

Concerning Command Investigations

Prior training is essential
by CWO3 Mark L. Baldwin

In the last 50 years, there has been little substantial changes to the way Marine Corps units conduct investigations at the Service level (outside of technological advances). Failure to account for our current societal view on discipline in the U.S. Military Services undermines the singular focus of the investigations at the unit level: to correct a wrong if there was one. The Marine Corps must take proactive steps to generate a more robust investigative system at the unit level or else the reactive nature of our legislative branch will take the ability to maintain discipline away from our commanders. As of the writing of this article, unit safety representatives, destructive weather officers, uniform victim advocates, defense travel system authorizing officials, and even unit voting officers are required to conduct training prior to assuming those roles—a unit investigating officer requires zero training to conduct his mission. This must change.

On 13 March 2013, the Subcommittee on Personnel from the U.S. Senate's Committee on Armed Services provided grim testimony that included "cover-ups" (as stated by former PO3 Brian K. Lewis), alleged rapists "being promoted and given command" (as stated by former Capt Anu Bhagwati), and complaints simply "falling on deaf ears" (as stated by Senator Lindsey Graham of South Carolina).¹ The military's ability to dictate the next move in the public opinion arena is slowly coming to the end with regard to investigating claims of abuse and holding offenders

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accountable.² The failure to accurately or transparently account for justice even had the Marine Corps Commandant issue a letter reminding certain officers that "soft reliefs ... are not authorized."³

The investigative process for the most severe crimes perpetrated by personnel in the Marine Corps ordinarily rests with either Navy Criminal Investigative Service or Criminal Investigation Division. Though the job is taxing, these investigators are in the best position to achieve positive results because they are formally educated in the investigative process and their main mission is completing these tasks.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces' report on adult penetrative sexual offenses in fiscal year (FY) 2017, completed in October 2020, stated,

there is a systemic problem with the referral of penetrative sexual offense charges to trial by GCM when there is not sufficient admissible evidence to obtain and sustain a conviction.⁴

The report detailed that 1,336 of the 1,904 cases reviewed resulted in the initial disposition authority taking no administrative action, nonjudicial, or judicial action against the subject.

Further, of the 517 that cases that were preferred, 144 were completely acquitted of charges. Given that the very best detectives in the armed forces were conducting these investigations, the subpar conviction rates are staggering.

Now imagine less severe issues like sexual harassment, bullying, revenge porn, or even racism occurring within a command. Though these concerns are not felonies, they still carry a hefty price for a young service member and his command. For less severe crimes, which occur far more frequently, Marine Corps units utilize an administrative investigation as outlined in the *Manual of Judge Advocate General (JAGMAN)*. According to the *JAGMAN*, the purpose of these investigations is to

provide the convening authority and reviewing authorities with information regarding a specific incident which occurs in the Department of the Navy.

Based on the Naval Post Graduate School publication,

nothing will serve and protect the Navy's interest more effectively than a thorough, comprehensive, and properly documented investigation.

Sadly, however, most command investigations are routinely not very thorough, comprehensive, or properly documented. As the *JAGMAN* notes, every naval officer will have contact with an administrative investigation, yet not a single officer assigned to serve as an investigating officer (IO) will have formal training that provides the foundation for a thorough, comprehensive, or properly documented investigation.

This failure on the Marine Corps to account for investigative training can be seen in high profile cases as late as June 2020 when the Assistant Commandant of the Marine Corps, Gen Gary Thomas, appointed an independent Consolidated Disposition Authority to review the command investigation conducted following a crash involving personnel from Marine All-Weather Fighter Attack Squadron 242. The Consolidated Disposition Authority determined that the command investigation “did not capture a completely accurate picture of the event.”⁵

Another huge hurdle in administrative investigations is the always looming possibility of undue command influence or transparency. When a commander appoints an officer or staff noncommissioned officer to serve as an IO, the IO knows full well the likely

How can a commander make an informed decision regarding disposing of charges if the member appointed to investigate a crime is not properly trained to conduct the investigation, has other competing priorities, or undue command influence is already floating overhead? The reality is that the commander likely will not be able to make that decision in good faith.

Two simple and achievable changes should be considered:

1. Appoint Command Investigator(s) as a permanent collateral duty in all O5 and higher commands. Similar to the way we currently appoint education officers, voting officers, or suicide prevention officers,. This member(s) would be the command duty expert in administrative investigations and the primary investigator for low level infractions that NCIS/CID are not in-

tee that all administrative investigations are conducted by personnel truly in the best possible position to succeed and come to an honest assessment of what truly transpired regarding an incident. Moreover, these changes will remind all members in the command that administrative investigations are not just a check in the box as many personnel currently view them (particularly victims) but rather a means to an end. A properly executed command investigation could mean the difference between a fully capable command and a disenfranchised group of troops and for this reason change is needed—*now!*

Notes

1. Full text of the testimony is available at <https://www.govinfo.gov>.
2. Emma Moore and Katie Galgano, contributors for New American Society stated plainly that Congress should step in if the military cannot change the outcome. See Emma Moore and Katie Galgano, “If the Military Can’t Handle Its Sexual Assault Problem, Congress Needs to Step In,” *Military*, (October 2020), available at <https://www.military.com>.
3. Letter was obtained by *Task and Purpose*, see: Paul Szoldra, “Marine Commandant to Leaders,” Quit the ‘Soft Relief’ of Fired Officers,” *Task and Purpose*, (October 2020), available at <https://taskandpurpose.com>.
4. Review and reading of the full study is available at <https://dacipad.whs.mil>.
5. Megan Eckstein, “Marine Corps Finds 2018 Crash Investigation Had Flaws, Proposes New Safety Measures,” *USNI News*, (July 2020), available at <https://news.usni.org>.
6. Staff, *Military Courts-Martial Under the Military Justice Act of 2016*, (Washington, DC: Congressional Research Service, 2020).



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desired outcome the commander wants or does not want. This “mortal enemy of military justice—undue command influence” only gets worse the longer a commander has a unit, and his subordinates understand his personal and professional demeanor—and even worse when the incident being investigated has got the attention of the next level commander.

Sweeping changes do not normally occur in the military justice system, but in 2016, Congress enacted the Military Justice Act which did substantially change the Uniform Code of Military Justice. However, nothing in the reform led to more convictions as noted above in the review of adult penetrative sexual offenses. Additionally, Congressional Research Service’s report did conclude that commanders should dispose of the charges after an investigation is completed by a member of the command or civil/military investigators.⁶

investigating. Additionally, this change could allow for the appointed CIs to provide annual training classes to the command’s population, as well as serve to create an avenue for CGRI teams to validate the commands investigative processes. This duty should not be placed on the S1 officer as their duties as legal officers could compromise the integrity of the process.

2. Mandatory Training: Formal training is an absolute must for any officer or staff noncommissioned officer that is appointed as an IO. The fact that the most Marine Corps units provide more training to voting and destructive weather officers than it does to members investigating crimes within their command should be a shock. Furthermore, if a member is serving as an appointed command investigator, he should receive additional training.

These two basic foundational changes to the current process would guaran-