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

Professionalize the Military Justice System and Thereby Reduce Sexual Assault

Addressing the Opposition's Arguments

Those who are fighting to keep the status quo often use empty excuses or flawed arguments to justify their position. Military leadership has been unable to articulate exactly *what* negative consequences would occur by removing the "convening authority" (CA) from the chain of command. The arguments often cited by the opposition are as follows:

Prosecution Rate: Opponents argue that if convening authority is removed from the chain of command then prosecution rates will decrease. They argue that commanders refer more cases to trial than prosecutors support. This is simply not supported by the data from the Department of Defense itself. Of the DoD's 26,000 estimated cases of sexual assault and other sexual crimes in 2012, only 2,558 victims sought justice by filing an unrestricted report and only an abysmal 302 proceeded to trial.[1]

Opponents recently presented numbers about civilian authorities rejecting cases that commanders then chose to prosecute. However, this information is unclear and unpersuasive when examined further. For example, the military claims that in the past two years, the Army exercised jurisdiction in 49 cases. Of those, only 20 resulted in a conviction for an Article 120 sexual offense. It is not clear whether those numbers include cases that were: "incomplete investigations," those prosecuted by the military in exchange for the civilian authorities dropping charges, those that independent military prosecutors would have proceeded with anyway. The numbers of cases that civilian prosecutors "declined" that are cited by the military, should not include the above exceptions.

In addition, the Marine Corps and Air Force numbers do not reflect how many of the cases resulted in Article 120 sexual assault convictions, versus a collateral offense such as false official statement, fraternization, or adultery. The numbers for the Marine Corps also do not detail what type of punishment was imposed. Furthermore, the Navy's number of only one successful prosecution is not encouraging.

These statistics are also missing the point. These numbers are just from the cases that were reported. If convening authority is removed from the chain of command it will encourage more victims to report, thus increasing the pool of cases from which to prosecute. Prosecutors can take the strongest cases to trial and get more convictions, which serves as a greater deterrent.

[1] Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2012

The number of unwanted sexual contacts is rising, while prosecution rates for these crimes have not increased in step. Therefore, there is a widening gap between the number of crimes committed and crimes prosecuted. Additionally, even if commanders begin to feel political pressure to refer more cases to courts-martial, the long-term problem will not be solved. There is no reason to believe that after public and press attention wane, commanders will continue to aggressively prosecute cases.

Commander Accountability: The opposition argues that if commanders cannot convene courts-martial, they will be less invested in the issue of sexual assault and have less control over the environment of their unit. This is another spurious claim. Commanders are responsible for the "climate" of their command, which is multi-faceted and incudes things such as job satisfaction, safe work environment, and mentorship. In these areas a commander does not have the option of a court-martial but is still expected to maintain a healthy command climate through leadership alone.

Furthermore, the number of assaults reported at a command may not be indicative of poor leadership. A commander with no reports in his unit may be intimidating victims and burying offenses. While, more reports of sexual assault may mean that a commander is fair, effective and open to confronting the problem. Giving the prosecutors disposition authority (the authority to decide whether to proceed to trial) would increase transparency and thereby help legitimize the system and fix the culture. More victims would report, retaliations would decrease, and prosecutions would become more frequent.

Good Order and Discipline: The opposition argues that moving the convening authority from the chain of command will undermine "good order and discipline" and effectively lead to chaos in the ranks. What opponents seem to be saying is that without the threat of commander directed courts-martial, commanders cannot effectively control their troops. This is an outrageous and unfounded claim. The sad truth is, good order and discipline and mission readiness are actually undermined by the current epidemic of sexual assault. Our military leadership has publicly acknowledged this to be the case. They agree that when service men and women cannot trust each other or their superiors, it eats at the core of readiness and safety of the mission.

Commanders are well equipped with several other disciplinary tools to address this issue. The most frequently used is Article 15, non-judicial punishment (NJP), which allows a commander to discipline his troops with limited confinement, restriction, reduction in rank, forfeiture of pay, hard labor, and reprimands. Commanders can also move to administratively separate an offender with an Other than Honorable discharge. So, even if a commander feels that he simply cannot tolerate an offender in his unit, that person can be fired expeditiously and with negative paper.

Lesser Form of Punishment: Opponents sometimes argue that commanders need the threat of court-martial to "encourage" service members to accept a lesser form of punishment such as NJP. Under the Military Justice Improvement Act, commanders would retain convening authority for minor and military-specific offenses, such as AWOL, orders violation, conduct unbecoming, etc. These are the only offenses appropriate for NJP. Serious offenses such as sexual assault should never be disposed of at NJP, therefore the above tactic to encourage acceptance of a lesser punishment is inappropriate and inapplicable.

Swift and Local Justice: The opposition cites a need for commanders to be able to hold courts-martial quickly and locally, highlighting the fact that the Army has convened 800 courts-martial in forward deployed zones. However, the leadership fails to mention that in order to have courts-martial in those zones, there must also be a team of prosecutors, defense counsel, and judges in the same location. The military leadership fails to recognize that those forward deployed prosecutors could be the same prosecutors to hold disposition authority. This would not impede the ability to achieve swift justice on site.

Convening Authorities (CA) are Required to Consult a JAG: The opposition argues that with the proposed changes in the Senate Draft 2014 National Defense Authorization Act (NDAA),[2] a Convening Authority would be required to consult his Staff Judge Advocate (SJA) on each sexual assault case. If the CA's SJA recommends going forward and the CA disagrees, the case rises to the Service Secretaries. Opponents see this as an appropriate check on the system. In fact, consulting with their SJA's is not new. The CA already consults with his or her SJA on these cases. Furthermore, the SJA works for the CA who may sign the SJA's fitness report, or professional evaluation. There is an inherent conflict of interest in this arrangement. It is not unreasonable to assume an SJA would feel pressure to agree with the person who holds the keys to their professional advancement.

This information is also available on our website at: http://www.protectourdefenders.com/policy-positions

[2] 2014 National Defense Authorization Act (NDAA), Senate Committee on Armed Services Mark, Title V, Subtitle E, Part II, Section 552.