



Military Justice Overview

Over the history of the United States military justice system there have been many occasions where a commander's powers have been limited in the service of justice. Each time, this was due to the recognition by lawmakers, justices, and the American people of the blatant unfairness and lack of professionalism of the military justice system and a reflection of the collective shock at the violent disregard for the constitutional rights of our service members. These changes are well documented, and there is no evidence that commanders were rendered less effective in their ability to lead as a result of the curtailment of their power in this area. There was, however, an understanding that the changes were necessary in order to move towards a more legitimate system of justice.

While they represented progress, these changes have been instituted over time in a piece-meal fashion, and have resulted in a lop-sided cadre of procedural protections for the accused that have come at the expense of victims of crimes like rape and sexual assault. And, although reforms have injected certain checks into the process, commanders – who are inherently conflicted, often biased and lack legal expertise – still maintain their overarching power over the entire justice process.

In order to truly ensure fairness, legitimacy and effectiveness within the military justice system, it is necessary to start at the foundation. American society operates with a fundamental respect and appreciation for the rule of law, basic fairness, and justice. The command-driven military justice system is antithetical to these ideals. When a legal system is perceived as biased, arbitrary and unprofessional, those subject to it lose faith in its authority. Without respect for the rule of law, a system cannot function in an effective or just manner. The concept of blind justice is the bedrock of American jurisprudence that holds that all are equal under the law. Unfortunately, military justice falls short of this ideal.

No system of justice should provide an individual the authority to put their thumb on the scale of justice either on behalf of the accused or the victim.

Overview of Historical Changes to the Military Justice System

The American military justice system was modeled after the British system (which has since been modernized to limit the role of commanders in administering justice). Originally the commander was vested with immense power and there were essentially no protections for service members subjected to military courts-martial. Members were often convicted without the assistance of counsel, or the protection of a judge. The “jury,” rather than a judge, ruled on what evidence would be admitted, and the commander held vast authority over the charges and sentencing of the accused. Once convicted, the accused lacked access to modern appellate courts, and instead was forced to appeal directly to commanders. Until 1920, a commander who was

dissatisfied with a verdict or sentence could repeatedly return a case to a court-martial to obtain a harsher sentence or guilty verdict.

This system came under intense scrutiny during World War II, when so many Americans who served were subjected to the abusive and arbitrary power of commanders wielding unchecked court-martial authority. During the war, over 1 million court-martials were convened, and the Army alone executed more than 140 soldiers, including a shockingly high proportion of African Americans. These executions often occurred within weeks of a conviction, without undergoing any meaningful or independent review of the sentence.

In the 40 years following WWII, Congress worked to prevent such blatant disregard for defendant's rights, and gradually enacted reforms to infuse the military justice system with an ever-increasing array of rights and protections for the accused. The fear of abuse in the form of unlawful command influence (UCI) was warranted, and Congress sought to check it through the implementation of basic safeguards such as military judges and quasi-independent defense counsel, search and seizure protections, the right against self-incrimination, and a basic right to appeal. In a move that explicitly recognized the inherent bias and influence of commanders, Congress established measures in an attempt to ensure an accused was afforded due process and not convicted as a result of command pressure and influence. After the establishment of the Uniform Code of Military Justice in 1951, UCI was statutorily prohibited under Article 37.

The institution of the UCMJ was the keystone of reforming the military justice system, which consolidated all services' justice systems under a uniform military justice code and led to additional formal procedures and rules protecting the accused. However, to date these reforms have fallen far short of aligning with civilian criminal justice standards, and Congress has opted for an uneasy balance between the rights of an accused and the unwarranted belief that commanders must be responsible for administering military justice.

These changes, intensifying protections for the accused, fail to protect and often undermine the rights of crime victims, and in particular victims of rape and sexual assault.

Ultimately, the restrictions that Congress has placed on commanders in reaction to egregious violations of service member's rights have failed to fix the underlying problem, and simply added a buffer to guard against the power wielded by non-lawyer commanders. Furthermore, the restrictions against UCI intended to protect the accused, inherently inhibit the freedom of commanders to take aggressive action to address disciplinary and command climate issues required to prevent the future occurrence of similar offenses. The inherent conflict that led Congress to intervene in protection of the accused continues to infringe upon the rights of victims and obstruct their ability to seek justice for their assaults.

Weakness of Convening Authority System

The command-based military justice system has endured despite its lack of accountability, inefficiency, inherent bias and conflicts of interest.

Under this system, commanders, not prosecutors, make the decision as to whether an individual should be tried by court-martial, and the prosecutor's traditional authority and duties give way to the powers granted to the convening authority. Whereas American civilians can expect a transparent system of justice that invest authority with a prosecutor who is accountable and has the legal training and experience to make the nuanced decisions required in evaluating highly fraught cases such as rape and sexual assault, the same cannot be said for military justice.

Under this framework, a small minority of commanders exercise personal discretion in what is normally understood in civilian justice to be under the purview of "prosecutorial discretion," and their influence is pervasive through the process. Out of approximately 14,400 commanders in the military, just 2.7% act as general court-martial convening authorities. In other words, over 97% of commanders currently do their job without the ability to send a sex offense to trial. These commanders are not lawyers; they are pilots, infantry officers, surface warfare officers, and artillery officers. They command thousands of troops and have immense responsibilities in running their units. Of necessity, military justice accounts for a tiny fraction of their duties, and they usually serve in these positions for two years or less before moving on to another position. While these commanders are highly skilled in the areas central to their military role, they are inherently ill equipped to make the technical legal determinations required in the administration of fair, impartial justice.

Functions traditionally performed by prosecutors that have instead been vested in the convening authority or commander include the ability to:

- Initiate an investigation of criminal misconduct,
- Charge an accused with a criminal offense,
- Send charges to an Article 32 pre-trial hearing,
- Determine what charges (if any) will be sent to trial by courts-martial,
- Determine if the charges will be sent to a special (misdemeanor) or general (felony) court,
- Determine whether any expert witnesses will testify or expert consultants will be employed,
- Grant immunity for any witness whether testimonial or transactional,
- Enter into a pretrial agreement (plea bargain) with an accused,
- Withdraw any charges,
- Add any new charges,
- Place a suspect in pretrial confinement,
- Order a convicted offender into adjudged confinement,
- Compel a military witness to testify,
- Compel a military witness to cooperate with the prosecution,
- Decide to retry an accused in case of a mistrial,
- Appeal an order by a trial judge dismissing a charge or suppressing evidence, and
- Determine whether a case that has overturned on appeal should be retried.

The decision to prosecute is not the only decision that is made under conflict of interest. There are dozens of decisions made before and after the decision to prosecute. Each of them is made

under conflict of interest, with the potential to affect the resolution of the case or further ostracize someone for speaking up.

Each service has a small cadre of prosecutors with significant litigation experience, but they are not advisors to the convening authority and rarely have an opportunity to talk with the convening authority.

In this system, the hands of prosecutors are tied. They are left making legal arguments and presenting evidence at trial without the ability to exercise discretion or make the strategic legal decisions that must be made in the throws of litigation. Instead, that responsibility is left to an often-distracted lay person who is not even in the courtroom. Furthermore, this system places an undue burden on commanders, who, despite their best intentions, are not in a position to fully appreciate the legal merits of a case. They are also subject to bias, based on their relationship with the accused or his friends, or may even feel pressured by their superiors to pursue the wrong cases for political or institutional reasons.

Recently, a military prosecutor who reached out to POD summarized adverse results of this archaic and cumbersome process, saying,

“I am a prosecutor in the Armed Forces in one of the busiest litigation offices in the world. I wholeheartedly support this bill and am disappointed that it did not pass...the convening authority concept creates so many barriers to effective, efficient justice. It causes massive delays in investigation and adjudication decisions, cases are lost or overturned on appeal due to errors and victims don't want to come forward because of distrust in the chain of command.... We are overwhelmed in my office by how many sexual assault cases we have. We are understaffed and have so much pressure on us with these cases. I could better serve victims and move cases much quicker to resolution if I had discretion and did not have to brief commands and deal with the bureaucratic system we have in place. Executing a court-martial is an administrative nightmare due to the convening authority concept. Rather than work on prosecuting the case, I have to worry about witness travel not being completed or done right by the convening authority, the convening order not being drafted properly, or if jurors will be informed properly and will attend. It is a truly broken system.... Allowing military prosecution offices to truly run as [civilian prosecutor's office run] would drastically improve our ability to seek justice swiftly and protect the victims. It would also greatly increase the trust in our system.”

Impact of Reform on Good Order and Discipline

The argument is repeatedly made that commanders need to make the plethora of prosecutorial decisions that are involved in every criminal case, because “it is the commander, not the lawyer, who is responsible for the good order, discipline and morale within their command.” However, no one in authority ever gives a concrete explanation – supportable by data – as to why a commander would be unable to maintain good order and discipline in their unit if they gave up the power to launch and direct criminal prosecutions.

Specifically, no one ever articulates why a commander needs to be able to launch a criminal process to maintain good order, discipline and morale. Nor do they explain why, during the process, commanders need to make the types of decisions local district attorneys and United States Attorneys make every day. The argument is delivered as a truism requiring no explanation.

In reality, almost all of the things a commander can and should do to maintain good order, discipline and morale are left-of-boom (must occur before the law is broken). The effort to prosecute the accused is right-of-boom, (occurs after the transgression), is a long drawn out, highly technical process, with a very uncertain outcome. The outcome is binary, either the accused is a rapist or the victim lied, either the accused is guilty or did nothing wrong, commanders are either ignoring the problem or using Undue Command Influence.

When commanders take responsibility for the first 99% of good order and discipline, which occurs left-of-boom, they have the greatest ability to mete out discipline in a measured, proportionate manner and channel behavior productively. When they reserve most of their attention for right-of-boom, their options are reduced to two. There will never be consensus at that point about command objectivity or the rightness of result. The only guarantee is that there will be resentment.

Commanders cannot look the other way on poor discipline and unprofessional behavior in general and then, if that poor command climate leads to serious criminal conduct, expect that they can sort it all out with a court-martial. It's too late for a disciplinary lesson. At that point, the professionals should take the lead on that case and the commander should be free to focus on improving the command climate with less concern about Undue Command Influence.

The Nature of Reform

It is time for the military justice system to align itself with basic principles of American justice by injecting independence, objectivity and professionalism into the process. Empowering prosecutors instead of commanders to decide which cases should move forward to trial and manage the prosecutorial decisions as the process unfolds is a critical step—although not the final step—toward accomplishing this goal. This change would help ensure cases are being decided on their merit; absent outside influences, prior relationships, or political pressure. It would eliminate the layers of bureaucracy that bog down the system, allowing for swift, effective and efficient justice.

In addition, further steps should be taken to improve the current system, including reforming the jury structure, pretrial agreement process, sentencing procedures, and the appellate process.

- Military juries should be made up of 12 members for a general court-martial, and should be randomly selected without the influence of commanders.
- Judges should be aware of the terms of a pre-trial agreement in crafting an appropriate sentence just as in the federal system.
- Sentences should be decided by the judge, not the jury, and presentencing reports similar to those used in the federal system should be mandated for those convicted of serious crimes. This would give the judge a clearer picture of the person who he is sentencing, in contrast to the current system, which lacks transparency about the accused's past. The

rules of evidence should not be used during the sentencing hearing, except for those that ensure that the process is fair, as in the federal system.

- Appellate judges should be required to have served as a trial judge prior to joining the service courts of appeals, and have extensive criminal litigation experience. The prestige of the service appellate courts must be restored. One way to accomplish this may be to appoint only retired JAGs for fixed terms with the same status as judges on the Court of Appeals for the Armed Forces rather than the current process of JAGs being assigned to the court for a brief period before moving on to the next assignment. All convictions should be eligible for review regardless of the sentence, and only death sentences should require review. (The current standard requires review for sentences that result in a discharge or a sentence of confinement of a year or more, but those who receive a lesser sentence have no access to the courts. As a result, an accused who pleads guilty to a single drug use and is sentenced to a bad conduct discharge has his case reviewed even if there was not a single allegation of error. On the other hand, an accused who pled not guilty in a hotly contested trial with numerous contentious rulings will not have his case reviewed unless his sentence is long enough.)

The military must also develop litigation career tracks to ensure prosecutors, defense counsel, and judges have the experience and expertise to ensure a fair system of justice, and situate them in a separate chain of command under a civilian oversight body, such as the service secretary, to guarantee true independence and eliminate fear of retaliation. Just as in the federal system, the independence of prosecutors, defense counsel and judges is critical for both the appearance and reality of a fair system.

Conclusion

An independent prosecution system will liberate commanders to fully tackle the scourge of sexual assault unencumbered by much of the concern regarding UCI. The current system is antithetical to a 21st century military. It is inefficient, ineffective, and harmful to its integrity and credibility. The lack of a professional, impartial military justice weakens our military. It is a force protection, recruitment, and retention issue. Ultimately it impacts the ability of our military to effectively administer justice and erodes service member's faith in the institution and its leaders.

Finally, the impact of this broken system is felt far beyond the confines of the military. The military has jurisdiction over all crimes committed by military members, no matter where the crimes occur or the status of the victims. As a result, civilians are caught up in and adversely impacted by the command-based system, and are often deprived of rights that would be afforded to them if their case were being tried in a state or federal jurisdiction.

Through the creation of a professional impartial military justice system, the process will not only appear to be fair, but will be fair – both for victims and those accused – for the first time in our history.