

Congress Should Avoid Changes That Would Erode the Military Justice System

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KEY TAKEAWAYS

America's military justice system should enforce the law, punish criminals, and aid the military in defense of our nation.

Stripping commanders of their authority to refer serious crimes for prosecution would lead to fewer prosecutions and undermine military discipline.

Congress should abandon efforts to separate authority and responsibility for discipline in the military that would move military justice in the wrong direction.

Recent legislation proposed by Senator Kirsten Gillibrand (D-NY), the Military Justice Improvement and Increasing Prevention Act, if passed, would strip the authority to decide whether to prosecute sexual assaults and other serious crimes such as murder and manslaughter from commanders and give it to military prosecutors.¹

Since the founding of the American military, commanders, who are not lawyers, have had the authority to refer charges to courts-martial in order to enforce good order and discipline. Those commanders are advised by military lawyers, but the decision to send a case to a court-martial is theirs alone.

Depriving commanders of the ability to send serious criminal cases to a court-martial undermines their ability and responsibility to enforce good order and discipline, which in turn erodes their ability to

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fight and win wars. There is no evidence to suggest that this change would address the very real issue of sexual assault or other crime in the military. Instead, it would likely make matters worse.

Secretary of Defense Lloyd Austin has also received recommendations from an independent panel of civilians that he established to examine this subject. The panel made similar but slightly different recommendations, proposing only to remove the ability of commanders to refer charges for sexual assaults, not for all serious crimes. Chairman of the Joint Chiefs of Staff General Mark Milley reportedly supports this proposal. Secretary Austin is waiting to hear from service secretaries and chiefs of staffs before taking a position.²

Unique Purpose of the Military Justice System

The United States military justice system is integral to the military's mission. It is unique, and for good reason. Unlike the civilian justice system, which exists solely to enforce the laws of the jurisdiction and punish wrongdoers, the military justice system exists to help the military to defend the nation. It is structured so that those in charge, its commanding officers, can carry out the orders of their civilian leaders. Ultimately, it is structured to fight and win wars.

The military justice system is a well-developed, unique, and integrated criminal justice system that handles thousands of criminal cases per year, ranging from minor violations to major felonies. In almost all of these cases, the system works to ensure that justice is done. It is not perfect, but neither is the civilian criminal justice system, which has many flaws and must be continually improved. However, when proposing improvements in the military justice system, Congress must realize that the military is fundamentally different from the civilian world.

In the civilian criminal justice system, the prosecutor is charged with enforcing the criminal law of the jurisdiction in which he or she is employed. The legislature passes laws, the governor signs laws, and the prosecutor enforces the law in a fair and impartial manner. The prosecutor decides whether to charge a person, what offense to charge a defendant with committing, how to try the case, and what sentence to ask for if the defendant is convicted.

Why This Change Would Result in a Less Disciplined Military

A core principle of the U.S. military is that commanders are responsible for everything their units do and fail to do. When a U.S. Navy ship runs aground, they don't fire the navigator; they fire the captain, as he or she was ultimately responsible.

Among the fundamental responsibilities of commanders are the enforcement of good order and discipline in their units. Without good order and discipline, military units are doomed to failure. In the civilian world, the workplace and the criminal justice system are separate. In the military, they are inextricably fused as they need to be.

One of the most important tools a commander uses to enforce good order and discipline is the Uniform Code of Military Justice. The code, captured in federal statute, gives commanders the authority to decide whether to press serious criminal charges against servicemembers under their command.

Vesting the decision to refer charges with commanders gives them both the responsibility and the authority to enforce the law. Conversely, removing the ability of commanders to refer charges to a court-martial—the most serious form of accountability—reduces them to mere observers in the justice system.

Fewer Sexual Assault Cases Would Be Referred to Courts-Martial

There is understandable frustration about the number of cases of sexual assault in the military. Pentagon surveys suggest that approximately 20,000 servicemembers experience sexual assault each year,³ and various reforms and improvements have been attempted. There is, however, no evidence to support a belief that removing the ability of commanders to refer charges will solve or even help to solve this vexing problem. In fact, there is every reason to believe that the contrary is true.

Under the current system of military justice, commanders decide whether to refer serious criminal cases to a court-martial. They make this decision after they prefer charges to a preliminary hearing, called an Article 32 hearing.

The Article 32 hearing officer listens to the evidence presented by the government and the defense and then writes a written report and recommendation to the commander. In that report, the preliminary hearing officer comments on the evidence presented, the charges, whether there is probable cause to believe that the accused committed the offense cited in the charges referred to the Article 32 hearing, and whether those (or other) charges should be referred to a court-martial.⁴

Regardless of the recommendation of the preliminary hearing officer (a senior Judge Advocate General officer who presides over the hearing, akin to a judge), the commander can decide to refer the case to a court-martial even if the preliminary hearing officer has found no probable cause. Put

another way, a commander can decide to refer a case to a court-martial even if there is no reasonable likelihood of success at trial. That is because the commander is not a lawyer and thus is not bound by the ethics rules that lawyers must follow.

That reality results in many more sexual assault and other criminal cases being referred to courts-martial. Again: Commanders refer cases to courts-martial to enforce good order and discipline.

If the decision to refer serious criminal cases is given to military lawyers, then far fewer cases will be referred to courts-martial. That is because military lawyers, like their civilian counterparts, must comply with the bar ethics rules and the standards for prosecutors. Prosecutors may not prosecute a case unless there is a reasonable likelihood of success on the merits. Unlike commanders, they cannot simply refer a case to a court-martial simply because they want to enforce good order and discipline. And military lawyers certainly are prohibited from referring cases to a court-martial if there is no probable cause.

Nor can Congress require prosecutors to abandon their ethical duties to their state bar or ignore the American Bar Association rules that are applicable to prosecutors. A prosecutor's duty is to do justice, not to get convictions.

If asked, many—perhaps most—former and current military commanders can recall instances when they demanded that an individual be referred to a court-martial against the advice of a military lawyer, including a military prosecutor. They knew that sending the case to court-martial sent a powerful message that such behavior would not be tolerated, even if the ultimate success of the case at trial was not certain.⁵

Military prosecutors, vested with this new authority and responsibility, could not be depended upon to make the same decision. Discipline would suffer in such a world.⁶

Additionally, creating separate categories of crimes for which military prosecutors refer charges while commanders act in others adds enormous complexity and confusion to the system. This, in turn, would result in an explosion of litigation challenging the new rules.

What Congress Should Do

Since 2004, Congress has enacted over 100 provisions to address the prevention of sexual assault. Special victim advocates and counsels have been provided, protected reporting methods have been established, protections against retaliation have been enacted, and many other helpful reforms have been implemented.⁷

These are useful, but removing the ability of commanders to refer charges would have a negative impact on military justice. Instead, Congress should:

- **Decline** to make changes that give military prosecutors the responsibility to refer cases to a court-martial.
- **Confront** the problem of sexual assault in the military by requiring the services to establish career tracks for military prosecutors and defense attorneys, requiring strict oversight of currently enacted changes in the military justice system, and making certain that military commanders ensure that annual general military training on how to deal with sexual assault is carried out from recruitment to retirement.

Conclusion

Commanders are responsible for enforcing military justice in their units, and they accomplish this task by their active role in the military justice system. Giving military prosecutors rather than commanders the responsibility to refer cases to courts-martial will only undermine the ability of commanders to ensure that good order and discipline are maintained in a proper manner.

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Endnotes

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2. Meghann Myers, "Austin Still Mum on Whether to Prosecute Sexual Assaults Outside Chain of Command," *Military Times*, May 6, 2021, https://www.militarytimes.com/news/your-military/2021/05/06/austin-still-mum-on-whether-to-prosecute-sexual-assaults-outside-chain-of-command/?utm_source=Sailthru&utm_medium=email&utm_campaign=EBB%2005.07.21&utm_term=Editorial%20-%20Early%20Bird%20Brief (accessed May 10, 2021).
3. U.S. Department of Defense, *Department of Defense Annual Report on the Sexual Assault in the Military, Fiscal Year 2019*, April 2020, p. 6, https://www.sapr.mil/sites/default/files/1_Department_of_Defense_Fiscal_Year_2019_Annual_Report_on_Sexual_Assault_in_the_Military.pdf (accessed May 10, 2021).
4. Jennifer K. Elsea and Jonathan N. Gaffney, "Military Courts-Martial Under the Military Justice Act of 2016," Congressional Research Service *Report for Members and Committees of Congress* No. R46503, August 28, 2020, pp. 11–12, <https://crsreports.congress.gov/product/pdf/R/R46503> (accessed May 10, 2021).
5. Author's experience and Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, *Meeting and Reference Materials*, 13th Public Meeting, Arlington, Virginia, August 23, 2019, pp. 25–30, https://dacipad.whs.mil/images/Public/10-Reading_Room/02_DACIPAD_Mtg_Materials/DACIPAD_Meeting_Materials_20190823_Final.pdf (accessed May 10, 2021).
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7. Kristy N. Kamarck and Barbara Salazar Torreon, "Military Sexual Assault: A Framework for Congressional Oversight," Congressional Research Service *Report for Members and Committees of Congress* No. R44944, updated February 26, 2021, *passim*, <https://crsreports.congress.gov/product/pdf/R/R44944> (accessed May 10, 2021).