

Setting the Record Straight: The Military Justice System and Sexual Assault

Recently, there have been several op-eds and blogs arguing that the American military justice system is flawed and that the United States should transfer authority over criminal cases from commanders to an “independent prosecutor.”

As an active duty Air Force Judge Advocate with over 10 years military justice experience, serving as both an Air Force prosecutor and defense attorney, I believe such a change is unnecessary and unwise.

The comments below are my personal opinion and do not reflect the official position of the United States Air Force Judge Advocate General’s Corps, the United States Air Force, or the Department of Defense.

First, the U.S. military is not simply, as some suggest, an “employer” with its own unique justice system. Our system of justice is tailored to our unique role in protecting the national security of the United States.

The Supreme Court recognized important differences between American society and the military that protects it: “The military is, by necessity, a specialized society separate from civilian society...the differences between the military and civilian communities result from the fact that it is the primary business of armies and navies to fight or ready to fight wars...” *Parker v. Levy*, 417 U.S. 733 (1974).

It is military discipline that transforms a collective group of individuals into combat effective units and it is the Uniform Code of Military Justice (UCMJ) that provides commanders with the means of maintaining good order and discipline.

In the UCMJ, Congress gave commanders gate-keeping authority over criminal prosecution of military members; the same authority commanders have had since the time of Gen Washington.

The military court system created to administer the UCMJ not only protects Constitutional guarantees such as right to counsel and to confront witnesses, it also meets Constitutional requirements for substantive and procedural due process.

Its juries (court members) tend to be more educated than civilian juries because they are chosen, according to Article 25 of the UCMJ, based upon their age, education, training, experience, length of service, and judicial temperament.

In addition, military courts are more transparent than other Federal or state courts. For example, grand jury proceedings in other Federal or state courts are often secret proceedings where the indictment is often sealed.

By contrast, Article 32 hearings in the military justice system are open and the results are a matter of public record.

But why is ours a commander driven system?

First, discipline is essential to command and control which is key in maintaining a combat effective force.

Second, the commander's authority over the criminal process enhances service members' responsiveness to command. Commanders need to say to subordinates, "I have zero tolerance for drug abuse/discrimination/hazing/sex assault/etc" and back up their words with action. Commanders sending cases to criminal trial reinforces the message.

Why is a "prosecutor" driven system not appropriate for the military?

Deterrence is best applied directly from commanders to individual Airmen. Furthermore, forwarding cases to a central prosecutor is not timely and is difficult to administer in a forward deployed location; exactly where discipline is needed most.

With regard to sexual assault, unfortunately yes, there is a problem in the military...as there is in American society as a whole.

While the vast majority of Airmen are committed to adhering to our core values of service, integrity, and excellence, some fail. When they do, the Air Force must address criminal misconduct in its ranks to preserve good order and discipline to ensure we are ready when our nation calls on us.

The Air Force and other military services have put special emphasis on prevention, deterrence and prosecution.

Commanders have no incentive to tolerate sexual assault, cover it up, or provide anything less than the full measure of accountability to an offender because to do so would undermine unit cohesion, morale, and combat effectiveness...the standard upon which commanders are ultimately evaluated.

Forty years ago (long before *Law and Order* popularized “Special Victims Units”), the Air Force began using experienced prosecutors to serve as “Senior Trial Counsel” to prosecute the most difficult criminal cases, including sexual assault.

What is often missing from comparisons between military and civilian justice systems, their prosecutor conviction rates, and who ultimately better obtains justice for victims is that the UCMJ affords commanders the option of bringing criminal charges for inappropriate behavior that is not otherwise a crime in civilian society such as “conduct unbecoming an officer” and “failure to obey an order or regulation.”

In addition, commanders have the option in less serious cases to take other adverse action against a perpetrator including loss of rank and pay in a non-judicial punishment action or administratively discharge the Airman from the Air Force.

There can be no doubt that Air Force senior leadership is committed to reducing sexual assault in the ranks. I believe the best way to accomplish that goal lies through a combination of education, training, and demonstrated resolve at the command level under our current system.

Steven J. Smart, Major, USAF
Air Force Judge Advocate
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