FEATURES

Military lawyers confront changes as sexual assault becomes big news

BY LORELEI LAIRD

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Photo of Air Force Reserve Lt. Col. David Frakt by Ben Van Hook.

If there's such a thing as a typical military rape case, it might start like a typical civilian rape case.

Men and women may be drinking together. The woman may pass out. The next day she would allege that she was sexually assaulted and claim that her drink was drugged. If these were civilian co-workers, the decision about whether to prosecute would be in the hands of a professional prosecutor.

But in the military, the commanding officers have that power and more. Although they don't necessarily have law enforcement or legal training, commanding officers have discretion on whether to drop the charges, convene a court-martial or impose a less serious nonjudicial punishment. They receive advice from military prosecutors—and usually follow it, military attorneys say—but the final decision is theirs.

And when cases do go to a court-martial, commanding officers have absolute clemency power. The officer who convened a court-martial (called the convening authority) is able to throw out the resulting guilty verdict entirely, or reduce it as much as he or she pleases. No explanation is required. It's a system based on the military's culture of respect for the commanding

officer, whose authority is thought to be vital to “good order and discipline.” Military observers say there’s no comparing civilian bosses to commanding officers because in the military, obeying orders can mean life or death.

But after criticism of how it handles sexual assault, the military justice system is facing calls for change.

Some proposals would remove the convening authority’s ability to overturn a military jury’s verdict and modify the system to more closely resemble civilian procedure. That’s the trend among our allies and in other parts of military justice, such as the military death penalty system, says Air Force Reserve Lt. Col. David Frakt, a military justice expert.

“If the overall goal is to have a military justice system that more closely resembles a civilian justice system, it’s hard to justify” convening authority, Frakt says. “And it’s particularly hard to justify giving that kind of power to a nonlawyer.”

Meanwhile, Congress is considering a bill that would take away the convening authority’s ability to overturn a military jury’s verdict. The bill, however, declines to authorize a military prosecutor—rather than a commanding officer—to decide whether to prosecute. This was originally included but removed after military leaders said taking this “initial disposition” authority away from officers would undermine good order and discipline.

Major Gen. John Altenburg Jr. says such discipline does not overburden commanding officers; it’s an integral part of their jobs. Now retired from a 28-year career as a military judge advocate, he chairs the ABA’s Standing Committee on Armed Forces Law.

“It’s hard work, but it’s hard work that they want to do because it’s important to the success of their organization,” says Altenburg, now of counsel to Greenberg Traurig in Washington, D.C.

But one service branch has gone ahead with a new advisory system. In January, the Air Force began the Special Victims’ Counsel program to bring victims’ rights law—already a feature of many civilian justice systems—into the military.

SVC lawyers represent victims who file a sexual assault report, including restricted reports that don’t lead to prosecution. SVCs handle all of the legal needs that could arise from reporting an assault, including explaining the military criminal justice process, advocating for victims on matters like rape shield laws, and helping with related civil matters like protective orders. When necessary, they can advise on any criminal charges against the victims themselves, which sometimes arise for collateral misconduct like underage drinking.

Photo of Maj. Gen. John Altenburg Jr., chair of the ABA Standing Committee on Armed Forces Law, by Zarin Goldberg.

"Obviously, a concern is the underreporting of the crime," says Lt. Col. Dawn Hankins, the chief of the Air Force SVC program. "We're hopeful that maybe the idea that they can have an attorney who represents their rights and helps get them through the process … might encourage some folks to come forward who otherwise wouldn't."

INGRAINED BEHAVIOR

All of these changes seek to revise a system that has long abided by military rules. Yet critics say it doesn't adequately consider the severity of sexual assault victims' claims. It's the consequence of a military that has integrated women into the system but as yet hasn't dealt with their complaints.

The U.S. Department of Defense reports a 34 percent increase in the number of estimated unwanted sexual contacts for fiscal 2012, as compared with 2010. That report is an estimate based on a survey of 22,792 active-duty service members and includes everything from groping to rape. The same survey found that 67 percent of military victims didn't report the crime, compared with the 54 percent of sexual assault crimes that the U.S. Bureau of Justice Statistics says are unreported in the country as a whole.

And this happened in the wake of a widely seen 2012 documentary that was critical of the military justice system. *The Invisible War* told the stories of service members who said they were retaliated against for reporting rapes and often drummed out of the military. Often, they said, they were prosecuted for "collateral misconduct" like

underage drinking, or for making reports their commanders thought were lies. At the same time, they said, their commanders were free to let the assailant go unpenalized or require very light penalties. The movie was nominated for an Oscar.

As for the power of a convening authority, in February Air Force Lt. Gen. Craig Franklin overturned a November jury verdict and sentence against Lt. Col. James Wilkerson, who was convicted of aggravated sexual assault of a woman in his off-base home in Italy.

Sexual assault in the military has frequently arisen as a national issue. The 1991 Tailhook scandal touched off congressional hearings as well as shake-ups in the Navy's command structure. Reports of sexual assault during deployments in Iraq and Afghanistan led to several reforms in 2004, including a rewrite of Article 120 of the Uniform Code of Military Justice, the provision dealing with rape, effective in 2007. That revision was widely criticized as poorly written and arguably unconstitutional, in part because it removed consent as a defense. Article 120 was rewritten again, with more success, in 2011.

The 2004 reforms also led to the establishment in 2005 of a new "restricted reporting" option for military sexual assault victims. Restricted reports give victims access to counseling, medical resources and chaplains, but they don't go through the military justice system. Thus, there's no possibility of prosecution, but also no possibility of retaliation by a commander. The policy is believed to have increased reporting of sexual assault, though even more cases still go unreported.

And in April 2012, before this year's series of congressional hearings on military sexual assault, former U.S. Defense Secretary Leon Panetta handed down a memo withholding the authority of commanders with ranks lower than colonel or Navy captain to decide whether to prosecute sexual assaults. Defense officials said the goal was to give power to more experienced officers, and to avoid bias or the appearance of bias by lower-level officers who might know both the accuser and the accused personally.

But military lawyers are cautious of its effect. Zachary Spilman, a Marine Corps judge advocate serving as a military defense counsel at Camp Lejeune, N.C., says Panetta's withholding-of-authority order has changed the way Spilman works a case. He says he now has to speak to higher-level officers who are removed from the matter.

"The further up the chain of command you go, sometimes the further away you are from the people involved," says Spilman, who emphasizes that his views are his alone and not those of the Department of Defense. "A general officer is going to be in

charge of thousands and tens of thousands of personnel. He has to get briefed on it."

Frakt says upper-level officers simply don't have time to act as prosecutors. For that reason, he believes initial disposition authority should be given to military prosecutors.

Officers "have huge organizations they're responsible for," he says. "They're training people, they're fighting wars, and to also have responsibility to review hundreds of pages for a criminal investigation, to review the entire transcript of a military trial—it's unrealistic."

Spilman adds that the heavier emphasis on prosecution of sexual assaults has led to more prosecutions, sometimes including cases that wouldn't be prosecuted in the civilian world. He points to a *Joint Force Quarterly* article arguing that common features of military sexual assault cases—such as memory lapses, heavy alcohol use and a lack of witnesses—make cases difficult to prove beyond a reasonable doubt. As a result, the article argues, defendants are more often acquitted, which makes outside observers believe the military doesn't penalize rapists.

And after the two congressional rewrites of Article 120, Spilman believes the provision is so broad that it criminalizes conduct that may not be criminal. He is a contributor to CAAFlog (http://www.abajournal.com/blawg/caaflog/), a blog that follows the military's highest court, the Court of Appeals for the Armed Forces. In one post (http://www.caaflog.com/2012/10/07/a-sexual-assault-rorschach/), he suggests that the sailor kissing a nurse in Times Square in the famous photo from the day the fighting ended in World War II might be subject to prosecution for sexual assault under the current Article 120.

"If this kiss happened today, it would be chargeable as a rape under Article 120," he wrote in October. "Lack of consent is not an element, intoxication is not a defense, and the maximum authorized punishment for such a rape is imprisonment for life without the possibility of parole."

Indeed, Spilman says, "your life is on the line" in a military sexual assault prosecution. A conviction can put the accused in the brig for decades and get him or her a punitive discharge without benefits. He adds that practically any conviction under Article 120 carries the obligation to register as a sex offender, a collateral consequence that he says is often more onerous than the actual sentence.

SPOTLIGHT BRINGS AWARENESS

Perhaps a better consequence of all this attention to sexual assault is more training on the complicated legal and scientific issues that arise. Spilman says he's received more training, and has sometimes spent long hours working to understand the

scientific and legal issues involved. For example, he says, sexual assault cases often involve alcohol or drugs, which can cast the affected person's testimony into doubt.

"[Sleep aids] and other hypnotics have effects on the way people perceive things," he says. "That's a big concern because we rely on the memory of the witnesses to figure out what really happened."

Thus far, the Air Force Special Victims' Counsel program has gotten good reviews from victims. The program surveys victims after their cases are over, and all the respondents reported being "extremely satisfied" with their representation.

"Many comments were: 'I really wish I'd had a victim's counsel at the beginning,' " says Hankins, chief of the Air Force SVC program. "Giving them a voice in the process, I think, has been one of the huge benefits."

Photo of Lt. Col. Dawn Hankins, chief of the U.S. Air Force Special Victims' Counsel program, by Stacy Zarin Goldberg.

Officials also like the SVC program. Legislation has been introduced in Congress to expand it to all branches of the military. The Defense Department views it as a pilot program that may be expanded to all of the branches. But SVCs represent only the victims, whose interests may clash with those of the prosecution. For example, it's emotionally difficult for victims to keep retelling their stories, but prosecutors may ask for multiple interviews if they feel it's necessary to build their cases.

"Everyone has their own agenda," says Hankins, who is stationed at Andrews Air Force Base in Prince George's County, Md. "Our only duty is to represent [victims'] interests in an attorney-client privilege system."

Because no part of the military had experience with victims' rights law before the program started, the Air Force consulted the National Crime Victim Law Institute in Portland, Ore. Its executive director, Meg Garvin, a professor at Lewis & Clark Law School, helped train the first class of 60 judge advocates in December. This first

class acted as SVCs part time, balancing the work with other duties; in June, the Air Force assigned 24 judge advocates to do the work full time. From Jan. 28 (the program's start date) to June 7, SVC attorneys had represented 327 clients.

SVCs are less popular among defense counsel, who, Hankins says, are concerned that an extra, adverse lawyer stacks the deck against defendants. But a military appeals court ruled in July that victims may be heard in courts-martial through their SVCs. In *LRM v. Kastenberg* the Court of Appeals for the Armed Forces, the military's highest court, reversed military judge Joshua Kastenberg's ruling that LRM, known by her initials, and her SVC were third parties with no such rights. The Air Force Court of Criminal Appeals then ruled that it didn't have jurisdiction to hear the case. The CAAF disagreed with both, though it cautioned that military judges still retain discretion to set reasonable limitations.

"The CAAF decision is a huge step forward for victims' rights in the military," says Hankins. "SVCs will be able to fight in court to protect their clients' privacy rights and uphold their legal interests."

"The court has recognized standing for the victim to be heard, by themselves or through counsel," says Air Force Maj. Robert Wilder, a colleague of Hankins'.

The case attracted amicus briefs from defense divisions in every military branch—all of them supporting the case of the defendant and real party in interest, Airman First Class Nicholas Daniels. Hankins says different courts-martial judges have decided this different ways so far. The Army appeals court decision could be appealed to the U.S. Supreme Court.

BIG CHANGES IN PENDING BILLS

Perhaps the most sweeping changes are the ones being proposed in Congress. As of June, the bill believed most likely to pass would take away the convening authority's ability to overturn a military jury's verdict. That bill is notable for what it's missing: a provision authorizing a military prosecutor, removed after military leaders objected.

Altenburg says that "good order and discipline" is another way to say "readiness for combat"—one of the most fundamental goals of the military. Part of that is willingness to work together and follow orders, he says, and commanders are responsible for making sure their units do that.

"Lives are at stake," Altenburg says. "So it's important that units work together. That's why commanders going back hundreds of years have the authority to impose discipline." Besides, he says, commanders are trained in this duty and usually follow military prosecutors' advice.

Not every military veteran agrees. Taryn Meeks was an active-duty Navy judge advocate until May. She is now executive director of Protect Our Defenders, an organization based in Burlingame, Calif., that advocates for women and men who were sexually assaulted while serving in the military. Meeks, who lives in Washington, D.C., believes military leadership hasn't explained well enough why good order and discipline requires initial disposition authority.

Photo of Taryn Meeks, executive director of Protect Our Defenders, by Stacy Zarin Goldberg.

"The military leadership has never been able to articulate how or why this would undermine good order and discipline … specifically," she says. "One of the reasons discussed at the [congressional] hearing is the need for swift justice for forward-deployed," meaning those who are deployed to front lines, usually far from a base and its resources. "But in order to convene a court-martial, you still have to have prosecutors," Meeks says, "so what is the impediment to swift justice when you already have that team?"

In early June, law professors signed an open letter to Congress advocating several major changes to military justice, including reviving the measure giving this decision to military prosecutors. Frakt was the only current military attorney among the signatories.

"I agree and believe that commanders have to have authority to maintain discipline, but I don't think that requires them to be convening authorities for courts-martial," says Frakt, a former professor at the University of Pittsburgh School of Law.

He notes that commanders would still have a "large toolbox" for maintaining order, including nonjudicial punishments. And if the crime requires a court-martial, he believes it's no longer a matter of good order and discipline because the military doesn't want to retain people who are guilty of serious crimes.

The law professors' letter also supported the congressional measure to take away the clemency power of the convening authority. Frakt says he loved it when he was a defense counsel "because it's a second bite at the apple for every defendant." A complete reversal of the verdict, as in the Wilkerson case, is rare, he says.

But Meeks of Protect Our Defenders says it's "an affront to justice" that it can happen at all. "You have senior members [military jurors] look at this case and judge it on its merits," she says. "But then for one person who was not at the trial … [to change the outcome], I think it really undermines the credibility of the system."

Frakt says part of the reason commanders are willing to overturn juries is that the military jury system is flawed. Court-martial members (the name for military jurors) are hand-picked by the convening authority, they do not have to decide unanimously, and they can number as few as five. The law professors' letter called for random assignment of court-martial members to avoid bias or the appearance of bias.

Meeks adds that both military prosecutors and defenders have problems with the military jury system because it stacks the jury with people who know the parties and might decide based on a personal bias.

TOUGH HURDLES

Civil attorney Susan Burke of D.C., who works closely with Meeks and Protect Our Defenders, represents many veterans interviewed in *The Invisible War*, which criticizes the military's handling of sexual assaults. The lawsuit profiled in the film, *Cioca v. Rumsfeld*, was dismissed in federal district court. In July, the 4th U.S. Circuit Court of Appeals at Richmond, Va., upheld the dismissal, saying that Supreme Court precedent forbids civilian courts from interfering with matters of military discipline. Burke is also pursuing separate lawsuits against the Navy and Marine Corps (dismissed in district court on the same grounds) and the service academies. The lawsuits allege that the military has failed to implement reforms required by Congress, creating a culture that tolerates sexual assault.

It's tough legal terrain. Past U.S. Supreme Court cases dramatically limit service members' right to sue over injuries related to military service. The court has ruled that no lawsuit can be filed when the injury is "incident to service," because the courts shouldn't interfere in matters of military discipline unless Congress invites them to. This was the basis for the dismissal of *Cioca*. Burke says part of the point of the lawsuits is to call congressional attention to that situation.

"One thing important for Congress to understand is they can't have a notion in the back of their heads that the courts will take care of this," she says. "By banging our heads against this brick wall, we prove to Congress that the only people who can fix

this are you."

Political commentary on military justice has already brought about some changes, but not the intended ones. In two courts-martial in June, military judges ruled that President Barack Obama's public comments on sexual assault in the military amounted to "unlawful command influence," or pressure from the top to rule a certain way. But it's not clear that civilians can exert UCI. The Air Force Court of Criminal Appeals has already upheld a court-martial judge's UCI ruling, agreeing that a juror can be challenged based on UCI from Obama; the Navy-Marine Corps Court of Criminal Appeals was considering two similar cases as of June, and the issue may well go to the Court of Appeals for the Armed Forces.

But even substantial changes to the military justice system are only half of what's needed, critics say; the culture must change, too. Even U.S. Secretary of Defense Chuck Hagel framed the issue as a cultural one when arguing for keeping initial disposition authority within the command structure. Meeks and other reformers disagree with Hagel on that, but they agree that military culture is a vital part of military justice.

"I think this is a multistep process," Meeks says. "It really needs to be attacked from both angles: Change the structure of the system while we hope and fight for cultural change."

Lorelei Laird is a freelance writer in Los Angeles.