the student code of conduct." USC then expelled John.

Under a California procedure, John subsequently filed a petition for a writ of administrative mandamus, alleging that he had not received a fair hearing. On appeal, the state appellate court ruled that USC had indeed violated John's rights by not affording him a fair hearing. In reaching this conclusion, the appellate court noted that "[i]n disciplining college students, the fundamental principles of fairness require, at a minimum, 'giving the accused students notice of the charges and an opportunity to be heard in their own defense.'" The appellate court further noted that a university disciplinary hearing was not the same as a criminal proceeding, and federal constitutional guarantees were not applicable to private colleges like USC. Nevertheless, the court stated that constitutional "[d]ue process jurisprudence … may be 'instructive' in cases determining fair hearing standards for disciplinary proceedings at private schools" under California law.

The appellate court concluded that the process was unfair because the adjudicator did not personally interview the key witnesses and assess their credibility. The court also concluded that the hearing was unfair because Dr. Allee did not attempt to recover potentially exculpatory evidence, specifically the bedding and clothes from the night of the encounter.

After granting John's petition, the court further held that if USC chose to hold another hearing, it should allow John to submit questions for the adjudicator to ask Jane. "[A]s

part of the adjudicator's assessment of credibility, an accused student must have the opportunity indirectly to question the complainant."

Following the opinion of the case discussed above, the California appellate courts reversed two additional USC Title IX disciplinary decisions. These appellate courts found USC's Title IX investigatory process "fundamentally flawed" under California law because, among other things, the Title IX process did not allow the Accused student the opportunity to cross-examine the complaining witness.

Increasingly, collegiate disciplinary hearings are resulting in litigation between disciplined students and universities, often concerning alleged violations of constitutional due process, breach of contract, and Title IX violations. Regardless of the theory under which the complaint is brought, these complaints primarily allege that the collegiate disciplinary procedures were unfair.

As previously mentioned, the U.S. Department of Education's proposed new Title IX regulations seek to correct the unfairness inherent in these disciplinary proceedings. These proposed regulations would, among other things, create safe harbors for colleges and universities whose disciplinary processes provide for certain elements of due process.

Although these issues are emotional, universities in this context have similar roles to that of prosecutors. As such, these institutions should take heed to the following guidance from the Supreme Court: the role of the prosecutor "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a … prosecution is not that it shall win a case, but that justice shall be done."