

Israel Separates Command and Criminal Justice

Amos N. Guiora

The “balance of power” between military commanders and military prosecutors (judge advocates) in Israel is profoundly different than in the United States.

When I served as judge advocate to the Israeli Navy and Home Front Command, in consultation with my own commander, I had sole authority to order the filing of an indictment against a soldier or officer. Commanders of those being investigated had no role in the matter, although I notified them of my charging decision and was open to their input.

Detaching legal concerns from military command does not affect discipline or effectiveness of the armed forces. This protocol is intended to prevent undue command influence to ensure objectivity in court martial decisions, and make sure they are based on legal analysis rather than unit or command interests. Needless to say, this is a bone of contention when commanders believe that a particular court-martial decision may affect national security.

One commander was furious that I had not informed him nor sought his advice when I indicted one of his men. I should have let him know as a matter of professional courtesy. But his opinion that this was a matter for a disciplinary hearing held no sway over my decision to hold a court martial.

While the system minimizes command influence in the criminal process, the disciplinary process remains within the commanders’ jurisdiction, subject to review by the judge advocate. And in matters of universal public concern, like national security and counterterrorism, command authority remains strong, in spite of its detachment from court martial decisions.

Amos N. Guiora, a former judge advocate in Israel, is a professor at the University of Utah's S.J. Quinney College of Law and the author of "Legitimate Target: A Criteria Based Approach to Targeted Killing."