Protect Our Defenders
Strengthen our Military. Prosecute Rape. Support Survivors.

NINE ROADBLOCKS TO JUSTICE

The Need for an Independent, Impartial Military Justice System

1. COMMANDER BIAS AND CONFLICT OF INTEREST

In the military, the accused's commander serves as the Convening Authority (CA) – the person who (1) decides whether the case should go to court-martial and (2) appoints the jury and convenes the trial. This is an inherently biased and inefficient system. The CA is not a lawyer, not a criminal law expert, and may have close ties to the accused. The commander's career may even suffer if assaults happen in his unit or on his watch, and he may have an interest in covering up the crime. The current system also lacks transparency. There is no way to track how well each CA performs their duty and therefore no way to hold them accountable. This system is inherently unfair – and it discourages many victims from reporting.

Victims are often discouraged or sometimes outright told not to report a sexual assault. Of the 26,000 incidents of sexual assaults and other sexual crimes that occurred in 2012, only 3,374 were officially reported. Many times, victims are advised by people in their chain of command that if they report, the victim could face criminal charges or non-judicial punishment for collateral misconduct. This is often enough to silence a victim who is already intimidated or distrustful of the system. Of the victims who chose not to report, 47% indicated fear of retaliation or reprisal as a reason for not reporting.

Convening authority must be removed from commanders and placed in the hands of capable, military attorneys – JAGs. The O6 JAG (Colonel or Navy Captain) at the base or region where the offense occurs should hold the convening authority on criminal cases. And the cases must go to them directly from the moment an unrestricted report is made. The JAGs can work with commanders to address their concerns and maintain good order and discipline, but it should be a criminal attorney who assesses the criminal case and takes it to trial. Allowing prosecutors to convene cases will create transparency, impartiality and help legitimize the system.

2. JURY SELECTION IS NOT RANDOM

Today, military juries are hand selected by the convening authority. They are not randomly selected and could be or appear to be biased. Despite *voir dire*, a process of questioning designed to address bias, jury members who have been hand selected by the commander may have preconceived notions about the case, witnesses, or the outcome.

The military should follow the civilian structure and implement a random, fair, selection of jury members for each trial. This could be as simple as requiring each person who checks into a base, to submit their information for a jury pool database. This would remove the commander's hand from the jury box, and eliminate conflict and bias.

3. INEXPERIENCE, MISTAKES, AND PREJUDICE

Inexperience, mistakes, and prejudice plague the military justice system. From investigators to military judges, the level of experience and training is shockingly low. In the military, attorneys change roles every 2-3 years and will hold a broad spectrum of job responsibilities. This fosters professional inconsistency and dilutes courtroom expertise. The constant change in assignments forces attorneys who may have been serving in non-litigation billets, to suddenly handle complex criminal cases or even to serve as military judges.

Congress should mandate a military justice career track for all services. The Navy has already implemented such a career track with its JAG Corps to increasing success. It allows JAG officers to specialize in criminal justice, hone their skills, and serve in that role continuously. Congress could also create special terms of office for military judges, which would grant more authority and independence. These changes would engender expertise in the criminal process and prevent otherwise inevitable mistakes.

4. TRAUMATIC ARTICLE 32 HEARINGS

In the military criminal justice process there is a preliminary (Article 32) hearing to determine whether enough evidence exists to proceed to trial. In practice, it is a mini-trial that can last for days, during which the victim is forced to testify for hours, usually without benefit of his or her own counsel. Victims are re-traumatized by defense counsel through lengthy cross-examination; potentially designed to intimidate, confuse, exhaust, and demoralize him or her. After a traumatic Article 32 hearing, it is not unusual for victims to decline further participation in the case.

Article 32 hearings should more closely model the federal grand jury process, with adaptations for the military environment. Instead of an Investigating Officer serving in the role of judge there should be a panel of three persons, similar to an Administrative Board. The prosecution alone should attend and present evidence. The defense should not be present, but entitled to a transcript of the testimony. After the government presents its evidence, the panel should deliberate and make an immediate determination on probable cause. This would expedite the process, protect victims, create a written record, and legitimize the system.

5. VICTIMS MUST HAVE THE RIGHT TO LEGAL REPRESENTATION

The military justice process is confusing and overwhelming for victims. Sexual assault coordinators provide an important role, but they cannot and do not take the place of legal representation. Victim representation by a full-service attorney is essential to prepare for Article 32 hearings, object during pre-trial hearings, file motions under MRE 412 and 513 to protect against unwarranted intrusion into mental health and sexual histories, meet with defense counsel, etc.

Currently only the Air Force provides victims with representation through its recently implemented Special Victims Counsel program. Unfortunately, the Navy, Marine Corps, Army, and Coast Guard only offer victims “legal assistance” or advice, not actual representation.

There is not a lack of resource availability. The military has sufficient attorneys to properly protect victims. Existing "legal assistance," or advice-only attorneys, can be easily converted into full service, representative Special Victims' Counsel.

6. GOOD MILITARY CHARACTER SHOULD NOT BE A DEFENSE

In the military, there is a defense called the "good military character" (GMC) defense, also known as the "good soldier defense". It allows an accused to call witnesses and present evidence about his character and military service. In essence, the defense can take an entire day or more to tell the jury what a great soldier, sailor, airmen or marine the accused is. At its worst, the GMC defense can enable an accused to be acquitted of rape simply because he is good at his job. It also allows defense two bites at the mitigation apple. The defense can present GMC evidence both on the merits (guilt or innocence phase) and again at sentencing. Therefore, juries hear twice how the accused has done good things for his service and his country.

The GMC defense should be eliminated from the merits phase of trial. Congress must enumerate in MRE 404, which addresses character evidence, that GMC is not a pertinent character trait on innocence or guilt for criminal offenses, except those offenses that are specific military crimes. This exception would not include Art 120 cases and other common law crimes.

7. MILITARY SENTENCING FAILS TO HOLD OFFENDERS ACCOUNTABLE

In contested courts-martial, military juries have the sole authority for sentencing (unless the accused elects a bench trial) and there exist no minimum guidelines to suggest an appropriate sentence. In fact, military judges instruct juries that sentencing options include: "no punishment at all" or only a fine, reprimand, restriction, hard labor, forfeitures, confinement, or a punitive discharge. Unfortunately, even in serious crimes, juries often award only days of confinement and retain the defendant in the service – thereby sending him back to his unit.

Military judges should be assigned sole responsibility to sentence an offender and Congress should mandate the establishment of minimum sentencing guidelines, following the well-established civilian federal system. Sentencing by judges would also make the system more efficient, because it would encourage plea bargaining. With jury sentencing, defense counsel know that even if they lose their case on the merits, they are still likely to receive a very light punishment. However, if judges are given sole sentencing authority, defense will be more inclined to negotiate a plea in order to get some protection, knowing they do not have the safety net of jury sentencing. More offenders will be held accountable, more victims will see justice, and the system will be less burdened.

8. CLEMENCY & APPEALS ARE ANOTHER CHANCE FOR OFFENDERS TO AVOID PUNISHMENT

After trial is over and before any appeals have even been initiated, the clemency process under Article 60, affords the accused another significant chance to go free or receive substantially reduced punishment. The clemency process occurs via communication directly between the defense counsel and the Convening Authority (CA). There are no rules of evidence and the

defense can submit anything they wish for consideration, including unreliable statements or documents that were inadmissible at trial. Unchecked clemency authority allows a CA to unilaterally overturn a verdict or sentence without justification. This is inherently unjust.

Clemency should only be entertained after all appeals have been exhausted and the responsibility should be left to higher authority, such as the Secretaries of the services, who are in a better position to make unbiased, fair decisions.

In the military system, defendants also get automatic appeals even if they plead guilty. This is a waste of resources and increases the chance an offender will be set free on a technicality. As in the Federal system, defendants should waive their right to appeal when they plead guilty. It would increase efficiency, unburden the system, and ensure that people who plead guilty for their crimes are held accountable.

9. A CULTURE OF MISOGYNY AND VICTIM BLAMING

Within the military services, there still exists a widespread, underlying culture of misogyny and victim blaming. Sadly, we have too often seen this undercurrent rise to the surface with "traditions" in which women are subjugated and demeaned. Victims – both male and female – are blamed for their attacks, harassed, ostracized, and retaliated against.

The military's leadership must be instructed from the top down, that this behavior in their units will lead to their being relieved from duty. Most important, leaders must be seen as upholding the standards they demand of their troops and must be held accountable for condoning or tolerating harassment. In addition, there must be a more convincing system wide education and indoctrination effort. The military's young recruits must understand these practices are not tolerated and that violators will be charged with harassment.