

For those of us who are defense counsel for service members, it has been a frustrating period of time. Fighting misconceptions of military law and justice in the face of the current political discussions of sexual assault is difficult. All defense counsel, military or civilian face the occasional accusation of “How can you defend someone like that?” but this is different. It is even more difficult with something as highly politicized as sex crime prosecutions and about which the discussion has been distorted by inaccuracies. It is more difficult when the discussion threatens to erode the protections that accused service members deserve. On many occasions I have spoken with civilians who have little knowledge of the military and even less of courts-martial. They have many misconceptions about how courts-martial function. Those misconceptions guide public opinion.

Almost every practitioner of military law will tell you that over the past two decades the military courts have become more like civilian courts. But, there remains a number of differences that serve the dual purposes of military justice which are justice and discipline. Among those who practice military law, there is a long standing debate about the weight that should be given to those two prongs of military justice but that is the reality of military justice. Most Americans see courts-martial as they do the law generally, through the filter of television and movie fiction. Obviously, a court-martial is not “A Few Good Men” or the television show “JAG.” A realistic view of courts-martial is not a bumper sticker slogan analysis. It requires a global perspective on how good order and discipline are maintained in the force.

These courts are tools of command, of good order and discipline as well as the place we hope to vindicate the rights of an accused. The credibility of the military courts is essential to maintain the confidence of all service members, both the victims of crimes and the accused. If that confidence is eroded, these courts cannot serve the purposes for which they were created.

We can disagree about what form the military courts should take, but we can all agree that commanders and those they command must have confidence in courts-martial.

The Uniform Code of Military Justice was adopted in part to address the concerns of the many veterans who served in World War II. Those veterans, including veterans who then served in Congress, were concerned by the arbitrariness and unfairness military justice. Over the past 60 years, military justice has become more protective of the rights of service members than it was in the past. There has been a recognition of how the power of command weighs on criminal prosecutions in the services. That recognition is based on the fact that service members are a captive audience, required to obey orders, and under the powerful influence of commanders. This is why military justice can be seen as paternalistic. We understand the influence of command power. It is the same dynamic that creates legitimate complaints about how the military has addressed sexual assault. The abuse of authority is the greatest temptation and flaw in any military organization by virtue of the literally life and death control that commanders possess.

As debate continues over how to address the prosecution of sex crimes in the military courts, it is important not to forget that this is not a system designed solely to protect the rights of the accused, even now. It is a common consideration in the decision to court-martial whether a proposed disciplinary procedure will serve as an example to other soldiers. It is done with the idea that discipline should be swift and sure to reinforce good order and discipline. This is not the hypothetically neutral civilian court. Our civilian courts, although the preservation of law and order is a goal of criminal justice, are not designed to maintain the internal discipline of one part of the government. Military justice is a tool of command. It is not uncommon to have the results of disciplinary proceedings announced to the troops when assembled, as an example to others.

Military discipline has retained a thread of personal discipline that is unique to it. We reprimand, reduce in rank, dismiss the individual in disgrace as well as exercise the option of

incarceration. It is personal because military discipline is a tool of control. We punish behaviors that would not be conceived of as criminal in the civilian world. It is a potential crime to not go to work. It is a crime to make an obscene gesture to another. It is a crime to commit adultery in many circumstances. The scope of behaviors that are criminalized in the military is very broad. The military can even manufacture new crimes, those actions that are prejudicial to good order and discipline. I might lose a civilian job if I have an affair with a subordinate, but I won't be charged with a crime and tried in a criminal court for my indiscretion.

The controversies over how sex crimes are handled in the military have focused on a belief, albeit inaccurate, that the Convening Authorities are going "easy" on sex offenders, those who work in these courts will tell you that is not true. The heavy hand of the convening authority hangs over all courts-martial. Civilian practitioners are surprised by some of the details of courts-martial procedure.

For example, if I need an expert witness for a trial by court-martial, I first must request that expert not through a neutral third party, a judge, but submit a request to the Convening Authority through the trial counsel, the military prosecutor. If refused an expert, I have the option of seeking relief from the military judge, but that inevitably means that I am delayed in preparing for trial. It tips the scales against the accused. There are numerous details of military justice practice that reflect the power of command. That can seem to have been forgotten in these discussions of sexual assault. But, diminishing the protections for the accused will not address the problem of sexual assault in the military. It is not a court problem we face, it is a command problem. Tinkering with changes that only diminish protections for the accused damages the credibility of these prosecutions and does nothing to address the sexual assault in the military.

My encounters with service members, both officers and enlisted members, inform me that there is little trust that these prosecutions will be carried out objectively. With the careers of senior officers being stymied in Congress, when they exercise the authority they must in good

faith. It is of little surprise that many senior commanders are unwilling to reject any proposed prosecution for sexual assault, even when they should. They will take the safer route of allowing the matter to go to court. At least in that manner they don't face the criticism that they were being soft on sex crime perpetrators.

This discussion must be open to solutions, not just accusations. The solution is not just more courts-martial. In addition to punishment, we must prevent, protect and educate. All options must be open. It is a myth that criminal prosecutions will halt sex crimes. It is a myth that exercising self-protection measures to help avoid sexual assaults is "blaming the victim". Some sexual assaults can be prevented by using the prudent tools already available to us. The buddy system can serve us well in helping to prevent service members from being taken advantage of at a vulnerable time. Admittedly, that only addresses some assaults, with the more insidious crimes having a different dynamic. But, that doesn't mean we shouldn't have a sober buddy (male or female) keeping an eye on the party to ensure it does not get out of hand. That is not victim blaming, it is trying to stop at least some assaults.

Education is important. Anu Bhagwati from the Service Women's Action Network and I sometimes disagree, but we do agree that the services cannot train their way out of the problem. But, that does not mean we must abandon training, formal and informal. Knowledge is an essential component of sexual assault prevention.

It is a myth that the solution to sexual assault in the military is to diminish protections for the accused. We must ensure that service members have confidence that they will not face a kangaroo court when accused of a crime. In addition, we need culture change, in its many forms, to have a more realistic understanding of who commits sex crimes. A recent conversation with an expert psychologist who has testified for both the defense and prosecution in sexual assault cases confirmed one of my observations, that those high performing "water walkers" can be perpetrators, something that seems better known to the civilian world were scout leaders,

coaches and clerics have been exposed as perpetrators. That is one change in understanding sexual assault that would move us forward in prevention. There are changes to be made, but those changes must be made with an understanding of the institution in which we serve and without damaging the legitimate protections we give to those accused of crimes, who are after all, presumed innocent until proven guilty.