

MEMO

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www.McCaskill.senate.gov/MilitaryJustice

Senate Armed Services Committee hearing with General Dempsey and Admiral Winnefeld
July 18, 2013

Re: How the military justice systems of America's strategic allies treat sexual assault

Canada

Canada's modification to its military justice system came as a result of the Supreme Court of Canada's opinion in a drug-related case involving a corporal in the Canadian Army. The corporal, Michel Genereux, appealed his conviction through the military appeals system and then the Canadian federal courts on the grounds that the court martial system lacked independence from interference from the executive and legislative branches.

In response, in 1998, Canada passed legislation to institutionally separate the functions and responsibilities of the main actors in the military justice system. Commanders no longer have a prosecutorial function, and the Director of Military Prosecution and Director of Defense Counsel Services were created to fully separate the two functions. In addition, sexual offenses were allowed to be tried within the military system.

All sexual misconduct complaints are investigated by the Military Police (MP), who then refer charges to either the Commanding Officer or the Canadian Military Prosecution Service (CMPS), an independent entity within the Canadian Forces that reviews cases and determines whether they should move forward. If the Commanding Officer chooses not to proceed with a charge referred by the MP, the MP may refer the charge directly to the Referral Authority. The Referral Authority is an officer of higher rank than the Commanding Officer or the Chief of the Defence Staff. If the Referral Authority chooses not to proceed with charges, the charge must be referred to the Director of Military Prosecutions, who is the head of the Canadian Military Prosecution Service, along with recommendations to dispose of the charge. The Director of Military Prosecution then has final say over proceeding to a court martial.

If the Director of Military Prosecution determines that the charge need not proceed to court martial, the offense can still be dealt with via summary trial, which is presided over by the chain of command - superior commanders, Commanding Officers of bases, units, or elements, or delegated officers - and the charge is disposed of at the unit level

The changes to the military justice system in 1998 included the creation of an independent Office of the Chief Military Trial Judge and stripped Commanding Officers of the ability to appoint the President and members of the court for a court martial. Instead the office of the Chief Military Trial Judge makes these decisions. In addition, military judges are no longer responsible to the chain of command.

United Kingdom

Like Canada, the United Kingdom made major changes to their military justice system as a result of judicial opinions. The European Court for Human Rights (ECHR) decided the case of *Findlay v. United Kingdom* in 1997, finding that the UK's system for convening courts-martial violated the European Convention on Human Rights by not providing the defendant with an independent and impartial tribunal. Article 6 of the European Convention states: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The ECHR found that several aspects of the UK's military justice system threatened the establishment of an independent and impartial tribunal. The court found that the officers of the court-martial were appointed by and directly subordinate to the convening officer who also performed the role of prosecuting authority and that the same officer served as the confirming officer and no case was final until confirmed by him. Because the same officer served as the confirming authority and the prosecuting authority, this raised serious doubts as to the independence of the tribunal from the prosecuting authority.

Even before the Findlay case, the UK had already begun to restructure its court-martial system and adopted a model similar to that of Canada. These changes began in 1996 when the role of the convening officer was abolished. The Judge Advocate General is now a civilian lawyer and as of 2009 the prosecution of serious crimes is in the hands of the Director of Service Prosecutions (DSP), who may also be a civilian.

Under the current structure of the military justice system in the UK, the commanding officer is under a duty to inform the Service Police of any allegations of actions or circumstances believed to be "serious offenses." Offenses of rape and sexual assault by penetration are considered to be serious offenses. If the service police conclude there is enough evidence to charge a subject with an offense, the case must be referred to the Director of Service Prosecutions (DSP). For serious offenses, the commanding office is effectively removed and the decision to prosecute a case rests solely with the DSP. The Director of the DSP can direct the commanding office to bring charges or send the case to a court martial. In the case of a court martial, DSP makes decisions on whether to prosecute and what charges to prosecute.

In other cases the Commanding Officer ("CO") will consider whether to deal with the matter summarily (if it is within his jurisdiction) or to refer the case to the DSP with a view to proceeding to a trial by the Court Martial. In all cases where it is intended there should be a trial by the Court Martial, it will be the DSP who makes the decision to prosecute and determines the charge or charges.

Australia

In 2005, the Senate Committee on Foreign Affairs, Defense and Trade completed a report on the effectiveness of Australia's military justice system. This report was influential in spurring passage of reforms in 2006 that removed proceedings for serious offenses from the chain of command. The reforms included the removal of prosecution decisions from commanders and giving it to an independent Director of Military Prosecutions. Previously, the job of Director of Military Prosecutions was to provide legal advice to commanders. Convening authority was transferred to a separate Registrar of Military Justice.

As with Canada and the UK, Australia changed its system out of concern for a lack of independence within the military justice system, although unlike those two countries Australia was not forced to change due to a court decision.

The Australian High Court has determined that when there is overlap in civilian and military jurisdictions, criminal offenses must usually be prosecuted in the civilian justice system. Some offenses, including sexual assault, treason, murder, and manslaughter must be referred to civilian authorities for consideration. For these cases, the Director of Military Prosecutions consults with civilian authorities and must seek permission to prosecute them in the military justice system.

Israel

Israel's military justice system has not been changed significantly since the Military Justice Law first went into effect in 1955. The decision on whether or not to adjudicate a matter by military court is made by the Military Advocate General, who is appointed by the Minister of Defense. Offenses that must be adjudicated by military courts, as opposed to being handled by a disciplinary proceeding, include treason, mutiny, looting, and rape.

Recent changes to Israel's military justice system have removed the chain of command from the adjudication of "lighter" sexual offenses. For sexual offenses considered "military offenses", which include "lighter" sexual offenses such as sexual harassment, the Military Advocate General (MAG) decides whether to proceed to a court martial or to dispose of a case with disciplinary action. For all military offense cases other than sexual offenses, the Commander decides how to proceed.

For sexual harassment cases that are handled in a disciplinary hearing, an Adjudication Officer (AO) presides. The AO must be at least at the rank of Lieutenant Colonel, have legal education or special training in handling sexual harassment cases, and is generally not from the same unit as the alleged perpetrator.