2016

Keynote Address | Sexual Offenses: Lessons from the Front Lines

Lisa M. Schenck
George Washington University Law School, lschenck@law.gwu.edu

Recommended Citation

Schenck, Lisa M., Keynote Address | Sexual Offenses: Lessons from the Front Lines (November 6, 2015). Lisa M. Schenck, Keynote Address: Sexual Offenses: Lessons from the Front Lines, 45 Southwestern Law Review 453 (2016) ; GWU Law School Public Law Research Paper No. 2016-30; GWU Legal Studies Research Paper No. 2016-30. Available at SSRN: http://ssrn.com/abstract=2819036

KEYNOTE ADDRESS

SEX OFFENSES: LESSONS FROM THE FRONT LINES*

Lisa M. Schenck**

What comes to mind when I say: "Tail Hook," "Aberdeen Drill Sergeants Sexually Abuse Trainees," "Sergeant Major of the Army McKinney," "Aviano Rape Conviction Dismissed," or "Naval Academy Football Team Acquitted of Rape"? These are media headlines that initiated scrutiny—and in turn, public criticism—of the military justice system. The military is a petri dish of social reform, and today our military is truly on the frontlines in dealing with sexual assault. The military justice system is also under attack, because many continue to believe, as someone once said, "military justice is to justice what military music is to music." In other words, some believe military justice is not justice.

* This is an edited transcript of a keynote address as delivered on November 6, 2015 at Southwestern Law School, Los Angeles, CA.

** Associate Dean for Academic Affairs, Co-Director of the National Security Law LL.M. Program, and Professorial Lecturer in Law at The George Washington University Law School. The author is a retired colonel from the U.S. Army Judge Advocate General's Corps who served as a Senior Judge, and previously, Associate Judge, on the U.S. Army Court of Criminal Appeals (2002–2008); upon retirement, she served as the Senior Adviser to the Defense Task Force on Sexual Assault in the Military Services (2008–2009). B.A., Providence College; M.P.A., Fairleigh Dickinson University; J.D., Notre Dame Law School; LL.M., The Judge Advocate General's Legal Center and School; LL.M., Yale Law School; J.S.D., Yale Law School. The speaker would like to thank the Southwestern Law Review and Southwestern Law School for inviting her to speak at this symposium. This Address reflects the personal opinion of the author and does not represent the views of the University, Law School, Department of Defense, or Department of the Army.

Today, I am here to tell you that observation, simply, is not true. The military justice system has withstood war and peace and transitioned from a disciplinary system to a balanced, fair judicial system.

Today, I am going to ask you—as attorneys, as stewards of fairness—to take an educated, measured approach to soliciting changes to the military justice system in response to sexual assault—to take an educated, measured approach when asking our lawmakers to overhaul the military justice system in response to a limited number of scrutinized and publicized cases. The military and the military justice system need your support with this battle on the frontlines in Washington, DC.

In the next few minutes, we're going to look at how the military justice system, in its 240-year history, has changed in response to public outcry, and how the justice pendulum has swung from a command-dominated/obedience-to-commander framework to a just, fair system focused on individual rights—up until today—when the military is faced with haphazard changes and the threat of a complete overhaul of the justice system in response to media scrutiny and Congressional concerns regarding sexual assault.

First, I will discuss briefly where we came from, describing the evolution of the military justice system, a system that pre-dates the Constitution and Declaration of Independence. For the first 175 years, under the Articles of War, this was a system where justice was swift, sure, and severe—a commander-dominated framework, which, over the next 65 years, under the Department of Defense, became a fair system protective of individual rights.

Then, we will touch on the response to sexual assault in the military services—with the alphabet soup of Congressional and DoD groups—DTFSAMS, RSP, JPP, MRJG, JSC—with sporadic studies, chipping away at parts of the military justice system to respond to media scrutiny and Congressional concern.

Finally, we'll look at how these changes are working and the potential implications that should be a warning to slow down and take an educated, measured approach to changing the military justice system in response to sex offenses.

First, let's review where we came from and the evolution of the military justice system. This review is important to show how military justice has evolved from a system focusing on discipline to a system of justice. From the start, in 1775, the Army had a code of conduct identified as the Articles of War and the Articles for Government of the Navy. These were the codes setting forth the military justice system for the first 175 years, from 1775 to 1950.

The Armed Forces were made up mostly of poor, uneducated immigrants, and the military leadership relied on the threat of punishment to ensure discipline. Few of the procedures and protections of the civilian criminal justice system were in place. The framework of the military justice system was focused on obedience to the commander.

Few changes were made in this system until the composition of the military force changed. With World War II [1939-1945] came changes in the force and a broader exposure to the system. Sixteen million men and women were in the Armed Forces and nearly two million courts-martial were conducted. And with the implementation of the draft, a large force assembled for war. These service members from all walks of life saw the court-martial system as harsh and arbitrary, with stiff sentences, and few individual protections. Commanders were in control, and command influence on the outcome of cases was prevalent. Upon leaving the service, these service members raised their concerns.

In response, the Uniform Code of Military Justice of 1950 (UCMJ) was enacted for all Armed Forces.

This military justice system combined discipline with justice. Still recognizing the unique military environment, this was a system equipped for war or peace, workable in the U.S. and abroad, during small-scale operations around the world. That Code included individual protections, such as Article 31(b) (predating *Miranda* by 16 years in 1966), granting the right against self-incrimination. The military accused also gained a right to a defense attorney at no cost, predating the equivalent civilian right by 12 years.

The UCMJ also created the Court of Military Appeals, a court with civilian judges appointed by the President. Judge advocates were given bigger roles in the process, including increased responsibilities for staff judge advocates.

From 1950 to 1968, more protections were put in place. The President revised the Manual for Courts-Martial, and that included Rules for Courts-Martial. The U.S. Army Field Judiciary was established; JAGs and judges were assigned to Military Service The Judge Advocates General (TJAG), not commanders. Military judges were appointed and sat for special and general courts-martial. Accused service members now had the choice of judge-alone trials. Boards of Review became Courts of Review and service courts were empowered to conduct de novo factual sufficiency review to ensure no case processing involved command influence.

From 1969 to 1987, post-trial and pre-trial practice procedures were revamped. A separate trial defense service was established to ensure independence of defense counsel. The military draft was eliminated. But also during this time frame, the Supreme Court in the *O'Callahan* case in 1969 limited jurisdiction of courts-martial to only cases where there was a service connection. The Supreme Court overturned this requirement in 1987 and to this day, service members may be tried for misconduct without any service connection.

And since that time, there have been minor UCMJ changes from 1984 to 2013. There are two groups tasked with reviewing the Manual for Courts-Martial and the UCMJ and recommending changes to be implemented—the Joint Service Committee (JSC) (comprised of representatives from all Services), and the Code Committee, made up of the Court of Appeals for the Armed Forces civilian judges, Service TJAGs, and two civilians. The latter group has not taken an active role in suggesting changes. The JSC, through DoD, has proposed changes, and changes have been made.

The President, through rulemaking authority, and DoD and the Services, through regulations, have provided further structure to the military justice system.

So, that is how the military justice system has evolved.

Now, with that in mind, fast-forward to today and the response to sexual assault in the military services and the impacts on the well-established, 240-year justice system. Starting in 2003, DoD panels reviewed sexual assault in the military. In 2003 DoD reviewed sexual misconduct at the Air Force Academy, in 2004 DoD looked at care of victims, in 2005

DoD studied sexual misconduct at the United States Military Academy and Naval Academy, and in 2008 the Defense Task Force on Sexual Assault in the Military Services (DTFSAMS) reviewed the Services. DoD implemented many changes to address prevention of, and response to, sexual assault, including restricted reporting and establishing Sexual Assault Response Coordinators and Victim Advocates. These changes also authorized victims to engage in privileged communications with Victim Advocates. There were no major changes made to the military justice system itself.

A major change to a specific criminal provision was the revision of punitive Article 120 addressing sexual assaults. The amendments resulted in a 2007 version and 2012 version—40 pages in the Uniform Code of Military Justice.

Then, in 2013, the media publicized and scrutinized three sexual assault cases (despite the fact that there were nearly 4,000 courts-martial): the Aviano case, where the convening authority overturned a rape conviction, a Naval Academy rape case involving football players, and the misconduct of a lieutenant colonel who was leading up the Air Force Sexual Assault Prevention and Response Office. Congress, DoD, and even the President responded to the media scrutiny with comments regarding ending the "epidemic" of sexual assault in the military services. President Obama told the press, "If we find out somebody's engaging in this stuff, they've got to be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged. Period."[1]

Then in 2013 there was a combined Congressional-DoD effort with appointment of the Response Systems Panel and in 2014 the Judicial Proceedings Panel. Also in 2013, DoD's Military Justice Review Group was established. All three of these groups were tasked with looking for changes to the military justice system. These groups, still in existence, are stand-alone committees. These groups run parallel reviews, focusing on certain areas of the military justice system. Their work is in addition to the JSC. In 2015, we will also have the new Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed

1. Jennifer Steinhauer, *Sexual Assaults in Military Raise Alarm in Washington*, N.Y. TIMES (May 7, 2013), http://www.nytimes.com/2013/05/08/us/politics/pentagon-study-sees-sharp-rise-in-sexual-assaults.html?pagewanted=all&_r=0.

Forces. Over a period of 24 months, January 2013 to December 2014, members of Congress introduced over 40 bills to amend the Uniform Code of Military Justice. These included:

- National Defense Authorization Act (NDAA) FY 14 (enacted Dec. 2013). The provisions of this act concern sexual assault Title XVII, Sexual Assault Prevention and Response, and include 36 sections, with 16 military justice reforms. NDAA FY 15 (enacted Dec. 2014) included Title V, Military Justice, Including Sexual Assault and Domestic Violence Prevention and Response – 17 sections, 44 provisions, and 24 substantial revisions to the military justice system. Together, these National Defense Authorization Acts amended 36 UCMJ articles.

- The NDAA for FY 15 codified the Special Victim Counsel requirement, along with seven pretrial process reforms including reforms impacting the Article 32 preliminary hearing such as requiring Judge Advocates as hearing officers and allowing victims the option whether to testify at those hearings. Those reforms also limited interviewing victims without Special Victim Counsel present and providing an opportunity for input from victims regarding whether the civilian or military should take jurisdiction and prosecute. These reforms also ensured review for decisions not to refer sexual assault cases . . . five trial process reforms were included in the NDAA for FY 15 – changing the Military Rules of Evidence (which usually correspond to the Federal Rules of Evidence). Mandatory minimum sentences, four post-trial process reforms—limiting convening authority clemency to minor offenses, and four criminal law reforms including extended statutes of limitations—are also included.

Getting to my third point: how is that working for the military? Well, we don't know. The attention on sexual assault may be warranted, but attributing the sexual assault problem to the military justice system is unfounded. And modifying the military justice system in its entirety in response is problematic.

Changing various provisions in the Manual for Courts-Martial must be done with a holistic approach and we must consider potential problems that may result with other provisions. This was a very structured system tied together with intricacies throughout the Manual for Courts-Martial. There is

no question that some of those changes are beneficial, the Special Victim Counsel, for instance. As for some changes, we do not know how they will impact cases—for example, unsworn statements from victims during presentencing proceedings and no clemency authority for convening authorities even if a legal error occurs—we cannot be sure.

What has been seen is that changes in the criminal statutes have caused confusion and in some cases, acquittals; some cases involve different versions of the statute: pre-2007, 2007, and 2012 versions.

Instructions on lesser-included offenses are onerous and confusing because the different types of sex offenses do not share the same elements; these lesser-included offenses must be charged for panels to receive the required options and instructions. And due to a broad criminal statute and fear of not prosecuting cases, the military is prosecuting cases that would not make it to court in the civilian sector.

Because of the comments from the President and DoD leadership, command influence is once again a legal issue due to the attitude that cases must be tried. In some cases, when pretrial hearing officers and staff judge advocates do not recommend going forward with the case, those cases are being tried and are ending in acquittals.

Victims are not required to testify at the pretrial hearings, and in some cases may not testify or may not be interviewed until they actually testify at trial. I am not sure that this is good, and in all likelihood it is not good for the government's case. These cases may also end in acquittals because the evidence at trial may not support the charges.

The military needs time to implement and adjust to these extensive changes in order to determine the effect on the system, the Services, and individual service members. These changes were not based on an educated, measured approach; rather, these extensive changes were a response to a cry for reform due to a perceived sexual assault epidemic.

In sum, we have covered a lot of ground in a half an hour. First, I described the 240-year-old military justice system and the modifications to that framework—a transition from a system where justice was swift, sure, and severe, to the DoD-led system, which evolved into a fair criminal justice system focused on individual rights.

We also discussed the response to sex offenses, the numerous review groups, and the extensive changes to the system from 2013 to the present.

Finally, we highlighted potential problems.

Change is not the problem. The problem is how we are making those changes—changes to a system that has worked for our Armed Forces for 240 years, a system that guides the DoD, comprised of over 1.4 million active duty service members, a system that works during war and peace, for our unique mission, which includes peacekeeping forces, training foreign nationals overseas, and special operations missions.

I hope I have convinced you that we need to take a measured, educated approach to future change.

That is what is best for the military justice system. And our service members deserve a well-thought-out system. The military needs your support with this battle on the frontlines – a battle that started out with sexual assault. I hope you are as concerned as I am for the future of the military justice system.

Thank you.

[*Applause*]