



# Sex assault and the pressure to prosecute: why some Marines fear justice is no longer blind

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Almost two years have passed since Capt. Nicholas Stewart was exonerated by a military appeals court that ruled his rape conviction was unconstitutional, but he's still fighting the system to regain what he lost.

Stewart, now working in requirement development at Marine Corps Base Quantico, Va., was restored to service after serving a year of his two-year jail sentence when the Court of Appeals for the Armed Forces found his guilty verdict placed him in double jeopardy: A military jury found him guilty and not guilty of nearly identical specifications regarding a one-night stand with a civilian friend.

Stewart believes he eventually received justice. But he's still working to secure the promotion for which he was selected before being charged and recoup related financial losses. Moreover, he contends the handling and pursuit of his case was colored by an aggressive political push to eradicate sex assault in the armed forces, starting with his command's decision to pursue prosecution even though the investigating officer recommended against it.



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“It’s become very clear,” Stewart said, “what the attitude now is: ‘We’re going to convict them all, and take down some innocent men and women to avenge the women in the past who did not see justice.’”

Faced with a damning history of failing sex assault victims, military leaders are pouring resources into combating such crimes and assisting victims. In the Marine Corps, victims have also gained significant new legal power with programs aimed at providing attorneys to help them pursue their cases and orders that trigger criminal investigations for every allegation. But while many are hailing such progress, others say the effort has become more about accountability than justice, and that the careers and reputations of good Marines are becoming casualties of the war on sex assault.

**Prosecutions double**

The problem of sex assault in the military has been emerging from the shadows. In a 2012 lawsuit filed in U.S. District Court in Washington, D.C., a group of 12 officers and enlisted Marines claimed they had suffered rapes and sexual assaults during their time in the Corps and that they were humiliated, harassed and retaliated against by those in their commands when they attempted to report the alleged crimes. The lawsuit was eventually rejected, but stories like theirs have become common as more victims emerge with their own accounts of injustice.

Marine commanders are now under great pressure, from Congress and the Marine Corps’ top general, to be prompt and aggressive when sex assault allegations emerge. Commandant Gen. Jim Amos targeted sex assault in his 2012 series of “Heritage Brief” lectures and again more recently as part of his “Reawakening” campaign. In a 2012 memo to Marines, Amos called the prevalence of sex assaults “an ugly mark on our proud reputation.”

Trouble arises when the Marine Corps equates justice with convictions. Amos claimed during his Heritage Brief talks that “80 percent” of sexual assault allegations are legitimate, a statement that military defense lawyers seized on as evidence of unlawful influence on the due process for those accused. Yet an October 2013 news release from Marine Corps headquarters bears out the same logic.

Between January and June 2013, Marine Corps sexual offense prosecutions doubled compared with the same period a year prior, according to the release. Cases resulting in confinement tripled, and convictions increased by more than 150 percent. Since 2010, the release states, the Corps prosecuted 28 sexual misconduct cases that civilian jurisdictions declined to prosecute and obtained a conviction in half of them. All this is evidence that the Marine Corps has “stepped out smartly” in holding sexual assault perpetrators accountable, it says.

**‘I blame the process’**

Accounts of Marines who believe they were aggressively prosecuted on groundless charges are numerous, however. One senior officer, Lt. Col. Kisha Flagg, who served until recently as the diversity management liaison for Quantico’s equal opportunity

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office, said her December 2013 conviction for fraternization and making false official statements, which is likely to end her career, was pursued despite a dearth of evidence and an unreliable witness. Her accuser, another female Marine, claimed she was sexually assaulted by the man with whom Flagg was convicted of fraternizing and threatened to harm herself. Those are the statements that caught her command's attention, Flagg said.

In a letter she drafted requesting early retirement, Flagg said politics played a part in her conviction. The accuser "knew what buzzwords would force this issue to this level," she wrote.

The man the fraternization charge concerned, Master Gunnery Sgt. Steven Fontenot, expects to face sexual assault charges related to the same allegations. Those claims, he said, are baseless, an act of vengeance. Still, he's more confident the case will be pursued fiercely by Marine leaders with heightened sensitivity to sexual assault cases than he is of a verdict that reflects justice.

"We have to find a way to deter people from filing false allegations," Fontenot said. "If you already knew what numbers to gamble on, wouldn't you gamble on them?"

Officials with Marine Corps Installations command told Marine Corps Times they have no comment on the Flagg case past its verdict. Marine Corps Times is withholding the accuser's name because it typically does not identify alleged victims of sex assault, and when reached by phone, she declined to comment.

Cpl. Brent Bialik, a data Marine in Twentynine Palms, Calif., won his acquittal on rape charges stemming from a night of heavy drinking at a 2011 Marine Corps ball in Las Vegas, but says he lost confidence in the Marine Corps justice system in the process. He remained on legal hold for a year and a half, he said, while his case advanced from criminal investigation to preliminary hearing to court-martial, despite a vehement recommendation that the case be dropped by the officer who investigated the allegations.

In concluding his July 2013 report on Bialik's Article 32 preliminary hearing, Maj. Cory Weck of Camp Pendleton, Calif., said he did not believe claims made by Bialik's accuser and found her testimony contradictory and unreliable.

"I do not feel that simply because an accusation has been made it is sufficient enough to warrant referral of the case to a court-martial," Weck wrote. "Finally, in this politically charged climate of [rape and sex assault] cases, it would be easy to send this case to a court-martial and let the court find the accused not guilty. However, I believe that, based on the evidence (primarily the testimony of the victim), this would be a tremendous waste of the command's time and resources."

Bialik was acquitted six months later, on Jan. 30.

He said he is in the process of leaving the Corps, having reached the end of his four-year enlistment while on legal hold. His decision not to pursue a continued career in the Marines was influenced in part by his time embroiled in the legal system, he said.



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"I was thinking I was probably going to get out, but, man, you feel very let down by the Marine Corps when this kind of s--- happens," Bialik said. "I don't blame the units. I blame the process itself."

### **Changing winds**

That process has evolved to give victims a more powerful voice. Between 2011 and 2013, the military services undertook a series of congressionally directed initiatives ranging from enhanced sexual assault prevention training for the troops, including a "bystander intervention" curriculum, to a new order that requires military criminal investigative organizations to open a new investigation for each allegation of sex assault, however minor.

This year alone, the Marine Corps made its new Victims' Legal Counsel Organization fully operational, giving victims an opportunity to request free legal advice and access to an attorney to help them pursue charges.

Another new policy change allows reported sexual assault victims to request that the accused perpetrator in their case be transferred to another command.

The most significant point of concern for many victims' advocates awaits action in Congress: the Military Justice Improvement Act, sponsored by Sen. Kristen Gillibrand, D-N.Y., would transfer from military commanders to senior military prosecutors the decision to prosecute crimes punishable by a year or more in confinement.

That legislation, said Greg Jacob, policy director at the Service Women's Action Network, would give alleged victims and the accused the best protection possible under the law, while allowing commanding officers to speak freely on topics such as sexual assault without interfering with defendants' due process.

The parties in a case would be protected, he said, because they wouldn't have to worry that a decision to prosecute was colored by the commanding officers' knowledge and opinion of the accused or their fear of negative career repercussions for failing to prosecute a case.

"It would allow leaders like Amos and the president to get out in front of this issue and say, if you do this, we're going to fry you," Jacob, a Marine veteran and former company commander, said. "They could say those things and take a really strong leadership role without having to worry about undue command influence."

Eugene Fidell, a former Coast Guard judge advocate who teaches military law at Yale University, said it is inconceivable that political pressure surrounding the issue of sex assault did not influence a commander's decision to prosecute a case, particularly in light of high-profile incidents in which senior commanders faced career repercussions directly tied to their treatment of sex assault cases. Last November, Air Force Lt. Gen. Susan Helms had her promotion blocked in the Senate for overturning the sex assault conviction of a captain in 2012. Another Air Force three-star, Lt. Gen. Craig Franklin, opted to retire amid controversy after dismissing the sex assault conviction of a lieutenant colonel.

In a Marine Corps-specific snapshot, new data requested by The Associated Press regarding sex assault prosecutions in Japan between 2005 and 2013 revealed that the Marine Corps was far more likely than the other branches to send offenders to prison, with a 20 percent incarceration rate, five percentage points higher than the Navy's. This figure, Jacob suggested, could reflect residual pressure on Marine commanders in the aftermath of a high-profile 1995 case in which two Marines raped a 12-year-old Okinawan girl, an incident that led to massive public outrage and strained international relations.

"Do we really think there are people who have not heard these gusts of wind outside the barracks window? Do we think that anyone missed the point when they read about Lt. Gen. Helms having her promotion to four stars blocked or Lt. Gen. Franklin forced into retirement?" Fidell asked. "When you put all these things together, you'd have to believe in the tooth fairy to not think these things affect the climate in which these decisions are ultimately made."

Coupled with weaknesses in the current system, Fidell said, political pressure on the military has resulted in an ironic trade-off.

"We've had a laserlike focus on the problem of sexual assault in the military," he said, "but at some expense in the administration of justice."

The move to transfer prosecution authority from out of the hands of commanders has met with opposition from a number of military service chiefs, who claim the law would damage unit cohesion and erode military leaders' authority.

Former Marine officer and military defense attorney Charlie Gittins said that legislation is not the only way to improve the system. Gittins said the military could make the Article 32 preliminary hearing investigation binding, de-emphasizing the unit commander's role in proceedings, and compel the alleged victim to attend, making the hearing more robust.

"The Article 32, as it was constituted, was really a good thing," he said. "But what was once called the bulwark against baseless charges is now worthless."

Stewart, the Marine captain who was exonerated after serving a year of his sentence, said he would like to see sexual assault training for Marines changed to reflect the realities of military prosecution and have leaders teach troops the fact that an accuser's hazy recollection could be enough to end a Marine's career or ruin his or her life.

In his own case, he has recouped about \$250,000 in pay lost during legal proceedings and his incarceration, and he said he is enjoying the fight to win his promised promotion to major, slow as the pace may be.

"There are people who don't like the fact that I won," he said. "But there is no one more powerful than an American citizen that

exercises his or her rights. Unfortunately for the Marine Corps, I'm right, and I'm literate enough to know it."

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