

OPINION | May 13, 2013, 8:10 p.m. ET

Congress Targets Military Justice

By CHARLES G. KELS

When George Washington assumed command of the nascent American Army in 1775, one of his most urgent priorities was installing a system of military justice. Pleading with the Continental Congress for the appointment of a military lawyer, or judge advocate, Washington professed that "my great concern is to establish order, regularity, and discipline." Otherwise, he fretted, upon the outbreak of combat "general confusion must infallibly ensue."

Washington's instincts about the importance of good order form the basis of America's military-justice system, which gives commanders ultimate authority. The modern court-martial process provides robust safeguards for the accused, as in the civilian criminal system. Yet the purpose of military law is not only to promote justice. It is also to maintain discipline in the ranks.

The foundations of this commander-driven system are now under attack, due largely to a string of scathing reports and high-profile sexual-assault cases. The decision in February by one Air Force commander, Lt. Gen. Craig Franklin, to overturn the aggravated sexual-assault conviction of another officer, Lt. Col. James Wilkerson, has angered many in Congress and inspired calls for wholesale modification of the Uniform Code of Military Justice, the military's criminal canon. Secretary of Defense Chuck Hagel has endorsed at least some of Congress's proposed changes, which would circumscribe commanders' authority to set aside guilty findings after trial.

Meantime, Democratic Sen. Claire McCaskill has blocked the promotion of Air Force Lt. Gen. Susan Helms for granting clemency in a sexual-assault case last year. The senator's move follows last year's lamentable sexual-abuse scandal involving basic-training instructors, and the arrest on May 5, 2013, of the Air Force's sexual-assault prevention chief for, of all things, sexual battery.

Understandably outraged by an apparent epidemic of sexual violence in the armed forces, lawmakers have lashed out at the military-justice system, taking special aim at the prerogative of non-lawyer commanders to bring and dispose of criminal suits. Much of the controversy has centered on Article 60 of the code,



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which empowers commanders to change a court-martial verdict. But other critics have been blunt about their intentions to upend a "primitive" system, as Rep. Jackie Speier (D., Calif.) put it. The goal, Sen. Kirsten Gillibrand (D., N.Y.) acknowledged in an April interview, is ultimately "to remove all decision-making out of the chain of command about whether to prosecute a case."

A common complaint is that the commanders who convene and ratify military trials do not possess specialized legal expertise. Although required to consider the recommendations of their legal officers, commanders are not bound to follow their advice. The fact that a non-lawyer ultimately controls this legal system no doubt appalls the many members of Congress who are lawyers with strictly civilian experience.

However, the notion of command prerogative is deeply ingrained in the military's legal tradition. While the schemes being floated in Congress would greatly enhance the autonomy of uniformed lawyers—and I am one of them—it is striking that the highest-ranking legal officers of all five branches of the armed forces testified in support of commanders retaining their sole discretion. Notably, it was Sen. Lindsey Graham (R., S.C.), himself a judge advocate in the Air Force Reserves, who warned his congressional colleagues not to "over-indict the system."

Military lawyers check their egos at the door when they put on their uniforms. Judge advocates play a vital role in advising command, but they support—rather than run—the overall mission. In a sentiment that might shock some Beltway pundits, military lawyers are comfortable with their role and do not yearn for absolute power.

Historically, concerns about military law have been precisely the opposite of those being articulated today—namely, that the system is overly harsh and stacked against the accused. This is largely why the Uniform Code of Military Justice was instituted and subsequently revised, and why Article 60 permits commanders to reduce, but not augment, court-martial results. From this perspective, the clemency authority of commanders is actually less unsettling than the current political pressure to make an example of military rape suspects, rather than treat each case on the merits.

There is nothing more antithetical to competent command than the specter of sexual violence. That's why now is the time to exercise military leadership—not to undermine military law.

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A version of this article appeared May 14, 2013, on page A15 in the U.S. edition of The Wall Street Journal, with the headline: Congress Targets Military Justice.