

From: DV Williamson
Sent: Fri, 11 Jun 2021 08:22:00 -0400
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (topic of the comment).

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My name is Dean Williamson. I am an economist and an historian. I also spent 20 years at the US Department of Justice doing my best to motivate antitrust cases.

I urge the Department of Education to preserve the integrity of due process protections afforded under the Title IX Rule.

Undermining the rule by, say, restoring the guidance advanced in the Department's "Dear Colleague" letter of 2011, amounts to shifting the burden of proof in quasi-judicial processes on campus. That is not a small matter. The existing rule agrees with the standard of "innocent until proven guilty". Undermining the rule would amount to imposing a standard of "guilty until proven innocent".

The problem with "guilty until proven innocent" is that it invests accusers and the universities with much capacity to manufacture claims and impose costs on people they don't like. In contrast, the standard of "innocent until proven guilty" imposes discipline on university processes. Specifically, it induces accusers and universities to take care in assembling their evidence and then evaluating the quality of their evidence. Pursuing a claim with poor evidence effectively amounts to bearing false witness. Yet, on determining that the quality of evidence is low, erstwhile accusers may give up on the idea of bearing false witness.

Under the "Dear Colleague" regime, universities found themselves the subject of hundreds of litigation efforts launched in actual courts of law. Going back to such a regime would merely invite more litigation, and it is not obvious that the universities or accusers would benefit. They would all likely be harmed.

My experience at the Department of Justice is apposite. Our job as antitrust enforcers was to build good cases. We understood that the we (the government) bore the burden of proof. It was up to us to convince a judge that a given merger or given business practice was anticompetitive. Facing the discipline of a court-ordered process induced

us to take much care in developing cases and in deciding which cases to pursue to litigation -- and in which cases to close. In contrast, were the burden of proof reversed - that is, if firms had to affirmatively prove the pro-competitiveness of mergers and business practices -- then the government could launch cases arbitrarily. The government could use litigation to arbitrarily bully firms into doing whatever it wanted. That would be one step short of organizing the economy as a Soviet, top-down command economy rather than as an economy based on voluntary exchange.

Or, put it this way: The standard of "innocent until proven guilty" operationalizes the concept of equality before the law. The alternative is *inequality* before the law. Indeed, reversing the standard to "guilty until proven innocent" would amount to imposing inequality before the law. It would amount to imposing arbitrary law. That is, it would amount to imposing rulings and decisions made up on the fly by quasi-judicial bodies. That is medieval.

The biggest question in the history of constitutional law was "Is the King above the Law?" That is, do we believe in the rule of law or, the same thing, is everyone equal before the law? The English required 50 years of on-and-off civil war from the 1640's to the 1690's to settle this question, but, by the end of it, it was established that, yes, even the king has to respect the rule of law. The king could no longer do what he had done: Use quasi-legal processes to harass political enemies.

I invite the Department to *not* build a bridge back to the 1630's.

Sincerely,

Dean V. Williamson, PhD