The Mandatory Modernizing of Military Justice

Why fact-based analyses are essential in determining felony prosecutions

by Capt Lambert Jackson

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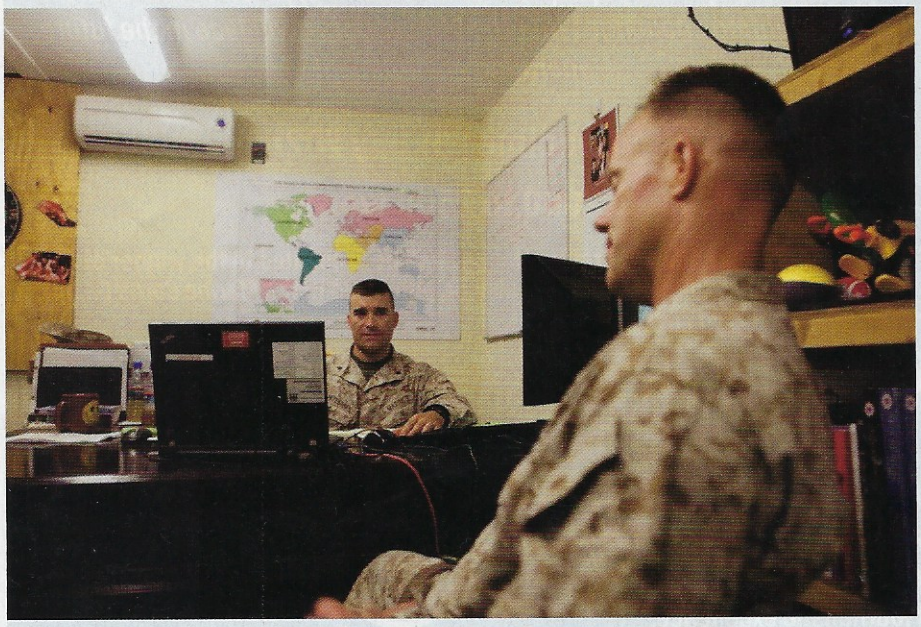
Military commanders today are charged with the administration of discipline within their units. These responsibilities range from delegable administrative admonishments on one end to convening federal felony trials on the other end. The Nation has historically overlooked the inherent conflict of interest in having the same commander responsible for both unit discipline and the fairness of judicial proceedings. This system was predominantly conceived in the late 1800s and early 1900s when it was often logistically impossible to remand an accused for stateside trial. That situation no longer exists today. Felony prosecution determinations must be vested with trained military attorneys rather than commanders; disentangling commanders from the often-ugly legal determinations for which they are ill-trained will allow commanders to more effectively focus their attention on preparing their units for conflict.



Military law requires capable advocates who may have to represent their clients against the chain of command. *(Photo by LCpl James Frazer.)*

Military law is subject to the unique tension between a commander's focus on proper unit discipline and the fairness that the Constitution demands in any criminal trial. Commander's decisions, especially for felony crimes, are often influenced by factors other than the facts of a specific case.[1] Constitutional underpinnings of our criminal system require that the facts of a case determine the outcome rather than considerations like making an example of a certain petty crime or political or strategic perception.

While many commanders would argue that the unfettered authority to direct prosecutions is a central tool in implementing unit discipline, both commanders and those accused of crimes have a vested interest in a fact-based justice system. In the words of RADM Evans,

> I cannot see how a commander's authority would be undermined and that she or he would somehow not be able to set the proper command climate to support the unit's mission, if cases proceeded to trial based on the strengths and weaknesses of evidence.[2]

Commanders are neither trained appropriately nor do they have the time to make criminal prosecution decisions in complex felony cases. Expecting a commander to meaningfully exercise these duties in any more than an administrative sense is tantamount to asking the commander to perform another full-time job in addition to that of being a military commander.[3] Col McHale succinctly summarized this point during testimony for the 2014 National Defense Authorization Act by noting,

> An effective commander needs to focus his or her attention on the warfighting responsibilities of the command. Our commanders are superbly trained and carefully chosen to fulfill this warfighting duty. By contrast, commanders are rarely trained or prepared to exercise informed judgment regarding the weight of evidence in pending criminal matters.[4]

Perhaps the most acute concern with tasking commanders to make prosecution decisions is that a case will not be evaluated on the facts of the case. Considerations such as the organizational climate, a desire to "make an example" of an individual, or even a commander's personal concerns about what his superiors might think of him if he does not appear hard on certain types of misconduct often play a role in the decision.[5] This is untenable because criminal charges against American service members must be based on facts alone rather than the varying viewpoints of individual commanders.

While some may dismiss these concerns as only thought exercises, they undeniably weigh heavily on a commander's minds. Military leaders exhort their subordinates to "purge their ranks" of certain types of misconduct and even appeal to service members moral imperatives to cleanse their Service of certain types of misconduct.[6] A civilian analogue might be having the town sheriff give a presentation to jurors about the damage the drug trade has done to their town before the beginning of a drug trafficking case. While such assertions are not always inaccurate, the cultivation of such biases directly from an authority figure is anathema to the American value of impartial justice.

Enormous deference is entrusted to commanders because they are trusted not to let improper pressures influence their decisions. However, in anonymous interviews, two different Army brigade commanders expressed a common sentiment among current military leadership:

> If a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end ... The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial. He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as 'someone who doesn't get it,' and that if he does not believe the victim, then he is further victimizing her.[7]

Legislative authorities have considered similar proposals over the last decade but traditionally deferred to military commanders who opposed substantial changes to the Uniform Code of Military Justice, viewing such changes as attempts to siphon authority away from military commanders. This article is written in an attempt to persuade those with such concerns of two ideas. First, that delegating prosecutorial decisions to military attorneys would create a healthier and more efficient system, and second, that fundamental changes to our current system are an eventuality rather than a possibility.[8]

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Those who disagree with entrusting criminal prosecutions to military attorneys likely do so for two reasons: First, divesting commanders of authority over criminal matters deprives commanders of a powerful tool for ensuring discipline; second, commanders already are advised by military attorneys on criminal matters.

With regard to the first assertion, this argument takes many forms but is most commonly expressed by the argument that a commander is responsible for virtually everything in his unit: discipline, morale, military efficiency, combat proficiency, and therefore should be afforded wide authority to affect those goals. Absent such absolute authority a commander cannot establish appropriate discipline within his unit.

This temptingly simple assessment appears valid on its face but struggles to articulate why a commanding officer, rather than an attorney, must exercise authority over criminal offenses such as a sexual assault of a civilian or the possession of child pornography in order to establish discipline within a unit. Such offenses are presumably rare within a unit and unrelated to military order or efficiency. Referring back to RADM Evan's comment,

> I cannot see how a commander's authority would be undermined and that she or he would somehow not be able to set the proper command climate to support the unit's mission, if cases proceeded to trial based on the strengths and weaknesses of evidence.[9]

The second, and perhaps more persuasive, argument against removing commander's prosecution authority is that each commander is already advised by an experienced military attorney: their staff judge advocate. The response to this argument is blunt; sound legal advice is only such if it is followed. BGen Dunn (Ret) commented that commanders have often disagreed with their lawyers, informing them that some cases need to go to trial regardless of the

Modernization of the UCMJ affect Military Law across all the services. *(Photo by Sgt Santiago G. Colon Jr.)*

evidence or the outcome because "it is a critical case and it has a critical impact on good order and discipline."[10]

Such statements soundly demonstrate a desire on the part of the commander for a certain result in the trial. This situation is exacerbated when it is a case that the judge advocate has recommended not go forward yet the commander pursues a trial regardless: "The process is inherently unfair to an accused when the individual with prosecutorial discretion must consider anything other than the facts and the evidence in reaching a disposition decision in a criminal case."[11]

This exact problem is on display in the Marine Corps. While testifying before the Senate Armed Services Committee, Gen Amos remarked that he could not recall

> a single instance where my Judge Advocate came to me and said ... we recommend that you prosecute these cases, and I didn't do it. On the other hand, I can think of many where he said we don't have enough evidence, don't prosecute him, and I did anyway.[12]

Commanders understandably do not have sufficient time or training to critically examine the entire volume of evidence or know what would be admitted in a criminal trial for each and every case that comes before them. Absent this deep knowledge of the facts of each case, the temptation is especially strong to, as one commander put it, "send it forward ... and hope that justice is served in the end."[13]

Vesting criminal charging decisions with military attorneys would free commanders to focus on the warfighting business for which they have been hand selected and extensively trained while assuring both victims and accused that their cases are examined by trained attorneys and determined on the evidence alone.

Notes

1. *Orloff v. Willoughby*, 345 U.S. 83 (1953). Chief Justice Earl Warren once suggested that military personnel do not give up their constitutional rights: "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."

2. U.S. Commission of Civil Rights, *Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel*, (Washington, DC: June 2013).

3. U.S. Senate, *Senate Committee on Armed Services,* (Washington, DC: June 2013). Gen Amos: "Practically, this means the commanding officer's SJA is not affiliated with the prosecutors who evaluate the evidence in the case and recommend whether to take a case to trial."

4. *National Defense Authorization Act for Fiscal Year 2014*, H.R. Public Law 113-66, 113th Congress, (2013).

5. Gen James F. Amos, "Heritage Brief," (brief, Parris Island, SC, April 2012). Gen Amos made comments about his personal knowledge of Congress's lack of trust in the military's ability to handle sexual assault cases, demanded that his leaders fix the problem, and advocated that the health and future of the Marine Corps depended upon solving the problem of sexual assault.

6. Erik Slavin, "Obama Sexual Assault Comments Unlawful Command Influence," *Stars and Stripes,* (June 2013), available at http://www.stripes.com; and Erika Ritchie, "Public Mass Arrest of Marines at Camp Pendleton Was 'Unlawful,' Judge Rules," *Orange County Register*, (November 2019), available at https://www.ocregister.com.

7. MAJ Elizabeth Murphy, "The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process," *Military Law Review,* (Charlottesville, VA: The Judge Advocate's Legal Center & School, 2014).

8. *National Defense Authorization Act For Fiscal Year 2020,* H.R. Public Law 116-92, 116th Congress, (2019). See Sec 540F (Report on Military Justice System Involving Alternative Authority for Determining Whether to Prefer or Refer Changes for Felony Offenses Under the Uniform Code Of Military Justice).

9. *Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel.* RADM Evans (Ret) served as a commander in the Navy for eight years with six years as a GCMCA.

10. *Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel.*

11. "The Military Justice Divide."

12. Evolution of the Military Criminal Legal System before the Response Systems to Adult Sexual Assault Crimes Panel During the Response Systems Panel, in discussing the issue of commanders referring weak cases to trial against the advice of their lawyers, Mr. Harvey Bryant, a former Virginia prosecutor, stated that it is an "abuse of the process" to "teach somebody a lesson when you know you're not going to win" and that losing weak cases teaches service members that people can get away with crimes.

13. "The Military Justice Divide."

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