

## Flawed from the Start: Marine Corps Command-Directed Investigations

In the Marine Corps,<sup>1</sup> all jobs and almost all collateral duties require training. Unit Safety Representative? Training.<sup>2</sup> Uniform Victim Advocate? Training.<sup>3</sup> Unit Voting Officer? Training.<sup>4</sup> A new commander<sup>5</sup> taking command of a unit? Training, in fact, *legal* training.<sup>6</sup> But if a Marine is appointed as an investigating officer (IO) for a Command-Directed Investigation (CDI)—most lack training on how to investigate allegations, what evidence to look for, or how to properly handle a traumatized victim.<sup>7</sup> As Colonel Amy Ebitz, USMC (Ret.) explained, “I didn’t realize how inexperienced investigators could be until I was a commander—and that [inexperience] was a problem.”<sup>8</sup> Unfortunately, the problems for CDIs run deeper than simply a lack of training.

To maintain good order and discipline, Marine commanders have the ability to direct CDIs into their personnel who have potentially violated a law, regulation, or policy.<sup>9</sup> With few exceptions, commanders have sole authority over whether a CDI occurs regarding issues in their unit, many of which are non-military specific (e.g. sexual harassment and racial discrimination).<sup>10</sup> If a commander convenes a CDI, she appoints an IO to investigate the allegation. An IOs primary job in the Marine Corps is not investigations though—their primary job can be anything from flying a military aircraft to handling logistics operations. In other words, these are warfighting experts moonlighting as investigators. These IOs also are generally

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<sup>1</sup> Although this paper focuses on the Marine Corps, most CDI concerns raised apply to all U.S. military branches—Army, Navy, Air Force, and Space Force. Any key CDI differences between these branches and the Marine Corps will be **bolded** in the footnotes.

<sup>2</sup> CWO3 Mark L. Baldwin, *Concerning Command Investigations Prior Training is Essential*, THE MARINE CORPS GAZETTE (August 2021), <https://mca-marines.org/wp-content/uploads/61-Concerning-Command-Investigations.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> JAG INSTRUCTION 5800.7G CH-1, MANUAL OF THE JUDGE ADVOCATE GENERAL 2-5 (2022), <https://www.secnave.navy.mil/doni/SECNAV%20Manuals1/5800.7G%20CH-1.pdf> (Commanders are “Marine Force Commanders, Commanding General, Officers in Charge in the grade of O-5/O-6, and slated O-5/O-6 Commanding Officers.”).

<sup>6</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-338, MILITARY TRAINING: THE SERVICES NEED TO ENSURE THAT ALL COMMANDERS ARE PREPARED FOR THEIR LEGAL RESPONSIBILITIES 9, 25 (2021) (“The Marine Corps provides training with blocks of legal content to officers selected for command at the O-5 and O-6 levels...Given the wide range of unique legal responsibilities entrusted to commanders, having sufficient legal training to prepare commanders is imperative to enable them to perform their legal responsibilities effectively.”).

<sup>7</sup> To be sure, at The Basic School (TBS), there is one class covering CDIs. However, this one-hour class is for Second Lieutenants who are brand-new to the Marine Corps. And this class does not offer practical application of CDI concepts—simply an overview of what CDIs are and how they work. Even if TBS did offer practical application, “there is only so much utility in teaching investigations, military justice, etc. to new lieutenants at TBS.” Email Interview with LtCol Susan Upward, USMC, Marine Corps Judge Advocate with Over 10 Years of Experience (June 25, 2023).

<sup>8</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>9</sup> GAO-21-338, *supra* note 6, at 9.

<sup>10</sup> MARINE CORPS ORDER 5354.1F, MARINE CORPS PROHIBITED ACTIVITIES AND CONDUCT (PAC) PREVENTION AND RESPONSE POLICY 1-7 (2021), [https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8vcNd\\_hNCfPiCca6eAfSQ%3d%3d](https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8vcNd_hNCfPiCca6eAfSQ%3d%3d); see MARINE CORPS ORDER 5370.8A, MARINE CORPS HOTLINE PROGRAM (2019), <https://www.marines.mil/Portals/1/Publications/MCO%205370.8A.pdf?ver=2019-08-02-142855-683>; NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK (REV. 03/16), <https://apps.dtic.mil/sti/tr/pdf/AD1014458.pdf>.

in the chain of command<sup>11</sup> under the commander who appoints them and in the same command as the subject and complainant—sometimes they work only a few cubicles away from each other.

What CDIs lack in structure and approach, they make up for in ramifications. These investigations—which make up a majority of administrative investigations in the Marine Corps—have life altering consequences, ranging from administrative separation (being fired) to adverse material being placed in a personnel file (many times career ending for officers, sometimes for enlisted too).<sup>12</sup> Although being fired seems mundane, there is the potential of receiving an Other than Honorable characterization of service as a result of these investigations, which generally leads to losing all Veterans Affairs’ benefits and creates a higher-risk for homelessness.<sup>13</sup> These ramifications are not isolated to individuals though: flawed investigations lead to recruitment and retention issues—creating serious national security concerns.<sup>14</sup>

So what does all this mean? It means that a commander must make a potentially life-altering decision based on investigations where the IO is not “properly trained to conduct the investigation, has other competing priorities,” and lacks proper quality assurance and independence.<sup>15</sup>

By comparing and contrasting other administrative investigatory bodies with purview over Marine Corps issues, this paper argues that CDIs are inherently flawed. This paper will first provide an overview of three areas where Marine Corps investigations originate from: commanders, the Inspector General of the Marine Corps (IGMC) and Command Inspector General (CIG), and the Department of Defense Inspector General (DoD IG).<sup>16</sup> Each section will examine five foundational areas underlying these investigations: 1) convening authority, 2)

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<sup>11</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 5, at 1-45 (“The chain of command is defined as ‘the succession of commanding officers from a superior to a subordinate through which command is exercised.’”).

<sup>12</sup> See e.g., DEPARTMENT OF DEFENSE LEGAL SERVICES AGENCY, REPORTING AND INVESTIGATING MILITARY COMPLAINTS OF SEXUAL HARASSMENT IN THE DEPARTMENT OF DEFENSE 7 (2022) (“Commanders frequently take administrative action, including initiating administrative separation, letters of reprimand, adverse evaluation reports, counseling, training, recommendation against reenlistment, and relief for cause as a result of CDIs.”).

<sup>13</sup> John Ismay, *‘Bad Paper’ Discharge Can Lead to Homelessness, Hopelessness*, AMERICAN HOMEFRONT PROJECT (Apr. 6, 2016), <https://americanhomefront.wunc.org/2016-04-06/bad-paper-discharge-can-lead-to-homelessness-hopelessness>.

<sup>14</sup> See Video: *Hirono Highlights Importance of Supporting Female Service Members and Increasing Public Trust in Order to Meet Military Recruitment and Retention Goals*, U.S. Senator Mazie Hirono (Sept. 21, 2022), <https://www.hirono.senate.gov/news/press-releases/video-hirono-highlights-importance-of-supporting-female-service-members-and-increasing-public-trust-in-order-to-meet-military-recruitment-and-retention-goals>.

<sup>15</sup> CWO3 Mark L. Baldwin, *Concerning Command Investigations Prior Training is Essential*, THE MARINE CORPS GAZETTE (August 2021), <https://mca-marines.org/wp-content/uploads/61-Concerning-Command-Investigations.pdf>.

<sup>16</sup> One significant hurdle this paper faced was the lack of publicly available information regarding administrative investigations in each respective service. As of this writing, there is no comprehensive review of CDIs available to the public. See DEPARTMENT OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 18 (2022). These investigations are also generally unavailable under the Freedom of Information Act (FOIA). To overcome this lack of access, I chose two methods as the basis of the paper: expert interviews and reviewing all relevant instructions and orders for administrative investigations in the U.S. military. For the expert interviews, many choose to stay anonymous so they could provide candid responses.

personnel selection and qualifications, 3) training, 4) quality assurance, and 5) independence. The next section will analyze issues with CDIs, especially compared to IGMC, CIG, and DoD IG. Coupled with this analysis is an overview of how flawed investigations—either in appearance or in fact—create national security issues. With these foundational points explained, the paper will provide recommendations on how to improve CDIs.

## **1. Investigatory Overview**

### **a. CDIs**

#### **i. Convening Authority**

Generally, commanders initiate CDIs for incidents that occur within their command or involve their personnel.<sup>17</sup> Marine commanders will use these CDIs to investigate allegations ranging from sexual harassment<sup>18</sup> to racial discrimination to hazing.<sup>19</sup> For many issues, these commanders have the sole authority to investigate an allegation.<sup>20</sup> CDIs include preliminary inquiries (PIs)<sup>21</sup> and command investigations (CIs).

#### **ii. Personnel Selection and Qualifications**

Convening authorities select these IOs through a simple process. When picking a CDI IO, a convening authority will generally ensure that an IO is asked two questions: whether they know the subject or have written personnel evaluations on them.<sup>22</sup> Simply knowing the subject though will not have a candidate removed: there must be a friendly or personal relationship to do so. The convening authority will also have his staff check current officer misconduct files to see if any potential IO is under investigation; if they are, they are removed from the potential IO list. However, there is no review of the IOs personnel file to scan for *past* adverse material nor is there any requirement to do so.<sup>23</sup> So an IO may be appointed to investigate a sexual harassment allegation who had a substantiated sexual harassment complaint against him earlier in his career.

A list will then be generated with names from the command that shows a potential IOs age, length of service, and current billet. From this list, a convening authority will base his

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<sup>17</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-10.

<sup>18</sup> DEPARTMENT OF DEFENSE LEGAL SERVICES AGENCY, REPORTING AND INVESTIGATING MILITARY COMPLAINTS OF SEXUAL HARASSMENT IN THE DEPARTMENT OF DEFENSE 2 (2022) (“With few exceptions, the chain of command resolves sexual harassment allegations through administrative investigations or low-level command leadership actions.”).

<sup>19</sup> MARINE CORPS ORDER 5370.8A, *supra* note 9, at 2-4.

<sup>20</sup> *Id.*

<sup>21</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-7 (PIs are used as a quick, informal review to provide a surface-level understanding of a situation. These investigations generally should only take three calendar days.).

<sup>22</sup> Email Interview with Anonymous Active Duty Marine Lieutenant Colonel, Prior Investigating Officer with 15 Years of Experience (June 20, 2023) (“I’ve conducted a PI and CI (1 each, separate incidents) as an IO. In neither case [was I asked these] two questions.”).

<sup>23</sup> See generally JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4.

selection off several factors: “age, education, training, experience, length of service, and temperament.”<sup>24</sup> There is a seventh, implied factor: “who is available?”. Stated differently, whose section can absorb losing one of their Marines for weeks or months.<sup>25</sup> A convening authority will select an IO based on these factors with an attempt to find an IO senior in rank to the subject, although that is not required.<sup>26</sup>

Just as important as what is considered is what is not considered. A convening authority generally does not know what the potential IO knows about investigations; the convening authority does not know if he has ever done an investigation; the convening authority does not know if he may be a poor choice due to prior misconduct (e.g. a previous harasser is now the IO for a harassment allegation).

### iii. Training

IOs have little to no training on how to conduct an effective investigation.<sup>27</sup> They do not attend courses before starting an investigation to learn investigative techniques or how to properly think through legal and factual issues.<sup>28</sup> Nor do IOs have trauma-informed training to properly communicate with sexual harassment victims.<sup>29</sup> There is also no recurring training to maintain proficiency with CDIs. What is more, many IOs have done few—if any—investigations in their career.

In lieu of training, an IO is given two references to review at the start of the investigation: the JAGMAN Investigations Handbook (JAGMAN) and the Manual for the

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<sup>24</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-11.

<sup>25</sup> Colonel Charles A. Jones, USMCR, *Get the Investigation Monkey off the Commander's Back*, U.S. NAVAL INSTITUTE (Nov. 2005), <https://www.usni.org/magazines/proceedings/2005/november/get-investigation-monkey-commanders-back>.

<sup>26</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-11; *cf.* ARMY REGULATION 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS 13 (2016), [https://armypubs.army.mil/epubs/DR\\_pubs/DR\\_a/pdf/web/r15\\_6.pdf](https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r15_6.pdf) (“**In all cases, an IO or voting member of a board will be senior in rank to any person whose conduct or performance of duty may be investigated, or against whom adverse findings or recommendations may be made, except when the appointing authority determines this to be impracticable because of military exigencies.**”).

<sup>27</sup> Email Interview with Anonymous Retired Marine Corps Colonel, Former O-6 Marine Commander (June 1, 2023); *cf.* DEPARTMENT OF THE DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 6-7 (“**All IOs will take the Air Force Investigating Officer Course, available on the Air Force online learning system, regarding how to conduct thorough, fair, and objective investigations. Subsequent training and guidance as to how the IO should execute the investigation will be provided by the appointed legal advisor.**”); *cf.* ARMY REGULATION 15-6, *supra* note 22, at 48 (“**Before conducting witness interviews, IOs may consult inspector general officials or law enforcement personnel, such as military police officers or Criminal Investigation Division agents, for guidance on interview techniques. the IO should avoid a cookie-cutter approach to the witnesses.**”).

<sup>28</sup> *Cf.* DEPARTMENT OF THE AIR FORCE MANUAL 1-101, COMMANDER DIRECTED INVESTIGATIONS 12 (2021), <https://www.airuniversity.af.edu/Portals/10/Holm/documents/DAFMAN1-101%20Apr%202021%20CDI.pdf> (“**Commanders inform the installation Equal Opportunity (EO) office upon receipt of any allegations of discrimination based on race, sex (including pregnancy, gender identity, and sexual orientation), color, national origin, age (40 or older), religion, disability, genetic information or reprisal for previous EO activity. EO has primary responsibility for investigating allegations of discrimination. Before starting an investigation into any allegation of EO discrimination, commanders must consult with SJA legal advisor and EO.**”).

<sup>29</sup> INDEPENDENT REVIEW COMMISSION SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 4 (2021).

Judge Advocate General (JAGINST).<sup>30</sup> Both these references provide an overview on how to conduct an investigation.<sup>31</sup> For example, they explain how to handle witnesses, provide examples of questions to ask, and note observations the IO should make.<sup>32</sup> In one section, the JAGMAN explains that the IO should “let the witness tell what happened,” not ask questions that suggest answers.<sup>33</sup> Building on this advice, the JAGINST explains that IOs can assist witnesses with their statements, ensuring that “the witness addresses all relevant facts known to the witness.”<sup>34</sup> Of course, it also explains that the IO “shall not tell a witness what to say.”<sup>35</sup>

These references provide wide latitude to IOs. For interviews, IOs can capture the subject, victim, and witness’s statement in “summary or verbatim form.”<sup>36</sup> That is, if IOs interview the subject or complainant in the first place—which is not required.<sup>37</sup> Regardless of whether an interview is captured in summary or verbatim form, the statement can be signed by the individual *or* the IO to certify that it is accurate.<sup>38</sup> Many investigations settle for having the IO sign the statement to certify the statement’s accuracy. And because most IOs choose not to record interviews, there is no method to confirm what was said or whether key information was left out of the investigation.<sup>39</sup>

#### iv. Quality Assurance

For most PIs, there is no requirement for any review except by the convening authority, even though PIs can result in the same ramifications as CIs.<sup>40</sup> But CIs require a Legal Sufficiency Review (LSR) by the “cognizant judge advocate.”<sup>41</sup> There are three substantive questions for an LSR:

- (1) Does the investigation adequately address the matters complained of;

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<sup>30</sup> Cf. DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 8 (“After the IO is appointed, and before the investigation begins, the legal advisor meets with the IO. The legal advisor will provide any necessary training on CDIs, and assist in formulating an investigation plan, witness list, proposed questions, and proof analysis matrix. The legal advisor will advise the IO during the investigation, as issues may arise. Having the legal advisor present at all witness interviews is recommended, and if the IO requests, the legal advisor may take part in the witness interviews.”); cf. ARMY REGULATION 15-6, *supra* note 22, at 45 (“In particular, the legal advisor helps the IO or board develop an investigative plan; identify necessary witnesses and develop appropriate questions...A legal advisor must be appointed to advise an IO conducting an investigation under this regulation.”).

<sup>31</sup> NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK 1-1 (REV. 03/16), <https://apps.dtic.mil/sti/tr/pdf/AD1014458.pdf>.

<sup>32</sup> *Id.* at III-2.

<sup>33</sup> *Id.*

<sup>34</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-15.

<sup>35</sup> *Id.*

<sup>36</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-13; cf. DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 20 (“Summarize the testimony immediately following the interview and have the witness review and sign the summary, generally that same day.”).

<sup>37</sup> See JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-13.

<sup>38</sup> *Id.*

<sup>39</sup> *But see* DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 21 (The Air Force is even more adamant: “Considering the limited scope and purpose of most CDIs, recorded testimony will be the exception, not the rule.”).

<sup>40</sup> See generally JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4.

<sup>41</sup> *Id.* at 2-19.

- (2) Does the evidence *support* the findings of the investigating officer or board; and
- (3) Are the conclusions and recommendations of the investigating officer or board *consistent* with the findings?

Similar to IOs, the judge advocate completing the LSR generally reports directly to the convening authority or the General Court Martial Convening Authority (GCMCA), who usually has final input and closes the investigation.<sup>42</sup> This structure means that the convening authority or GCMCA writes the personnel evaluation on the judge advocate providing the LSR for the investigation. IOs can also speak to this same judge advocate before and during an investigation.<sup>43</sup> However, IOs are not required to speak to the judge advocate, the manuals only say “should.”<sup>44</sup>

For CDIs that involve allegations stemming from the Prohibited Activities and Conduct (PAC) Order (i.e. sexual harassment, discrimination, harassment, hazing, bullying, dissident and protest activities, and wrongful distribution or broadcasting of intimate images), an Equal Opportunity Advisor (EOA) must provide an advisory opinion for the convening authority.<sup>45</sup> This opinion answers several substantive questions, such as whether there was any bias from the IO and whether there was a “thorough” review of the circumstances.<sup>46</sup> However, EOAs, similar to IOs, are not investigators. Moreover, if a command does not have the ability to coordinate with an EOA for an investigation, the judge advocate will complete both the LSR and advisory opinion.<sup>47</sup>

Only some CDIs can be appealed.<sup>48</sup> For example, a CDI into an allegation stemming from the PAC Order can be appealed. What this PAC appeal generally looks like in practice: a convening authority appoints an IO, who investigates the complaint. The IO then submits the report, which then receives an advisory opinion and then the LSR. The convening authority will

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<sup>42</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-13.

<sup>43</sup> *Id.* at A-2-A.

<sup>44</sup> *Id.* at 2-18; *cf.* DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 6 (“**Before beginning an investigation, the IO will: Review this publication. Review all materials provided by the appointing authority. Review regulations, directives, instructions, manuals, guidance, and if applicable, contract documents relating to the allegations. The appointed legal advisor can help the IO determine which regulations or publications apply to the particular.**”).

<sup>45</sup> MARINE CORPS ORDER 5354.1F, MARINE CORPS PROHIBITED ACTIVITIES AND CONDUCT (PAC) PREVENTION AND RESPONSE POLICY 5-4, [https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8ycNd\\_hNCFPiCca6eAfSQ%3d%3d](https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8ycNd_hNCFPiCca6eAfSQ%3d%3d).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Cf.* DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 30 (“CDIs are a function of command, and requests for reconsideration are likewise the responsibility of the chain of command. Simply disagreeing with the findings or with the command action taken in response to the findings is not sufficient reason to justify a higher-level review or additional investigation. It is the requestor’s responsibility to provide new and compelling information, including specific reasons why they believe the original complaint resolution was not valid or adequate, that justifies a higher-level review on previously considered issues.”).

then review all three documents and endorse the investigation. At that point, the complainant and subject will be notified of the convening authority's determination. Those findings will also be forwarded to the GCMCA. If either the subject or complainant appeals, that appeal will also be provided to the GCMCA. The GCMCA will then make a determination on the investigation and on the appeal.<sup>49</sup> On all PAC cases except discrimination or sexual harassment, the GCMCA's decision is final.<sup>50</sup>

When appealing an investigation, both subject and complainant likely will want a copy of the investigation to prepare an appeal and provide to any outside legal counsel. The same GCMCA that endorses and closes the investigation is “the release authority” for the investigation.<sup>51</sup> In other words, the commander with a vested interest in the case controls whether individuals can receive a copy of the investigation. Subjects almost always receive a copy under the Privacy Act<sup>52</sup>; however, a complainant's request falls under the Freedom of Information Act (FOIA)—which generally are denied though under FOIA.<sup>53</sup>

An example is helpful to illustrate the issue here: a 20 year-old enlisted Marine alleges two supervisors harassed and made racist comments towards her for months; the investigation unsubstantiates these allegations, but the investigation appears to be, at worst, a cover-up and, at best, a result of carelessness. The victim can review the investigation in an office and take notes. But she cannot make copies of the investigation or provide a copy to her lawyer that she hired to help her with her appeal. Her lawyer must rely on the Marine's notes to craft the appeal—who may or may not have captured the proper information or understood the whole investigation.

## v. Independence

In general, the convening authority and GCMCA control the investigation.<sup>54</sup> If the convening authority determines the investigation needs further evidence or analysis, he will return the investigation to the IO for further inquiry.<sup>55</sup> If the convening authority determines that

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<sup>49</sup> In cases where the convening authority and GCMCA are the same commander, the appeal will go one-commander up.

<sup>50</sup> MARINE CORPS ORDER 5354.1F, MARINE CORPS PROHIBITED ACTIVITIES AND CONDUCT (PAC) PREVENTION AND RESPONSE POLICY 5-4 – 5-8 (2021), [https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8ycNd\\_hNCfPiCca6eAfsQ%3d%3d](https://www.marines.mil/Portals/1/Publications/MCO%205354.1F.pdf?ver=u8ycNd_hNCfPiCca6eAfsQ%3d%3d).

<sup>51</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-23.

<sup>52</sup> 5 U.S.C. § 552a.

<sup>53</sup> 5 U.S.C. § 552; otherwise known as a “GLOMAR” response, an agency “may refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a FOIA exemption.” *Wilner v. Nat'l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009). There is no constitutional dimension to this denial—simply statutory language—which can be changed by Congress.

<sup>54</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-19; *but see* ARMY REGULATION 15-6, *supra* note 22, at 14 (“**The authority taking action on an administrative investigation or board is the approval authority. Generally, the appointing authority will also act as the approval authority.**”).

<sup>55</sup> *Id.*; *cf.* ARMY REGULATION 15-6, *supra* note 22, at 14 (“**The approval authority may consider any relevant information in making a decision to take adverse action against an individual, even information that the IO or board did not consider. The approval authority will attach that information to the report of investigation, if available.**”).

the investigation is complete, he will endorse the investigation. In that endorsement, he must “approve, disapprove, modify, or add to the findings of fact, opinions, and recommendations” and may make recommendations that he cannot implement at his level.<sup>56</sup> If he determines that “the investigation is of no interest to anyone outside the command” or not directed by a superior, he can keep the investigation internal.<sup>57</sup> Generally though, the GCMCA “superior to the [convening authority] must review [and endorse] every command investigation.”<sup>58</sup> The GCMCA will also have the ability to modify “facts, opinions, and recommendations.”<sup>59</sup> Sometimes the convening authority and the GCMCA are the same Marine, so in those instances, the investigation only requires *one* review and endorsement.<sup>60</sup> Once endorsed by the GCMCA, the investigation is usually closed.<sup>61</sup>

For many CDIs, the convening authority is the commander for the IO.<sup>62</sup> In fact, sometimes the convening authority is even the direct supervisor for the IO; but, at the very least, he is a higher-ranked officer in the IOs chain of command. Because of this structure, convening authority’s write personnel reviews on many of their IOs. Even if they do not, the Marine writing the review likely reports directly to the convening authority. Equally important, the IO is usually from the same command as the subject of the investigation, if not also the complainant as well.

#### **b. Inspector General of the Marine Corps (IGMC) and Command Inspector General (CIG)**

The Marine Inspector General Program consists of the IGMC, CIG, and their respective staff.<sup>63</sup> IGMC is a separate, distinct entity from CIG, although IGMC does have authority over CIG.<sup>64</sup> CIG are found at subordinate commands throughout the Marine Corps.<sup>65</sup> IGMC handles “all complaints involving a senior official, or an Inspector General, as well as allegations of reprisal/retaliation.”<sup>66</sup> Both IGMC and CIG will “investigate military whistleblower reprisal

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<sup>56</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-19.

<sup>57</sup> NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK III-2 (REV. 03/16), <https://apps.dtic.mil/sti/tr/pdf/AD1014458.pdf>.

<sup>58</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-19.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> ALNAV 024/22, INTERIM POLICY GOVERNING INVESTIGATION OF FORMAL SEXUAL HARASSMENT COMPLAINTS UNDER 10 U.S.C. 1561 (2022), [https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2022/ALN22024.txt?ver=6JqcUUa8IXVnUSy-TX\\_XoA%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2022/ALN22024.txt?ver=6JqcUUa8IXVnUSy-TX_XoA%3D%3D) (According to ALNAV 024/22, all formal sexual harassment complaints received by a Marine Corps commander must be forwarded to the next higher level commander, no lower than the 0-6 level, for appointment of an investigating officer from outside the command of both the subject and complainant, and be conducted in accordance with Marine Corps Order 5354.1F (PAC order).).

<sup>63</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, MARINE CORPS INSPECTOR GENERAL PROGRAM 3 (2019), [https://www.marines.mil/portals/1/Publications/MCO%205430.1A\\_Admin%20CH.pdf?ver=2019-02-06-090553-387](https://www.marines.mil/portals/1/Publications/MCO%205430.1A_Admin%20CH.pdf?ver=2019-02-06-090553-387).

<sup>64</sup> *Id.*

<sup>65</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-105316, MILITARY INSPECTORS GENERAL: OPPORTUNITIES EXIST TO STRENGTHEN PROCESSES FOR ADMINISTRATIVE INVESTIGATIONS AND TRAINING 5 (2022).

<sup>66</sup> MARINE CORPS ORDER 5370.8A, *supra* note 9, at 26.



complaints not investigated by the [DoD IG] office; and investigate or inquire into matters concerning fraud, waste, abuse, or mismanagement.”<sup>67</sup>

CIG and IGMC act as facilitators more than investigators though.<sup>68</sup> More than 90 percent of all complaints in the Marine Corps are resolved outside IGMC or CIG.<sup>69</sup> In fact, most complaints to IGMC and CIG are referred to a command for a decision on the complaint and decision on whether to conduct a CDI.<sup>70</sup> In those cases, the commander selects the IO, mirroring the CDI process previously discussed.

### **i. Convening Authority**

IGMC has the authority to direct its personnel to conduct investigations.<sup>71</sup> CIG can “initiate and conduct investigations into any matter within the command as directed by IGMC, the commander, or as otherwise deemed appropriate by the CIG.”<sup>72</sup>

### **ii. Personnel Selection and Qualifications**

IGMC and CIG consist of both civilian and military personnel.<sup>73</sup> The Secretary of the Navy appoints the Inspector General of the Marine Corps, choosing from “among the general officers of the Marine Corps.”<sup>74</sup> The General in charge of IGMC will remain in this position for about 3 years.<sup>75</sup> IGMC and CIG military positions are temporary, with rotations occurring every 2-3 years.<sup>76</sup> There is no specific military occupational specialty (MOS)<sup>77</sup> required to work for IGMC or CIG.<sup>78</sup> IGMC personnel are not connected to any command where a complaint would arise; nor are they peers or colleagues with subjects, complainants, or witnesses.

In contrast, CIG heads are selected by their commander, report directly to that commander, and are evaluated by that commander; they can either be a civilian or active-duty Marine.<sup>79</sup> Commanders also select the other personnel for a CIG.<sup>80</sup> Both CIG and IGMC conduct background checks for civilian and military personnel to ensure there is no prior misconduct or

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<sup>67</sup> GAO-22-105316, *supra* note 58, at 6; MARINE CORPS ORDER 5370.8A, *supra* note 9, at 26.

<sup>68</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023) (“CIG doesn’t generally do investigations though; they are the catcher and then they put it in the glove it needs to, e.g. the command.”).

<sup>69</sup> GAO-22-105316, *supra* note 58, at 6.

<sup>70</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>71</sup> MARINE CORPS ORDER 5370.8A, *supra* note 9, at 26.

<sup>72</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 3.

<sup>73</sup> GAO-22-105316, *supra* note 58, at 20.

<sup>74</sup> *Id.* at 5.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 23.

<sup>77</sup> An MOS is a Marine’s career field (e.g. a pilot or logistics officer).

<sup>78</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 6.

<sup>79</sup> *Id.* at 5.

<sup>80</sup> *Id.* at 6.

allegations that would bias them.<sup>81</sup> Neither IGMC nor CIG use contractors to conduct administrative investigations.<sup>82</sup>

### iii. Training

There are training requirements for both IGMC and CIG personnel. Before starting as an IG investigator, one must “[a]ttend an IGMC Mobile Training Team IG Course at the first available opportunity, but not later than six months after joining.”<sup>83</sup> After completing this training, IG investigators must attend the same training biannually.<sup>84</sup> These trainings cover “all aspects of IG investigations,” lasting about three to four days each.<sup>85</sup> The Marine Corps tracks this training and ensures that all IG investigators are compliant.<sup>86</sup>

There are also several recommended training sessions for IG investigators, which most attend at least one per year. IG investigators should attend “the DoD IG’s Joint Inspector General Certification Course, courses offered by the Association of Inspectors General, courses offered by the Federal Law Enforcement Training Center, or courses offered by the Council of the Inspectors General on Integrity and Efficiency.”<sup>87</sup> IGMC and CIG personnel also have the ability to shadow investigators in the office before being assigned to an investigation as the lead investigator.<sup>88</sup> The ability to learn from investigators who have been on the job for years provides further guidance and training for new investigators.<sup>89</sup>

### iv. Quality Assurance

IGMC develops policy and procedures for “complaint resolution” within IGMC and CIG.<sup>90</sup> IGMC also can comment on and review any CIG investigation.<sup>91</sup> IGMC requires that “all investigations receive a quality review by the IG office staff and all reports to undergo a legal review.”<sup>92</sup> IGMC must submit a report to Congress semiannually, summarizing IGMC and CIG activities.<sup>93</sup> These reports are also published online.<sup>94</sup> Each IGMC case receives a Director of

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<sup>81</sup> Email Interview with Anonymous Marine General, former Inspector General and Marine Commander (June 14, 2023); MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 6.

<sup>82</sup> *Id.* at 22.

<sup>83</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 13.

<sup>84</sup> *Id.* at 12.

<sup>85</sup> GAO-22-105316, *supra* note 58, at 27-28.

<sup>86</sup> *Id.*

<sup>87</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 12.

<sup>88</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>89</sup> *Id.*

<sup>90</sup> GAO-22-105316, *supra* note 58, at 5.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 19; MARINE CORPS ORDER 5370.8A, *supra* note 9, at 3-2.

<sup>93</sup> GAO-22-105316, *supra* note 58, at 36.

<sup>94</sup> *Id.*

Investigation review (civilian lawyer), a Deputy IG review (generally, a retired Colonel), and then a review by the Inspector General of the Marine Corps.<sup>95</sup> IGMC investigations can be appealed.<sup>96</sup>

CIG has their own policies as well. For CIG investigations, they are “highly encouraged to consult with their [Staff Judge Advocate (SJA)] during the investigative planning phase and during the investigation.”<sup>97</sup> If CIG refers an investigation to a commander for investigation, that investigation will return to CIG for review, concur/non-concur, and close-out.<sup>98</sup> Before doing so though, it will undergo a legal review.<sup>99</sup> And when a CIG is concerned about the “existence or appearance of a conflict of interest, bias, prejudice, or other circumstance that may place the independence or impartiality of the inquiry in doubt, it shall refer the matter to the next higher office in the chain of command with a CIG.”<sup>100</sup> CIG investigations can be appealed.<sup>101</sup>

#### **v. Independence**

IGMC and CIG make the final determination on a case on whether to concur or non-concur.<sup>102</sup> IGMC also appoints their own investigators to run the investigations, with no input from the commander.<sup>103</sup> CIG often will rely on the commander to appoint an IO.<sup>104</sup>

#### **c. Department of Defense Inspector General (DoD IG)**

DoD IG conducts investigations of fraud, waste, abuse of authority, and mismanagement issues.<sup>105</sup> It also has “first right of refusal to investigate military whistleblower reprisal complaints” and handles investigations into complaints against senior DoD officials.<sup>106</sup> For any reprisal investigation that DoD IG details to IGMC or CIG, DoD IG will “ensure that the IG conducting the investigation of an allegation under this subsection is *outside* the immediate chain of command of both the member submitting the allegation and the individuals alleged to have taken the retaliatory action.”<sup>107</sup> DoD IG also has the ability to review CDIs, and IGMC and CIG

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<sup>95</sup> Email Interview with Anonymous Marine General, former Inspector General and Marine Commander (June 14, 2023).

<sup>96</sup> *Id.*

<sup>97</sup> MARINE CORPS ORDER 5370.8A, *supra* note 9, at 3-2.

<sup>98</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>99</sup> Email Interview with Anonymous Civilian CIG, (June 25, 2023).

<sup>100</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 11.

<sup>101</sup> Email Interview with Anonymous Marine General, former Inspector General and Marine Commander (June 14, 2023).

<sup>102</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>103</sup> *Id.*

<sup>104</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023).

<sup>105</sup> DEPARTMENT OF DEFENSE DIRECTIVE 5106.01, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510601p.pdf?ver=2020-05-29-143946-603>; MARINE CORPS ORDER 5370.8A, *supra* note 9, at 3-2.

<sup>106</sup> GAO-22-105316, *supra* note 58, at 6 fn 17; DEPARTMENT OF DEFENSE DIRECTIVE 5106.01, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510601p.pdf?ver=2020-05-29-143946-603>.

<sup>107</sup> 10 U.S. Code § 1034 (emphasis added).

investigations when there are allegations of material flaws.<sup>108</sup> However, based on workload and staffing, DoD IG rarely does.<sup>109</sup>

### **i. Convening Authority**

DoD IG initiates its own investigations.<sup>110</sup> And if DoD IG refers a case to IGMC or CIG, then DoD IG will review the final investigation before approval.<sup>111</sup> Similar to IGMC and CIG, if DoD IG receives a commander-level issue, DoD IG will send the case down to CIG, who then will send the case to the commander.<sup>112</sup>

### **ii. Personnel Selection and Qualifications**

DoD IG only uses civilians for its investigations.<sup>113</sup> The DoD IG Administrative Investigation office will conduct background checks prior to hiring these individuals as investigators to ensure there is no prior misconduct or complaints against them.<sup>114</sup> When assigning cases to these investigators, the DoD IG will assign them to specific teams, e.g. a reprisal case will go to the reprisal team.<sup>115</sup> DoD IG looks for several different qualifications for their potential investigators, including whether they have prior investigatory experience and their past experience working on the type of issues that DoD IG handles.<sup>116</sup>

### **iii. Training**

The mandatory, foundational training for DoD IG administrative investigators is a basic IG course, such as the Air Force IG course.<sup>117</sup> Following this training, investigators must attend at least one course a year but, on average, investigators attend two courses a year—if not more.<sup>118</sup> These courses range from Essentials of Inspector General Investigations to Advanced Interviewing for IG Investigators to Sexual Assault Reprisal training.<sup>119</sup> On average, these courses run from roughly a few days to a couple weeks.<sup>120</sup> Most courses are information

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<sup>108</sup> Telephonic Interview with Anonymous DoD IG Administrative Investigations' Employee, Over 7 years in DoD IG (June 12, 2023); Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for over 10 years (June 9, 2023); 10 U.S.C. § 1034(d).

<sup>109</sup> Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for over 10 years (June 9, 2023).

<sup>110</sup> DEPARTMENT OF DEFENSE DIRECTIVE 5106.01, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE 6 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510601p.pdf?ver=2020-05-29-143946-603>.

<sup>111</sup> *Id.* at 17.

<sup>112</sup> Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for over 10 years (June 9, 2023).

<sup>113</sup> Telephonic Interview with Anonymous DoD IG Administrative Investigations' Employee, Over 7 years in DoD IG (June 12, 2023); Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for over 10 years (June 9, 2023).

<sup>114</sup> *Id.*

<sup>115</sup> Telephonic Interview with Anonymous DoD IG Administrative Investigations' Employee, Over 7 years in DoD IG (June 12, 2023).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *CIGIE Training*, CIGIE Institute, <https://www.ignet.gov/content/training-programs-0#aiigi>; Telephonic Interview with Anonymous DoD IG Administrative Investigations' Employee, Over 7 years in DoD IG (June 12, 2023).

intensive, provide lessons on investigation techniques, and require practical exercises with examinations at the end of the course.<sup>121</sup>

#### iv. Quality Assurance

DoD IG has extensive quality assurance measures in place. As mandated by the Inspector General Act, all DoD IG investigations follow the *Quality Standards for Investigations* (QSI) created by the Council of the Inspectors General on Integrity and Efficiency (CIGIE).<sup>122</sup> In short, QSI establishes principles and standards for investigations.<sup>123</sup> For instance, QSI explains that investigations must avoid “external impairments” and “personal impairments,” such as the “authority to overrule or influence the investigation,” professional relationships with individuals involved in the investigation, and “preconceived opinions.”<sup>124</sup> QSI also cautions that “the investigative organization must be organizationally located outside the staff or the line management of the unit under investigation.”<sup>125</sup>

Investigators use a checklist to ensure that they follow these standards. For each of the standards established by QSI, “investigators will document in writing whether the standard is met, whether there are deficiencies, and whether the deficiencies are significant enough that they adversely affected the outcome of the investigation.”<sup>126</sup> This analysis provides a “clear record of the analytical process and decision-making” and informs follow-on reviews.<sup>127</sup>

Another manual guiding DoD IG investigations is the Office of the Deputy Inspector General for Administrative Investigations (ODIGAI) Manual.<sup>128</sup> It explains that complainants and subjects “will *always* be interviewed.”<sup>129</sup> Interviewing both the subject and complainant allows them to tell their story and identify witnesses and evidence for the investigator.<sup>130</sup> The manual further notes that for witnesses identified by the complainant or subject, investigators *should* interview them.<sup>131</sup> All interviews will “obtain sworn recorded testimony from all

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<sup>121</sup> Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for over 10 years (June 9, 2023).

<sup>122</sup> OFFICE OF THE DEPUTY INSPECTOR GENERAL FOR ADMINISTRATIVE INVESTIGATIONS, ADMINISTRATIVE INVESTIGATIONS MANUAL 9 (2022), <https://www.dodig.mil/Portals/48/AI%20Manual%20update%209-23-2022.pdf>; DEPARTMENT OF DEFENSE INSTRUCTION 7050.01, DOD HOTLINE PROGRAM 22 (2017) [https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/705001\\_dodi\\_2017.pdf](https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/705001_dodi_2017.pdf).

<sup>123</sup> OFFICE OF THE DEPUTY INSPECTOR GENERAL FOR ADMINISTRATIVE INVESTIGATIONS, ADMINISTRATIVE INVESTIGATIONS MANUAL 9 (2022), <https://www.dodig.mil/Portals/48/AI%20Manual%20update%209-23-2022.pdf>.

<sup>124</sup> *Id.* at 7, 10.

<sup>125</sup> *Id.* at 10.

<sup>126</sup> *Id.* at 60.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 10.

<sup>129</sup> *Id.* at 36 (emphasis added).

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 45.

complainants, subjects, and primary witnesses who are interviewed.”<sup>132</sup> Recording “ensures a complete and accurate record of the witness’s testimony and improves the accuracy and quality” of the investigation.<sup>133</sup>

These investigations undergo a robust review process as well. The review process includes a peer review, a supervisor review, an editor review, a [Deputy Director Review], a [program analyst] review, a [Deputy Inspector General for Administrative Investigations (DIG AI) review], a legal review,” and then a front office review.<sup>134</sup> A peer review allows an impartial investigator removed from the investigation to examine the case with a “fresh set of eyes.”<sup>135</sup> “As a general rule, the more experienced the reviewing investigator, the greater the ‘value added’ to the report.”<sup>136</sup>

The supervisor review is next. This review also provides feedback on the substance of the investigation, which the investigator will incorporate in the draft.<sup>137</sup> The supervisor will ensure that directed changes are made in the report.<sup>138</sup> The Deputy Director Review (DDR) follows, again looking for substantive issues.<sup>139</sup> Any changes directed by the DDR will be corrected.<sup>140</sup> A program analyst, independent of the office conducting the investigation, will also review the investigation.<sup>141</sup> “The program analyst reviews evidence, source documents, and witness testimony supporting factual statements in reports to ensure the factual accuracy and supportability of the report.”<sup>142</sup> Following the quality assurance review, the DIG AI will review the investigation and provide feedback.<sup>143</sup>

Once approved by the DIG AI, an attorney “will review the report for legal sufficiency, which includes ensuring the conclusions are supported by the evidence.”<sup>144</sup> “Once the report has been cleared by [an attorney] for legal sufficiency and approved by the DIG AI as the final draft, the report is ready to be submitted to the IG Front Office for approval.”<sup>145</sup> The IG front office

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<sup>132</sup> *Id.* at 49.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 58.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 59.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 60.

will review the investigation and may edit the investigation still.<sup>146</sup> This action concludes the investigative review process.<sup>147</sup>

Following the review process, an oversight worksheet is created.<sup>148</sup> This worksheet provides the IG with a “a rating of the quality of individual cases in addition to valuable information on trends in systemic deficiencies in investigations within their Components.”<sup>149</sup> The focus of this feedback is to “teach and train.”<sup>150</sup> This feedback also adds uniformity to the investigations and provides oversight on and corrections to the investigator.<sup>151</sup>

After the investigation is signed, it can be appealed to the Under Secretary of Defense for Personnel and Readiness if the person appealing has new evidence or information to provide.<sup>152</sup>

#### **v. Independence**

DoD IG is “under the general supervision of the Secretary of Defense and the Deputy Secretary of Defense.”<sup>153</sup> However, DoD IG does not report to nor is it under any supervision of “any other officer of the DoD.”<sup>154</sup> The only cases that DoD IG does not have sole discretion over are cases that deal with national security, intelligence matters, or “sensitive operational plans.”<sup>155</sup> The Secretary of Defense and Deputy Secretary of Defense can interfere with these cases, if necessary.<sup>156</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 77.

<sup>148</sup> Telephonic Interview with Anonymous DoD IG Administrative Investigations’ Employee, Over 7 years in DoD IG (June 12, 2023).

<sup>149</sup> OFFICE OF THE DEPUTY INSPECTOR GENERAL FOR ADMINISTRATIVE INVESTIGATIONS, ADMINISTRATIVE INVESTIGATIONS MANUAL 77 (2022), <https://www.dodig.mil/Portals/48/AI%20Manual%20update%209-23-2022.pdf>.

<sup>150</sup> *Id.*

<sup>151</sup> Telephonic Interview with Anonymous DoD IG Administrative Investigations’ Employee, Over 7 years in DoD IG (June 12, 2023).

<sup>152</sup> *Id.*; DEPARTMENT OF DEFENSE INSTRUCTION 7050.06, MILITARY WHISTLEBLOWER PROTECTION ENCLOSURE (2) 7 (2015), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/705006p.pdf>.

<sup>153</sup> DEPARTMENT OF DEFENSE DIRECTIVE 5106.01, INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE 6 (2020), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/510601p.pdf?ver=2020-05-29-143946-603>.

<sup>154</sup> *Id.*

<sup>155</sup> 5 U.S.C. § 8 (2009).

<sup>156</sup> *Id.*

## Investigation Comparison

FEATURES	CDI	IGMC	CIG	DOD IG
Independent Convening Authority	✘	✔	✔	✔
Prior Investigator or Ability to Shadow Prior Investigators	?	✔	✔	✔
Investigative Training	✘	✔	✔	✔
Recurring/Advanced Training	✘	✔	✔	✔
Independent Quality Assurance	✘	✔	✘	✔
Investigation Results Independent	✘	✔	✘	✔
Legal Review	✔	✔	✔	✔

## 2. Analysis

### i. Convening Authority

Commanders control whether a CDI occurs for many allegations. If that commander does not believe the complaint should be investigated, that commander does not have to do so.<sup>157</sup> To be sure, that Marine could then file a complaint against that commander for failing to uphold her duty to properly investigate a legitimate complaint. However, this complaint must be resolved *before* the original allegation even starts to be investigated. As such, this “remedy” is somewhat of a red herring.

In contrast, IGMC, CIG, and DoD IG have the ability to start their own investigations. IGMC and DoD IG also do not report to the commander where the complaint arose, following QSI's cautions to remove personal and external impairments.<sup>158</sup> Being able to direct investigations without influence from the commander allows for independence and impartiality.

<sup>157</sup> The author realizes that most commanders *will* start an investigation regardless if they think there is merit or not. However, the fact that the commander controls the process is what is important here.

<sup>158</sup> OFFICE OF THE DEPUTY INSPECTOR GENERAL FOR ADMINISTRATIVE INVESTIGATIONS, ADMINISTRATIVE INVESTIGATIONS MANUAL 10 (2022), <https://www.dodig.mil/Portals/48/AI%20Manual%20update%209-23-2022.pdf>.



Although commanders strive to be objective, bias creeps into every decision—it is human nature.<sup>159</sup> With potential bias as a legitimate concern, decisions may not be made simply based on the evidence presented in the initial complaint. Decisions, sadly, could be made on what the complainant’s or subject’s reputation is in the command or the commander’s convictions regarding the allegation (e.g. a commander who takes drug usage more seriously than harassment). There may even be “competing incentives [for commanders] to avoid investigating their own units.”<sup>160</sup> “For example, investigations can reveal systemic issues with specific units or incriminate the command leadership, senior commanding officers, or their own troops.”<sup>161</sup> Allowing potential implicit or explicit biases to affect the initiation of a case hurts a unit’s readiness and the readiness of the Marine Corps as a whole.

Certainly, there is not some active conspiracy by commanders to cover up issues. However, the strong potential of biases affecting investigations is enough to remove convening authority from commanders of the subject or complainant. The direction of an investigation is the first action of a case. If that direction seems biased, then the investigation is inherently flawed.

## ii. Personnel Selection and Qualifications

CDI IOs selections are based on the wrong factors. Convening authorities hand-pick the CDI IO, basing the selection off factors that do not guarantee competency. These factors—“age, education, training, experience, length of service, and temperament”<sup>162</sup>—may reveal someone’s knowledge about the Marine Corps, capability of crafting a narrative, and ability to handle stressful situations. But what these factors do not ensure is the one aspect that is crucial to an investigation: being a competent investigator. These factors are also flexible, allowing a convening authority to select a CDI IO he knows will arrive at the conclusion he seeks.<sup>163</sup> There is a reason that IGMC, CIG, and DoD IG rely on training and proficiency, not simply one’s length of service and their temperament, for their investigators. There is also a lack of insight into whether a CDI IO has done previous investigations or has previous adverse material in their

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<sup>159</sup> LtCol Susan Upward, USMC, *Empaneling “Fair and Impartial” Members: The Case for Inclusion of an Implicit Bias Instruction at Courts-Martial*, Southern California Review of Law and Social Justice, 334 (2023) (“But decades of research and reports have shown that the military justice system is far from unbiased in the disposition of criminal cases of servicemembers. Studies from a multitude of sources have repeatedly quantified and warned against serious racial disparities in the military justice system.”).

<sup>160</sup> CENTER FOR CIVILIANS IN CONFLICT, IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 25 (2021), [https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report\\_Amended.pdf](https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report_Amended.pdf).

<sup>161</sup> *Id.*

<sup>162</sup> JAG INSTRUCTION 5800.7G CH-1, *supra* at note 4, at 2-11.

<sup>163</sup> See CENTER FOR CIVILIANS IN CONFLICT, IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 29 (2021), [https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report\\_Amended.pdf](https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report_Amended.pdf).

file, making them a poor choice to investigate an allegation. In contrast, IGMC, CIG, and DoD IG conduct background checks on its investigators and monitor investigations done by its personnel.<sup>164</sup>

CDI IOs are also not selected based on their merit. Stated differently, a CDI IO is not picked based on past performance as a CDI IO. There is no system that tracks whether an IO was a high-performing or low-performing IO. So unless the IO has done an investigation for that specific command, it is unlikely anyone would know whether an IO has any investigatory proficiency or how they performed on past investigations.

### iii. Training

For CDIs, the Marine Corps appears to dismiss the importance of training.<sup>165</sup> CDI IOs lack training on investigatory techniques, including trauma-informed interviewing skills.<sup>166</sup> They also lack recurring training to maintain proficiency as a CDI IO. When speaking to one Lieutenant Colonel, who has more than 15 years of experience on active duty in the Marine Corps, he explained that “as an IO, [he] received no training at all—[he] was simply given the references and tasked to conduct the investigation.”<sup>167</sup> This reality is the rule, not the exception: “Basic investigative techniques are typically absent from military CDIs.”<sup>168</sup> Conversely, IGMC, CIG, and DoD IG requires investigative and recurring training for its investigators. These investigators also consistently work on investigations, allowing them to maintain their proficiency.

This lack of training compromises CDIs. IOs who conduct one or fewer investigations within a year and lack training “may not be able to maintain proficiency in the skills needed for the job.”<sup>169</sup> In fact, the same Lieutenant Colonel admitted that “if [he] had to run the same investigations today that [he] ran back then, [his] procedures, and likely [his] conclusions and

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<sup>164</sup> GAO-22-105316, *supra* note 58, at 29.

<sup>165</sup> The Department of Defense Internal Review Team recently recommended that the DoD “develop and mandate appropriate training for all military police investigators (MPI) and for investigating officers (IOs) who conduct command-directed investigations.” DEPARTMENT OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 26 (2022).

<sup>166</sup> KRISTY N. KAMARCK & BARBARA SALAZAR, CONG. RSCH. SERV., R44944, MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 20 (2021); *but see* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105243, FEMA WORKFORCE: ADDITIONAL ACTIONS NEEDED TO HELP PREVENT AND RESPOND TO DISCRIMINATION AND HARASSMENT 16 (2022) (When FEMA experienced increased levels of discrimination and harassment, it “provided additional training to investigators on victim-based approaches to investigate sexual harassment claims.”); *but see also* SECNAV INSTRUCTION 5300.26E, DEPARTMENT OF THE NAVY POLICY ON SEXUAL HARASSMENT, <https://www.secnav.navy.mil/doni/Directives/05000%20General%20Management%20Security%20and%20Safety%20Services/05-300%20Manpower%20Personnel%20Support/5300.26E.pdf> (“DON personnel called upon to conduct or review investigations into alleged incidents of sexual harassment must receive training in DON policy on sexual harassment and investigative methods and processes.”).

<sup>167</sup> Email Interview with Anonymous Active Duty Marine Lieutenant Colonel, Previous Investigating Officer (May 29, 2023).

<sup>168</sup> Telephonic Interview with Anonymous DoD IG Investigator, Civil and Criminal Investigator for Over 10 years (June 9, 2023).

<sup>169</sup> GAO-22-105316, *supra* note 58, at 27-28.

recommendations, would be different.”<sup>170</sup> “Training of an investigator should be a recurring process and that a continuous career development program should be established to provide the proper preparation, training, and guidance to develop trainees into professionally qualified investigators and supervisors.”<sup>171</sup>

Some will point to the manuals that a CDI IO receives as adequate. They are not. These manuals provide hundreds of pages of advice and templates—which an untrained IO must absorb. Some of the advice is integral to conducting an investigation, such as what types of questions to ask a subject, complainant, or witness.<sup>172</sup> As moonlighting investigators, this information is foreign. Unfortunately, some CDI IOs do not familiarize themselves with the manuals either—which is currently allowed per the manuals as they only “should” look at them, not must. Even if they do, it would be impossible to absorb all relevant information for someone who is an amateur investigator. And due to this lack of understanding, inefficiency abounds as well: CDIs that should only take a couple weeks take months to complete due to incompetence or inability by the IO.<sup>173</sup> Just as Marines must gain proper skills before they shoot on the rifle range, so too must investigators before conducting an investigation—simply reviewing a checklist or manual is insufficient for either.

Even if one believes that IOs can self-teach the skills necessary to be an investigator, allegations such as sexual harassment and racial discrimination are not for moonlighting investigators. This statement is not a slight against IOs for CDIs—it is an acknowledgment that these serious allegations may seem simple but, in reality, require training, nuance, and proficiency. Why? Well, for instance, “service members who experience sexual harassment and gender discrimination suffer higher rates of sexual assault.”<sup>174</sup> Thus, treating these administrative investigations with the utmost seriousness could stave off future sexual assault. But the inverse is also true: a lack of seriousness can lead to more sexual assaults.

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<sup>170</sup> Email Interview with Anonymous Active Duty Marine Lieutenant Colonel, Previous Investigating Officer (May 29, 2023).

<sup>171</sup> GAO-22-105316, *supra* note 58, at 27-29.

<sup>172</sup> NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK III-2 (REV. 03/16), <https://apps.dtic.mil/sti/tr/pdf/AD1014458.pdf>.

<sup>173</sup> Email Interview with Anonymous Active Duty Marine Captain, Former CDI IO and Sexual Assault Prevention and Response Victim Advocate (June 5, 2023) (“I’ve been appointed an investigating officer for a few cases—some minor and two were notably significant. One of the significant cases was determining the facts and circumstances surrounding a suicide and determination of ‘within line of duty’ which holds weight when it comes to what benefits the family then receives postmortem. The other significant case was determining a Marine ‘fit for duty’ who had a sizeable medical, and legal history with the outcome being whether the Marine should remain in the Marine Corps or not. Both cases mentioned above were given to me as a ‘PI,’ which ultimately means that the investigation should be completed within 3 days of receipt with the possibility to request extension up to one week. Both of the investigations mentioned above ended up required almost two full months of work to complete due to the extensive information gathering requirement.”).

<sup>174</sup> INDEPENDENT REVIEW COMMISSION SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY 22 (2021).

#### iv. Quality Assurance

CDIs lack adequate quality assurance. For example, CDI IOs do not have to interview a subject or complainant. Anyone who has ever done an investigation knows that interviewing a subject is crucial as you never know whether the subject will admit something or even unintentionally reveal a crucial piece of information. Or the subject could provide information to exonerate himself. Interviewing the complainant allows that individual to be heard and provide further amplifying information. Complainants do not always recall all information when they file a complaint or even the first time they are interviewed. Yet a CDI IO can rely on an original complaint with no follow-up discussion.

There is rarely a method to verify whether a CDI IO captured all relevant information or conducted interviews properly. These IOs are not required to record witness interviews. In fact, CDI IOs can summarize interviews and submit that summary as evidence without having the witness review and sign the statement. Yet CDI IOs can also help witnesses craft their statement, which is significant authority to give someone not trained in investigations.<sup>175</sup> And because a CDI IO attempts to juggle the work at their primary job as well during the investigation, their attention and focus is split. As such, there is no doubt that these IOs make mistakes with their questioning, summaries, or leave out key information. And without a recording, no verification or accountability can occur.<sup>176</sup>

Bias erodes quality assurance for CDIs as well.<sup>177</sup> There are at least four types of bias that apply here: affinity bias, attribution bias, confirmation bias, and conformity bias.<sup>178</sup> Affinity bias is when one gravitates towards certain people they relate to.<sup>179</sup> Attribution bias is when someone makes assumptions about a person's actions due to that person's characteristics.<sup>180</sup> Confirmation bias leads us to conclusions—good or bad—based on what one already believes.<sup>181</sup> And conformity bias occurs when one changes their behavior to conform to a group.<sup>182</sup> DoD IG

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<sup>175</sup> NAVAL JUSTICE SCHOOL, JAGMAN INVESTIGATIONS HANDBOOK III-2 (REV. 03/16), <https://apps.dtic.mil/sti/tr/pdf/AD1014458.pdf> (“Let the witness tell what happened; don't ask questions that suggest answers.”).

<sup>176</sup> Email Interview with Anonymous Marine General, Former Inspector General and Marine Commander (June 14, 2023) (“One part of the investigation process that I do not like is the ‘summarizing by the IO of the interview’ and then signing it without witness review. I prefer verbatim interviews and or answers to questions that tell the story of the 5 W’s relevant to the case and signed by both the IO and the witness. This approach minimizes miscommunication on both the IO, witness and complainant.”).

<sup>177</sup> See LtCol Susan Upward, USMC, *Empaneling “Fair and Impartial” Members: The Case for Inclusion of an Implicit Bias Instruction at Courts-Martial*, Southern California Review of Law and Social Justice, 340-41 (2023).

<sup>178</sup> *Understanding Unconscious Bias*, Harvard School of Public Health, [https://www.hsph.harvard.edu/wp-content/uploads/sites/2597/2022/06/Types-of-Bias-Ways-to-Manage-Bias\\_HANDOUT-1.pdf](https://www.hsph.harvard.edu/wp-content/uploads/sites/2597/2022/06/Types-of-Bias-Ways-to-Manage-Bias_HANDOUT-1.pdf).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Conformity Bias*, University of Texas McCombs School of Business, <https://ethicsunwrapped.utexas.edu/glossary/conformity-bias>.

acknowledges that these biases are anathema to investigations, categorizing them as “personal impairments.” In fact, because these biases are so concerning to DoD IG, it mandates that all investigators create a worksheet detailing any potential situations that could create these biases.

All these biases apply to a CDI IO, any Marines involved in the review of CDIs, and the CDI convening authority and GCMCA. Most of these Marines—if not all—work together and fall under the command of the convening authority or GCMCA. Because of these working relationships, they generally know each other’s reputations. If a Marine gravitates toward a specific witness, subject, or complainant, this pull can create an affinity bias. In similar fashion, these prior relationships with and knowledge of these people influences conclusions and approaches, creating attribution and confirmation biases. For instance, *every* Marine has been part of a command that has Marines who are known as “time-sucks.” If one of these “time-sucks” becomes the subject of the CDI, an IO or convening authority may arrive at a conclusion based on what he already believes. Conformity has a strong grasp here too. For example, a case dealing with hazing could be unintentionally influenced simply because the IO knows the convening authority takes hazing seriously. Or a convening authority may endorse an investigation in a certain manner because he knows the GCMCA desires that outcome.

One other potential bias emanates from the relationship between CDI convening authorities, CDI IOs, and CDI reviewers. Convening authorities who appoint CDI IOs either write or have influence on the personnel evaluations for that IO. These evaluations are the “primary means for evaluating a Marine’s performance...[and] are critical to promotion, career designation, retention, resident school, command, and duty assignments.”<sup>183</sup> A CDI IO will likely know what conclusions the convening authority or GCMCA would like to see reached as would anyone reviewing the investigation. If one reaches a conclusion that contradicts what the convening authority or GCMCA desires, there could be potential ramifications to one’s personnel evaluation.

The Secretary of the Navy has implicitly acknowledged that impartiality is a concern for CDIs. Several months ago, he determined that sexual harassment complaints received by a commander must be forwarded to the next higher level commander, no lower than the O-6 level,

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<sup>183</sup> *Fitness Reports*, U.S. Marine Corps, <https://www.marforres.marines.mil/Staff-Sections/Special-Staff/Career-Planner/Fitness-Reports/>.

for appointment of a CDI IO from *outside* the command of both the subject and complainant.<sup>184</sup> This change underscores the sentiments echoed throughout this paper: there are impartiality concerns with having an investigation handled and conducted under the same command where the complaint originated. And yet the current instructions controlling other CDIs do not mandate this approach.

To be sure, there is a layer of review for CDIs through the LSR and advisory opinion. But relying on these reviews to ensure proper investigations is a flawed approach. LSRs are based *on* the investigation; LSRs are not meant to reinvestigate a case nor are SJA offices staffed or resourced to conduct these investigations themselves.<sup>185</sup> In other words, any CDI review relies on steps taken, questions asked, and evidence collected by the IO. What was collected or summarized by the IO may support the investigation's conclusions; however, just because the conclusions are supported by the evidence gathered does not mean the investigation tells the whole, objective story. LSRs are helpful to ensure that CDI IOs connect the dots and properly document evidence. But LSRs are only as good as the initial investigation. The same reasoning that creates concerns with LSRs applies to any review done on CDIs.

Even if one believes that SJAs have the resources and staffing to conduct these investigations, lawyers are not trained investigators. Of course, most lawyers will fancy themselves as the second-coming of *Sherlock Holmes*. But one must humbly acknowledge that this belief is incorrect and potentially dangerous. There is a reason that administrative and criminal investigators attend courses on investigations, receive consistent training on these issues, and spend years honing their craft—investigating is a difficult job.

Even if with these concerns, a CDI generally cannot be appealed—only the actions that stem from the investigation can be appealed. Providing a method to appeal these investigations allows for one last commander to change the facts, opinions, and recommendations. For instance, imagine a Sergeant is accused of violating a base order. The convening authority unsubstantiates the claim in his endorsement, but the GCMCA disagreed, explaining a violation occurred and that he planned to proceed to non-judicial punishment for the Sergeant. Without an appeal, the

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<sup>184</sup> ALNAV 024/22, INTERIM POLICY GOVERNING INVESTIGATION OF FORMAL SEXUAL HARASSMENT COMPLAINTS UNDER 10 U.S.C. 1561 (2022), [https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2022/ALN22024.txt?ver=6JqcUUa8IXVnUSy-TX\\_XoA%3D%3D](https://www.mynavyhr.navy.mil/Portals/55/Messages/ALNAV/ALN2022/ALN22024.txt?ver=6JqcUUa8IXVnUSy-TX_XoA%3D%3D).

<sup>185</sup> See Email Interview with LtCol Susan Upward, USMC, Marine Corps Judge Advocate for over 10 Years (June 25, 2023).

Sergeant must now proceed to NJP.<sup>186</sup> But with a CDI appeal, the Sergeant would have one more opportunity to have a commander review the case and perhaps overturn the substantiation; if the commander arrived at this conclusion, no NJP would occur.

With such finality, it is imperative that quality assurance exists; otherwise, the investigation may be flawed with no method to stop the follow-on actions that flow, only appeal their outcomes. Even if the investigation can be appealed, the GCMCA controls whether a copy of the investigation will be released to the subject or complainant. So the commander who generally closes the case now can determine whether the investigation will be provided to subjects or complainants. And with how FOIA is currently written and applied, victims/complainants *do not* have the same access to investigations as subjects. Changing FOIA to allow equal access to redacted copies of an investigation will provide transparency into the administrative investigation process and accountability—operating in the darkness allows arbitrary rulings and individuals to hide behind poorly-run bureaucracy.

#### **v. Independence**

There is superficial independence for CDIs. For these investigations, the convening authority and GCMCA control the overall facts, opinions, and recommendations. Many investigations turn on razor-thin margins: believing one witness has more credibility than another or leaning on one piece of evidence more than another. Although there is nothing inherently nefarious with a convening authority or GCMCA weighing evidence differently than a CDI IO or the “cognizant judge advocate,” there is potential for doing so due to the previously discussed biases. In contrast, IGMC and DoD IG make determinations on investigations untethered from commands, subjects, or complainants.<sup>187</sup>

For some CDIs, the IOs and judge advocate will share drafts of the investigation as the IO is working through the issues. In theory, this sounds like a process where the IO is consulting with the “cognizant judge advocate.” However, this practice creates concern that the IO will simply adopt whatever the judge advocate suggests to help finish the process as quickly as possible. This approach injects the judge advocate as the de-facto CDI IO—a judge advocate that generally is on the staff for the convening authority or GCMCA and reports directly to one

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<sup>186</sup> In this hypothetical, the author is assuming that the Sergeant elected to forgo court-martial.

<sup>187</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO/AIMD-94-128, NAVY INSPECTORS GENERAL INVESTIGATIONS OF COMPLAINTS AND INSPECTION PRACTICES NEED STRENGTHENING 5 (1994) (In 1994, the GAO looked into the Navy IG office. One of their findings was that “for 19 of our 98 sampled cases, the complaint investigators were not independent because they were closely associated with the people involved in the complaint, subordinate to the accused, and/or part of the office or command identified or involved in the complaint.”).

of them.

### 3. National Security Concerns

The effectiveness of CDIs is a national security issue. Why? Because recruitment and retention, which are a clear national security issue, are tied to CDIs effectiveness—although that may not be immediately clear.<sup>188</sup> Over the last couple years, military recruitment and retention have suffered.<sup>189</sup> In 2022, only the Marine Corps and Space Force met their recruitment goals; the Army, Air Force, Navy, and Coast Guard missed them.<sup>190</sup> In fact, the Coast Guard missed its recruitment goal by over 25 percent; the Army missed it by 25 percent—to a tune of 15,000 active-duty soldiers.<sup>191</sup> And there is the expectation that the Army, Air Force, and Navy will miss their recruitment goals for 2023 as well.<sup>192</sup> With these numbers declining, readiness is a looming concern.<sup>193</sup>

Many factors affect military recruitment. One is America's decline of trust in the U.S. military.<sup>194</sup> Commentators point to many reasons on why trust has fallen, including the withdrawal from Afghanistan and the current concerns of sexual assault, sexual harassment, and discrimination in the military.<sup>195</sup> In 2021, “30 percent of Americans aged 16 to 24 said that the possibility of sexual harassment or assault was one of the main reasons why they would not consider joining the U.S. military.”<sup>196</sup> These concerns not only affect potential recruits: those who influence their decisions, such as family members and their community connections, also hold similar concerns.<sup>197</sup>

Retention has also been impacted by similar issues. In a recent study, RAND examined how sexual harassment affected service members' decisions on staying in or separating from the

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<sup>188</sup> See Video: *Hirono Highlights Importance of Supporting Female Service Members and Increasing Public Trust in Order to Meet Military Recruitment and Retention Goals*, U.S. Senator Mazie Hirono (Sept. 21, 2022), <https://www.hirono.senate.gov/news/press-releases/video-hirono-highlights-importance-of-supporting-female-service-members-and-increasing-public-trust-in-order-to-meet-military-recruitment-and-retention-goals>.

<sup>189</sup> See DEPARTMENT OF DEFENSE., INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 5 (2022).

<sup>190</sup> Jim Garamone, *Vice Chiefs Talk Recruiting Shortfalls, Readiness Issues*, DOD NEWS (Apr. 20, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3369472/vice-chiefs-talk-recruiting-shortfalls-readiness-issues/>; *Addressing the Recruiting Crisis in the Armed Services Insights from Research*, 118th Cong. (2023) (statement of Beth J. Asch).

<sup>191</sup> *Addressing the Recruiting Crisis in the Armed Services Insights from Research*, 118th Cong. (2023) (statement of Beth J. Asch); David Barno & Nora Bensahel, *Addressing the U.S. Military Recruiting Crisis*, WAR ON THE ROCKS (Mar. 10, 2023).

<sup>192</sup> *Addressing the Recruiting Crisis in the Armed Services Insights from Research*, 118th Cong. (2023) (statement of Beth J. Asch).

<sup>193</sup> Jim Garamone, *Vice Chiefs Talk Recruiting Shortfalls, Readiness Issues*, DOD NEWS (Apr. 20, 2023), <https://www.defense.gov/News/News-Stories/Article/Article/3369472/vice-chiefs-talk-recruiting-shortfalls-readiness-issues/>.

<sup>194</sup> *Addressing the Recruiting Crisis in the Armed Services Insights from Research*, 118th Cong. (2023) (statement of Beth J. Asch).

<sup>195</sup> *Id.*; Lolita C. Baldor, *Army Sees Safety, not 'Wokeness,' as Top Recruiting Obstacle*, AP NEWS (Feb. 12, 2023), <https://apnews.com/article/afghanistan-politics-military-and-defense-race-ethnicity-6548adcb0fee590f3427771d1e1eeea7>.

<sup>196</sup> David Barno & Nora Bensahel, *Addressing the U.S. Military Recruiting Crisis*, WAR ON THE ROCKS (Mar. 10, 2023).

<sup>197</sup> Douglas Yeung, Christina E. Steiner, Chaitra M. Hardison, Lawrence M. Hanser, & Kristy N. Kamarck, *Recruiting Policies and Practices for Women in the Military*, RAND CORPORATION 23 (2017), [https://www.rand.org/pubs/research\\_reports/RR1538.html](https://www.rand.org/pubs/research_reports/RR1538.html).



military. This study revealed that a sexually harassed service member is 1.7 times likelier to separate than a service member who has not been sexually harassed.<sup>198</sup> And those sexually harassed are 1.4 times likelier to be discharged due to “failure to adhere to standards or expectations” than those who are not.<sup>199</sup> One factor driving these increased numbers: some victims of sexual harassment do not believe their complaints are properly handled, leading them to feel they have “no choice but to separate.”<sup>200</sup>

Although these recruitment and retention studies and statistics apply to sexual harassment, one can draw at least two generalizations from them. First, just as sexual harassment decreases recruitment and retention, it logically follows that general distrust of CDIs would do the same. Second, a byproduct of distrust in the “credibility or effectiveness of the [CDI] process” leads to withheld complaints and increased misconduct, both of which further undermine recruitment and retention.<sup>201</sup> Unfortunately, complaints are the only method for service members to protect themselves—unlike their civilian counterparts, they cannot leave work one night and quit the next day.<sup>202</sup> To do so would be a crime under the Uniform Code of Military Justice (UCMJ).<sup>203</sup> As such, ensuring CDIs are done properly is a strategic necessity that directly impacts readiness and, in turn, impacts national security.<sup>204</sup>

#### 4. Recommendations<sup>205</sup>

This paper offers a list of recommendations that the Marine Corps should implement or Congress should mandate through the National Defense Authorization Act (NDAA). These recommendations should apply to *all* CDIs; however, if this approach is believed to be untenable due to resource shortfalls, these solutions should apply to more serious allegations and allegations that involve a victim, including sexual harassment, racial discrimination, hazing, and

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<sup>198</sup> Andrew R. Morral, Miriam Matthews, Matthew Cefalu, Terry L. Schell, & Linda Cottrell, *Effects of Sexual Assault and Sexual Harassment on Separation from the U.S. Military*, RAND CORPORATION 21 (2021), [https://www.rand.org/pubs/research\\_reports/RR870z10.html#:~:text=The%20researchers%20found%20that%20exposure,in%20the%20ensuing%2028%20months](https://www.rand.org/pubs/research_reports/RR870z10.html#:~:text=The%20researchers%20found%20that%20exposure,in%20the%20ensuing%2028%20months).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*; INDEPENDENT REVIEW COMMISSION SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY APPENDIX A 28 (2021).

<sup>201</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO/AIMD-94-128, NAVY INSPECTORS GENERAL INVESTIGATIONS OF COMPLAINTS AND INSPECTION PRACTICES NEED STRENGTHENING 5 (1994).

<sup>202</sup> INDEPENDENT REVIEW COMMISSION SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY APPENDIX A 28 (2021).

<sup>203</sup> See Article 86, UCMJ, 10 U.S.C. § 886.

<sup>204</sup> DEPARTMENT OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 24 (2022).

<sup>205</sup> While interviewing some experts regarding this topic, some raised the concern about how to handle CDIs in a field or deployed environment. To be sure, these environments require investigations to start immediately to ensure evidence is captured. Like all rules, there can be exceptions built in. However, whatever exceptions apply to these environments, the Marine Corps and Congress must ensure that the exceptions address a legitimate concern, not simply exist to weaken the structure, creating the same issues discussed throughout the paper.

harassment.<sup>206</sup>

**Recommendation #1:** Move the CDI IO, convening authority, reviews of the investigation, and final decision authority outside the command where the complainant or subject reside.<sup>207</sup> Whoever the new convening authority is will have the ability to start the investigation and modify it, same as the new GCMCA. These changes will reduce concern of bias and a lack of impartiality and independence.

**Recommendation #2:** Create a secondary MOS for CDI IOs, similar to EOA Marines.<sup>208</sup> Trying to juggle both an investigation and one's primary job leads to poor results.<sup>209</sup> This change would also alleviate the burden on commands from losing one of their Marines for months on end for investigations while having no replacement for that Marine. At the end of the day, "what commander, focused on the unit's warfighting mission, wants to remove officers from their regular duties and devote them to investigating problems or incidents?"<sup>210</sup>

**Recommendation #3:** Rely on reservists to augment CDI IOs. Many reservists are investigators in their civilian lives, such as federal or state law enforcement. Depending on the allegation, the IO could be specifically chosen because of their civilian training.

**Recommendation #4:** Create a policy or statutory mechanism to move CDIs outside a command if there is an "existence or appearance of a conflict of interest, bias, prejudice, or other circumstance that may place the independence or impartiality of the inquiry in doubt."<sup>211</sup> Imagine a sexual harassment complaint arising in X command. Due to ALNAV 024/22, the complaint now moves outside X command to Y command; however, Y command is led by X command's brother. There is a good-faith argument that there is a conflict of interest here.

**Recommendation #5:** Provide biannual training for CDI IOs. This training *cannot* just be "check in the box."<sup>212</sup> CDI IO training needs to be in-person or virtual with an examination

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<sup>206</sup> Email Interview with Lieutenant Colonel Byron Owen, Current O-5 Marine Commander and Previous Investigating Officer (June 1, 2023) ("I would prefer that someone investigating a [PAC] violation had more training because of the seriousness of the offense.")

<sup>207</sup> See INDEPENDENT REVIEW COMMISSION SEXUAL ASSAULT IN THE MILITARY, HARD TRUTHS AND DUTY TO CHANGE: RECOMMENDATIONS FROM THE INDEPENDENT REVIEW COMMISSION ON SEXUAL ASSAULT IN THE MILITARY APPENDIX A 24 (2021) ("The investigation of all sexual harassment should be performed by an independent, well-trained body that is outside the chain of command.")

<sup>208</sup> Colonel Charles A. Jones, USMCR, *Get the Investigation Monkey off the Commander's Back*, U.S. NAVAL INSTITUTE (Nov. 2005), <https://www.usni.org/magazines/proceedings/2005/november/get-investigation-monkey-commanders-back>.

<sup>209</sup> Email Interview with Anonymous Active Duty Marine Major, Current Judge Advocate (May 23, 2023) ("The main problem is that these folks execute their investigative authority in-conjunction with their day jobs. Regardless of what the appointment letter states vis-à-vis this is their primary duty, that is hardly the case. Supervisors will hold IOs accountable for work not performed during their IO tenure.")

<sup>210</sup> *Id.*

<sup>211</sup> MARINE CORPS ORDER 5430.1A W/ADMIN CH, *supra* note 56, at 11.

<sup>212</sup> Email Interview with Anonymous Marine General, Former Inspector General and Marine Commander (June 14, 2023) ("Marines respect professional competence in every area and knowing that their unit has qualified legally trained IOs to conduct the investigation process for all complaints is good for morale and discipline."); DEPARTMENT OF DEFENSE, INTERNAL REVIEW TEAM ON RACIAL DISPARITIES IN THE INVESTIGATIVE AND MILITARY JUSTICE SYSTEMS 22 (2022) ("Service members, particularly junior leaders, have not received sufficient training

or practical application after the training, similar to IGMC and DoD IG. As part of this training, there must be training focused on “trauma-informed techniques” as well.<sup>213</sup>

**Recommendation #6:** Allow investigations to be appealed. Once a GCMCA makes a final determination on an investigation, there should be the ability to appeal the investigation’s findings.

**Recommendation #7:** Remove the GCMCA’s authority to release investigations to the subject and complainant. This authority should be placed with a neutral party, not someone who has a potential vested interest in the investigation.

**Recommendation #8:** Change the statutory language of FOIA to allow for a redacted copy of the investigation to be provided to the complainant/victim. This copy would provide similar access as the subject of the investigation, resulting in equal access and accountability.

**Recommendation #9:** Mandate recording all CDI IO interviews. Recording interviews will capture testimony in full, allowing for proper review of the investigation or any potential issues that arise later (e.g. an IG complaint against the IO). Why? “Errors in basic facts or in testimony have the potential to undermine the overall credibility of the report, the investigation,” and the Marine Corps as a whole.<sup>214</sup> These recordings will be provided to the SJA office and stored there as this method is already used for when CDI IOs record interviews (although recording is rare).

**Recommendation #10:** Create and mandate the use of an outline worksheet for CDIs, similar to DoD IG. This outline would provide information on the decision-making of the IO, such as why he did not interview some witnesses or why he found some evidence more persuasive than others. When these investigations are appealed or used for follow on actions, these insights are helpful to the subject, complainant, IG, and other individuals who analyze the case. This change also adds another layer of assurance that the IO is thinking through these issues.

**Recommendation #11:** Mandate that the CDI IO attempt to interview both the subject

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and education to execute their roles in the investigative and military justice systems. This lack of training and education has profound negative impacts on the ability of Service members at all levels to effectively execute their roles in these systems.”).

<sup>213</sup> KRISTY N. KAMARCK & BARBARA SALAZAR, CONG. RSCH. SERV., R44944, MILITARY SEXUAL ASSAULT: A FRAMEWORK FOR CONGRESSIONAL OVERSIGHT 20 (2021).

<sup>214</sup> Cf. Scott Shackford, *Finally, Government Surveillance to Get Behind: FBI to Start Recording Interrogations*, REASON (May 21, 2014), <https://reason.com/2014/05/21/finally-government-surveillance-to-get-b/> (In 2014, the FBI became the last federal law enforcement agency to mandate recording witness interviews.).

and complainant.<sup>215</sup> Not interviewing a subject or complainant is completely antithetical to a proper investigation—yet it happens and is allowed under current Marine Corps policy and orders.

**Recommendation #12:** Create a database for tracking CDI IOs. This database would house two pieces of information: past adverse material against a potential CDI IO and their conduct on past investigations. This information would allow a convening authority to ensure that there is no past adverse material that may bias the IO against certain cases and that the IO has been proficient on past investigations. Otherwise, convening authorities could be selecting Marines who have sexually harassed other Marines to investigate sexual harassment.

**Recommendation #13:** Create a tracking system to ensure time limits are adhered to and proper explanations given for delays.<sup>216</sup> Although delays are supposed to be documented throughout investigations, they generally are explained as “administrative delay,” with no further context. A system that requires thorough explanations will hold all involved in the process accountable. Otherwise, the burden of delays falls on subjects and complainants, not on those potentially committing investigation malfeasance. In one case, for example, the author has seen a delay of three weeks to start a CDI, which led to a legally insufficient CDI. The cognizant judge advocate recommended a new CDI occur, which the convening authority agreed to. But the convening authority then took roughly four months to start a new CDI—with no explanation.

**Recommendation #14:** Mandate that the services collect statistics related to administrative investigations (see Recommendation #15 for statistics that should be collected) and provide the report biannually to the Secretary of Defense and Congress. This biannual report will allow DoD and Congress to monitor types of investigations at different commands, the number of substantiations, and other insights as well.<sup>217</sup>

**Recommendation #15:** Direct the Government Accountability Office (GAO) to study CDIs in the U.S. military.<sup>218</sup> Why? “Comprehensive reviews by an outside organization can

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<sup>215</sup> DEPARTMENT OF THE AIR FORCE MANUAL 1-101, *supra* note 19, at 24 (“At a minimum, IOs interview the complainant, the subject, and all witnesses named by a complainant or subject, or document why they were not interviewed. The IO consults with the legal advisor on whether there is a need to interview additional witnesses or gather additional documentary evidence to satisfy the burden of proof.”).

<sup>216</sup> Phone Interview with Lieutenant Colonel Donnie Hasseltine, USMC (Ret.), Former O-5 Marine Commander (May 28, 2023).

<sup>217</sup> GAO-22-105316, *supra* note 58, at 36; See U.S. GOV’T ACCOUNTABILITY OFF., GAO/AIMD-94-128, NAVY INSPECTORS GENERAL INVESTIGATIONS OF COMPLAINTS AND INSPECTION PRACTICES NEED STRENGTHENING 10 (1994) (“The Navy statutory IG has recognized the benefits that could result from trend analyses. For example, during an inspection, the Navy statutory IG found that data was not being analyzed for emerging trends or problems that may affect other Navy units...A pattern in substantiated cases could indicate internal control problems that should be the subject of a more detailed examination.”).

<sup>218</sup> See DEPARTMENT OF DEFENSE INSTRUCTION 1020.03, HARASSMENT PREVENTION AND RESPONSE IN THE ARMED FORCES 17, <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/102003p.PDF>.

provide perspectives and suggestions that result in improved operations and performance. Outside reviews also provide a measure of accountability in ensuring compliance with established regulations or policies.”<sup>219</sup> Because of the gravity of these allegations and the life-altering consequences of CDIs, Congress, the service branches, and the American people should understand how effective they are and what issues exist. This GAO study could follow a similar blueprint as GAO’s *Military Inspectors General: Opportunities Exist to Strengthen Processes for Administrative Investigations and Training* (GAO-22-105316). This study should investigate several different areas:

- 1) characteristics of investigators (e.g., experience, education, training);
- 2) how investigators are selected for an investigation;
- 3) average time to complete investigations;
- 4) number of re-investigations required;
- 5) number of appeals granted;
- 6) number of congressional complaints/inquiries validated fully or partially;
- 7) quality assurance in place to ensure proper and thorough investigations;
- 8) whether IOs or Commanders are held accountable for the quality of their investigations;
- 9) independence from the complainant, subject, and command for the investigation, convening authority, and ultimate determination on the investigation.

## **5. Conclusion**

CDIs in the Marine Corps suffer from inherent flaws, including a lack of training, ineffective quality assurance, and compromised independence. “These issues undermine the credibility and effectiveness of the complaint process, leading to potential injustices and negative consequences.”<sup>220</sup> To be sure, not all investigations suffer from the same shortcomings. But these structural shortcomings are ingrained in the process, creating flaws in the appearance of *all* CDIs. With this in mind, one can confidently assume that the outcomes of *some* investigations are flawed in fact.

For those concerned that implementing the recommendations presented would handcuff commanders, that concern is misguided. Commanders would still have authority to hold Marines

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<sup>219</sup> U.S. GOV’T ACCOUNTABILITY OFF., GAO/AIMD-94-128, NAVY INSPECTORS GENERAL INVESTIGATIONS OF COMPLAINTS AND INSPECTION PRACTICES NEED STRENGTHENING 10, 12 (1994).

<sup>220</sup> Email Interview with Anonymous Retired Marine Corps Colonel, Former O-6 Marine Commander (June 1, 2023).

accountable if an investigation substantiates misconduct. Commanders must not conflate policing its own with investigating its own. What would change is *who* is conducting those investigations and *who* is making the ultimate decision on the evidence gathered (i.e., a substantiated or unsubstantiated claim). This structure allows for a command to retain its good order and discipline tools while ensuring a more fair, impartial process.

One study, although focused on CDIs for civilian casualties, is instructional for all CDIs: “In some cases, the U.S. military has carried out detailed and thorough investigations;” “however, the lack of standardized approaches has contributed to a variety of shortcomings in other cases—including not investigating incidents when a close look was warranted.”<sup>221</sup> If there are issues with cases of grave importance, such as the drone strike of a civilian, what issues do you think plague a case done by an amateur IO? The current CDI approach smacks of an aura of unseriousness that is prejudicial to victims, subjects, the Marine Corps, and U.S. national security.<sup>222</sup> To remove this aura and improve CDIs overall, the recommendations provided here should be implemented.

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*The views expressed in this article are those of the author and do not necessarily represent the views of the U.S. Marine Corps, Department of the Navy, Department of Defense, or the U.S. Government.*

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<sup>221</sup> CENTER FOR CIVILIANS IN CONFLICT, IN SEARCH OF ANSWERS: U.S. MILITARY INVESTIGATIONS AND CIVILIAN HARM 22 (2021), [https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report\\_Amended.pdf](https://civiliansinconflict.org/wp-content/uploads/2021/10/In-Search-of-Answers-Report_Amended.pdf).

<sup>222</sup> Telephonic Interview with Colonel Amy Ebitz, USMC (Ret.), Former O-6 Commander and CIG at III MEF (June 9, 2023) (“These are powerful tools that are not treated with the due respect and concern they deserve.”).