



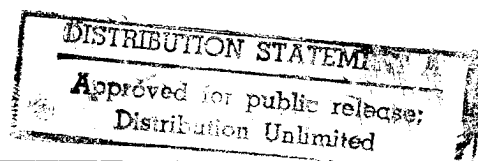
REPORT OF THE ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY OF THE DEPARTMENT OF DEFENSE

Volume I



19950928 062

DTIC QUALITY INSPECTED S





ADVISORY BOARD ON THE INVESTIGATIVE CAPABILITY
OF THE DEPARTMENT OF DEFENSE
1700 N. MOORE STREET, SUITE 1420
ARLINGTON, VIRGINIA 22209



The Honorable William J. Perry
Secretary of Defense
Pentagon
Washington, D.C. 20301

Dear Secretary Perry:

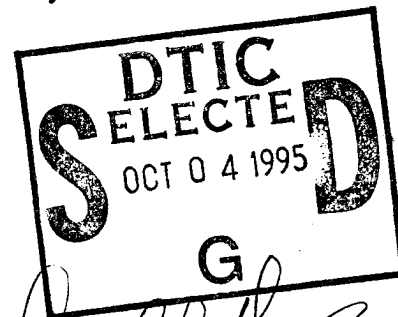
We are pleased to submit this report of the Advisory Board on the Investigative Capability of the Department of Defense.

This document contains the Advisory Board's findings and recommendations based upon an exhaustive review and analysis of the criminal and administrative investigative capabilities of the Department of Defense. The Advisory Board scrutinized thousands of pages of testimony and documents. We held 12 hearings, interviewed 667 individuals, and had contact with 218 military activities. The Advisory Board heard from many expert witnesses, including Members of Congress and their staff, officials representing the Department of Defense, the Department of Justice, and citizens groups. Our hearings, deliberations, and records were open to the public.

This report represents one year of work by the Advisory Board, our staff, and a vast number of individuals within the Department of Defense, who graciously gave us their time and comments. On behalf of the Advisory Board, I would like to thank all who contributed to this effort and give special recognition to our superb staff, headed so ably by Ms. Paula E. Boggs. Ultimately, of course, the Advisory Board bears full responsibility for the analysis and recommendations contained herein.

Very respectfully,

Charles F.C. Ruff
Charles F.C. Ruff
Chairman



Manuel Briskin
Manuel Briskin
Advisory Board Member

Eugene R. Fidell
Eugene R. Fidell
Advisory Board Member

Donald L. Graham
Donald L. Graham
Advisory Board Member

Albert C. Harvey
Albert C. Harvey
Advisory Board Member

James A. Ring
James A. Ring
Advisory Board Member

DISTRIBUTION STATEMENT A

Approved for public release;
Distribution Unlimited

DTIC QUALITY INSPECTED 8



For sale by the U.S. Government Printing Office
Superintendent of Documents, Mail Stop: SSOP, Washington, DC 20402-9328
Vol. I ISBN 0-16-045431-X
Vol. II ISBN 0-16-045432-8
Set ISBN 0-16-045433-6

ADVISORY BOARD STAFF

Paula E. Boggs
Staff Director

E. Vaughn Dunnigan
Deputy Staff Director

Team Leaders
Daniel S. Butler
Mary B. DeRosa
Charles F. Monk

Professional Staff
Anne W. Burtt, USAF
Maureen E. Gilmore, USA
Walter S. King, USAF
Susan L. Malone, DoD
Phillip J. McGuire, USA
Bradley D. McKnight, USN
Hilary C. Osborn, USN

Support Staff
Richard J. Allison, USA
Tezhra O. Dyson, USA
Elissa J. Hudson, USA
Michael B. Thomas, USN

Court Reporters
Michael Billings, USN
Kevin B. Gannon, USMC
Angela J. Merrill, USMC
Caretha Perry, USA
Rosa J. Rau-Keilty, USMC
Elizabeth Scharnhorst, USMC
Annette Sutherland, USA

Accession For	
NTIS CRA&I	☒
DTIC TAB	☐
Unannounced	☐
Justification	
By	
Distribution /	
Availability Codes	
Dist	Avail and/or Special
A-1	

EXECUTIVE SUMMARY

I. Introduction

Congress recommended that the Secretary of Defense conduct a "vigorous review of the conduct and review of DoD investigations" and convene an advisory board to "assess [the] current state of affairs within the Department" with respect to its investigative capability. On November 27, 1993, the Secretary announced formation of the Advisory Board on the Investigative Capability of the Department of Defense. He charged the Board to examine those issues of concern to Congress and report its findings and recommendations to him by December 31, 1994.

The seven-member Board assembled a full-time investigative staff of attorneys, policy analysts, professional investigators, and administrative personnel. The Board and staff conducted over 600 interviews; visited several large military bases; visited the headquarters, field offices, and training facilities of the Defense criminal investigative organizations (DCIOs);¹ and sent over 100 written requests for information to Department of Defense organizations.

The Board solicited information from customers and subjects of Department of Defense investigations. We defined "customers" broadly to include DoD civilians, commanders at all levels of command, trial and defense attorneys from the Judge Advocate General Corps, civil and criminal attorneys from the Department of

¹The four DCIOs are the Defense Criminal Investigative Service (DCIS), the U.S. Army Criminal Investigation Command (USACIDC), the U.S. Naval Criminal Investigative Service (NCIS), and the U.S. Air Force Office of Special Investigations (AFOSI). USACIDC, NCIS, and AFOSI are known as the military criminal investigative organizations (MCIOs).

Justice, Assistant United States Attorneys, other government investigative agencies and inspectors general, civilian defense attorneys, defense contractors, advocacy groups, Congress, DoD and Service audit agencies, and victims. In addition, the Board and staff spoke with a number of former members of the Department and the Services, including two former Secretaries of Defense and several former Service Secretaries.

The Board held monthly public meetings to hear briefings from the staff, to hear testimony from DoD and Service representatives, advocacy groups, Department of Justice representatives, and congressional staff, and to deliberate about its findings and recommendations. As requested, the Board provided a preliminary report of its proceedings to the Secretary and Congress on June 30, 1994. The Board compiled its findings and recommendations in a draft report, which it disseminated in October 1994 to interested DoD offices and organizations for comment. The Board carefully considered the comments it received and, where appropriate, changed the report in response to those comments.

The first volume of our report contains the Board's recommendations for changes to the DoD investigative system, and the findings and analysis that led to those recommendations. Because the Board's charter was extremely broad, and because many elements of the system work well, the Board did not make recommendations in all areas it examined. The second volume contains the detailed -- and very important -- background information on which the Board relied to reach its conclusions.

II. Findings and Recommendations

On Capitol Hill, among the public, and among the men and women of the armed

Executive Summary

forces, there has been an erosion of confidence in the reliability and professionalism of DoD investigations. The Board found, however, that much of this public concern about the quality of DoD investigations is based more on perception than on reality. Apart from the criticisms contained in this report, the Board found that DCIO investigators do a good job. People with whom we spoke, including commanders, judge advocates, and Assistant U.S. Attorneys, praised the responsiveness and independence of the DCIOs and also praised DCIO investigators for the quality of their general crimes, procurement fraud, and counterintelligence investigations.

DCIO investigations, however, comprise less than 25 percent of the criminal investigations and a mere fraction of all investigations ongoing at any one time in DoD. Service police investigators conduct most criminal investigations. In addition, the preponderance of investigations in DoD are non-criminal. They include DoD Inspector General investigations, Service Inspector General investigations, commander-directed investigations, and various other administrative investigations. These investigations and the quality with which they are performed are critical to the morale and readiness of the Department of Defense.

The Board identified some significant shortcomings that DoD must remedy quickly. Some of the Board's most important findings are in the following areas.

A. Leadership

DoD suffers from a lack of leadership in the setting of investigative policy and standards. No entity exists within DoD to provide effective and comprehensive oversight and coordination. Communication and cooperation among the investigative organizations is lacking, and there is no designated Department-wide proponent for the investigations mission. Uniformly professional and efficient investigative capability will remain an elusive goal unless the Secretary of Defense gives it his personal attention.

We recommend that the Secretary establish a Secretary's Board on Investigations, chaired by the DoD IG and composed of the Under Secretary of Defense (Personnel and Readiness), the DoD General Counsel, the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence), the MCIO heads, and the Service Inspectors General. The Secretary should charge the Board on Investigations to:

(1) Advise the Secretary concerning, and oversee implementation of, the recommendations of this report.

(2) Develop and oversee the implementation of investigative policy, both criminal and administrative.

(3) Monitor and evaluate, on an ongoing basis, DoD investigative training programs; investigator qualification standards; recruitment and career progression policies; support functions such as automated data processing; collection, analysis, and reporting of data; and organizational reforms such as functional consolidation, integration, and collocation.

(4) Advise the Secretary concerning the need for and allocation of investigative resources.

The Board should meet regularly and report periodically on its progress to the Secretary of Defense.

B. Consolidation

The Board considered both whether the Secretary should consolidate the DCIOs and whether he should consolidate investigation of procurement fraud. We concluded that consolidation of the Defense criminal investigative organizations would not improve the investigative capability of DoD. Estimates of potential savings from total consolidation are unreliable, and the cost of consolidation in terms of customer orientation, responsiveness, and readiness

would not be worth the savings under even the most optimistic estimates.

The Board found, however, that consolidation could help DoD be more effective in investigating procurement fraud. Currently, there is significant redundancy in procurement fraud investigations and jurisdictional squabbling among the DoD investigative organizations conducting those investigations. Eliminating these problems would improve the quality of procurement fraud investigations in DoD, certainly would improve their efficiency, and might save money.

Therefore, we recommend that the Secretary not consolidate the Defense criminal investigative organizations, but consolidate DoD procurement fraud investigations. Consolidated procurement fraud responsibility should be lodged in a new investigative agency in the Office of the DoD Inspector General. The agency should be built around the current infrastructure of DCIS; however, the Board suggests renaming DCIS the Defense Fraud Investigative Service (DFIS) to emphasize its fraud-specific mission, as well as the importance of supporting both criminal prosecutions and administrative and civil actions. The MCIOs should retain jurisdiction over installation-level fraud investigations.

C. Command Influence and Self-Criticism

There is a perception, principally outside DoD, that elements of DoD have difficulty engaging in the self-critical analysis that quality investigations require and that improper command influence over investigations is not uncommon. The Board found that the criminal investigative organizations do not have problems in this area. The DCIOs all have significant organizational and regulatory safeguards that protect -- as well as is possible -- against improper influence on investigations.

To the extent we found problems with self-analysis, we found them in non-criminal

investigations. Service IG investigations, for example, are a critical element of the system by which the military corrects its mistakes. If these investigations are not conducted independently and competently, it can damage recruiting, morale, and ultimately readiness. Although the Board found the IG investigative systems generally work well, they could be made stronger. In addition, commander-directed investigations are the most common but the least protected from influence, although the Board found no compelling evidence of systemic improper influence over these investigations.

We recommend that the Services increase attention to maintaining both the fact and appearance of impartiality in Service IG investigations and take other actions to strengthen their IG systems. Moreover, each Service must strengthen its requirements for the selection of investigators conducting commander-directed investigations. In addition, the Services should increase accountability for those commander-directed investigations that are conducted inadequately.

D. Training

Effective training of investigators is critical to quality investigations. Although the DCIO investigators receive excellent training, it is not provided efficiently. The DCIOs currently provide similar investigator training to agents at three different facilities. Training for Service police investigators and IG personnel and guidance for the officers who conduct commander-directed investigations are not always adequate. We recommend that investigative training be consolidated and integrated wherever practical. In particular, DCIO basic investigator training programs should be consolidated into a DCIO Investigations Academy at a single site. Moreover, all Service police investigators should be trained uniformly to minimum standards at a single facility, all Service Inspector General personnel should be trained at the U.S. Army Inspector General course, and each Service must increase guidance for those who order

and conduct commander-directed investigations.

E. Data Collection and Analysis

The capability to gather and analyze at the DoD level the enormous amount of data related to DoD investigations is virtually non-existent. A direct relationship exists between the ability to collect and analyze data and the ability to impose accountability on the DoD investigative system. The efficient management of scarce investigative resources is handicapped by the difficulty of collecting and correlating information. This shortcoming results in unnecessary redundancy and frustrates attempts to develop uniform DoD investigative management strategy and policy. The Board found that the prompt integration of automated data processing (ADP) and communications systems of DoD investigative organizations has the potential to improve significantly the overall investigative capability of DoD and save money in the long run.

Although the Board encourages the integration of DoD investigative ADP systems, it does so with the caution that the use of and access to investigative data can have a significant affect on individuals and ongoing investigations. The Board finds unacceptable the access that non-DCIO personnel currently have to sensitive DCIO investigative information in the Defense Clearance and Investigations Index, a DoD-wide automated index containing the identities of approximately 19 million individuals, in addition to information about closed and ongoing criminal and security clearance investigations.

We recommend that DoD integrate the automated data processing and data analysis capabilities of all its investigative organizations, but limit access to the identities of individuals and to information about ongoing criminal investigations entered in these systems.

F. General Crimes Investigations

Homicides, violent sex crimes, narcotics trafficking, theft, assault, and petty larcenies are crimes that affect the security, morale, and readiness of all servicemembers. Although the Board found fewer problems with general crimes investigations than we or others might have expected, we found some need for improvement in this important area.

The Services must ensure that adequate resources are being devoted to general crimes investigations. The Navy does not pay the attention to general crimes that it should and must increase its commitment in that area. Because most DCIS agents do not investigate general crimes as part of their mission, particularly Uniform Code of Military Justice offenses, and the general crimes training and experience they have is not current, they should not be called upon to investigate Uniform Code of Military Justice general crimes. To increase the credibility of investigations, the Services and DoD must be more vigilant to protect the rights of subjects of these investigations. Finally, the Services must pay significantly more attention to the training and supervision of their police investigators.

G. Counterintelligence

The Board found that the present organization of counterintelligence mission responsibilities is responsive to individual Service customers. It also found, however, that the Army, Navy, and Air Force counterintelligence doctrines, ADP systems, and procedures are not sufficiently compatible. In particular, divergent Service philosophies on the nature and goals of the counterintelligence mission -- the Army views counterintelligence principally as an intelligence discipline, while the Navy and Air Force view it as a law enforcement discipline -- hinder coordination, improved communications, and potentially cost-effective consolidation of counterintelligence training.

We recommend that DoD reorient its counterintelligence doctrine to exploit more

effectively the intersection between the disciplines of law enforcement, counterintelligence, and intelligence. The DoD Director of Counterintelligence and Security Programs should reconcile the tension between the different Service counterintelligence goals of criminal prosecution and intelligence exploitation and examine counterintelligence doctrine, training, and operations to eliminate unnecessary redundancy, integrate DoD counterintelligence ADP systems, and employ more efficiently increasingly scarce resources.

H. Navy Commitment to Quality Investigations

The Navy invests too little in its investigative programs. Of the three military criminal investigative organizations, NCIS has the fewest general crimes investigators for the population policed. NCIS has one general crimes investigator for 1,605 Navy personnel; USACIDC and AFOSI, in contrast, have one general crimes investigator for 1,141 Army personnel and 540 Air Force personnel, respectively. In addition, the Board found that Navy commanders use more commander-directed investigations or police investigations for cases that the MCIOs often investigate in the other Services. One reason for this may be that NCIS has fewer agents dedicated to the general crimes mission than the other MCIOs. Another reason may be that NCIS agents, 95 percent of whom are civilian, are less acculturated to the Navy and Marine Corps.

Problems with training and supervision of police investigators (masters-at-arms and civilian installation police) are particularly acute in the Navy. Training of Navy civilian police is ad hoc and unregulated, yet many of these civilian police conduct criminal investigations on Navy installations. Finally, the Navy's IG program requires more personnel dedicated and trained as IGs, particularly at lower echelons, if it is to serve effectively as a warning mechanism for Navy leadership.

The Navy can take several steps to remedy these problems. First, it should increase the proportion of its investigative force dedicated to general crimes investigations. The Navy also should integrate Marine Corps CID agents more fully into NCIS field offices. All Navy police investigators should receive the same training as that provided to Army military police investigators and Air Force security police investigators, and the Navy should establish and require a uniform structure and standard staffing levels for the investigative elements in all security departments. Finally, the Navy must increase significantly the number of trained personnel assigned to Inspector General duties at lower echelons.

I. The DoD IG

The Board's study was the first comprehensive examination of the operations of the Office of DoD IG since it was created more than a decade ago. It became clear during the Board's inquiries that the effectiveness of the Office, particularly in its relations with the MCIOs and in its role as a key member of the Secretary's management team, has been affected adversely by the extended absence of an appointed Inspector General. Although the Office has functioned well in many respects under the leadership of the Deputy IG, we urge the Administration to move quickly to appoint an Inspector General and recommend that every effort be made to avoid lengthy vacancies in the future.

As reflected in the report's discussion of procurement fraud, DCIS investigations in that area have been professional and effective. The same standard has not been met, however, in the Office's non-criminal investigations, in particular those conducted by Departmental Inquiries. Departmental Inquiries reports fail to articulate the applicable standards breached by, or the criteria applied to evaluate the actions of, the senior official whose conduct is under scrutiny and, thus, sometimes convey the impression that investigators are substituting their judgment for that of the subject. In addition, the tone of Departmental Inquiries reports can be unnecessarily provocative.

Executive Summary

Because these deficiencies undermine the credibility and persuasiveness of Departmental Inquiries reports, they are not as useful to decision makers as they should be. It is important, therefore, that steps be taken to improve both the quality and procedural fairness of these critically important non-criminal investigations.

TABLE OF CONTENTS

INTRODUCTION	1
THE DOD INVESTIGATIVE STRUCTURE.....	5
I. DEPARTMENT OF DEFENSE INSPECTOR GENERAL.....	5
II. THE MILITARY CRIMINAL INVESTIGATIVE ORGANIZATIONS	6
III. POLICE INVESTIGATORS.....	8
IV. MARINE CORPS CRIMINAL INVESTIGATION DIVISION.....	8
V. SERVICE INSPECTORS GENERAL	9
VI. COMMANDER-DIRECTED INVESTIGATIONS	9
FINDINGS AND RECOMMENDATIONS.....	10
I. OVERSIGHT AND POLICY	10
A. The Issues	10
B. Possible Solutions	13
C. Recommendations	14
II. INVESTIGATION OF PROCUREMENT FRAUD	17
A. Findings.....	17
1. The Status Quo and DoD Instruction 5505.2.....	17
2. Quality.....	19
3. Responsiveness and Independence	20
4. Remedies Programs	21
B. Recommendations	22
III. INVESTIGATION OF GENERAL CRIMES	30
A. Findings.....	30
1. DCIOs.....	30
a. DCIS	30

b. MCIOs	33
(1) Quality.....	33
(2) Responsiveness	34
(3) Independence.....	36
(4) Protection for Subjects	42
2. Police Investigators.....	46
a. Quality.....	47
b. Selection and Training.....	47
c. Supervision and Retention.....	49
d. Responsiveness	50
e. Independence.....	50
f. Reporting	51
3. Marine Corps CID	51
a. Quality.....	52
b. Selection and Training.....	52
c. Supervision and Retention.....	53
d. Responsiveness	53
e. Independence.....	53
B. Recommendations	54
1. DCIOs.....	54
2. Police Investigators.....	59
3. Marine Corps CID	62
IV. COUNTERINTELLIGENCE.....	64
A. DoD Counterintelligence Organization and Mission	64
B. Findings.....	66
1. Structure of DoD Counterintelligence	67
2. Nature of Service Counterintelligence Doctrine	69

3. Service Counterintelligence Training	71
4. Counterintelligence Automated Data Processing	73
5. Army MI Program Management	74
C. Recommendations	74
V. NON-CRIMINAL INVESTIGATIONS.....	77
A. Findings.....	77
1. Departmental Inquiries	77
a. Training	77
b. Independence.....	78
c. Protection for Subjects	79
d. Quality of Reports	83
e. Role in Senior Official Investigations	87
2. Service Inspectors General	87
a. IG Investigative System.....	88
b. Misuse of IG System.....	90
c. Protection for Subjects	91
d. Training	91
e. Manuals	92
f. Communications and Data Collection	92
3. Commander-Directed Investigations.....	92
a. Potential for Abuse	94
b. Guidance for Investigators.....	96
c. Coordination with Judge Advocates.....	97
d. Selection of Investigators	98
B. Recommendations	98
1. Departmental Inquiries	98
2. Service Inspectors General	100

3. Commander-Directed Investigations.....	101
VI. ADMINISTRATIVE VERSUS CRIMINAL INVESTIGATIONS	104
A. Findings...	104
B. Recommendations	106
VII. THE PROPER ROLE OF THE ATTORNEY IN INVESTIGATIONS	108
A. Findings.....	108
1. The Role of Judge Advocates	108
a. General Crimes and Administrative Investigations	108
b. Counterintelligence Investigations	110
2. Service General Counsel.....	110
3. DoD General Counsel	112
B. Recommendations	114
VIII. DCIO AND ARMY MI WORKFORCE	116
A. Findings.....	116
1. Recruitment.....	116
a. Women and Minorities	116
b. Educational Background	117
c. Military Experience of NCIS Agents	117
d. DCIS Recruiting Practices	118
2. Training.....	118
a. Basic Agent Training.....	119
b. Advanced and Specialty Training	122
c. Probation Programs	123
d. In-Service Training	124
3. Supervision.....	125
a. Supervisory and Management Training.....	126
b. Commissioned Officer Supervisors in USACIDC.....	126

c. Effect of the Military Drawdown.....	127
4. Retention.....	127
B. Recommendations	129
1. Recruitment.....	129
2. Training.....	131
3. Supervision.....	133
4. Retention.....	134
IX. INVESTIGATIVE TOOLS AND TECHNIQUES	136
A. Findings.....	136
1. Automated Data Processing.....	136
2. Laboratories	137
3. Polygraph Services	137
4. Arrest Authority.....	138
5. Undercover Operations.....	140
a. Consensual and Nonconsensual Monitoring	140
b. Storefront Operations.....	142
6. Psychological Autopsies	143
B. Recommendations	144
X. ANTIDEFICIENCY ACT.....	146
A. Findings.....	148
B. Recommendations	149
XI. SEXUAL HARASSMENT	150
A. Findings.....	150
1. Departmental Organizational Structure	150
2. Data Collection	152
B. Recommendations	153

APPENDIXES

A. Charter	A-1
B. Advisory Board Members' Biographies	B-1
C. Hearings Held by the Advisory Board.....	C-1
D. Individuals Contacted	D-1
E. DCIO and Army MI Workforce Statistics.....	E-1
F. Recommendations	F-1

INTRODUCTION

In the late 1980s and early 1990s, the Department of Defense, Congress, and the public became increasingly concerned about the effectiveness of investigations by DoD investigative agencies. Much of this concern stemmed from a few highly publicized cases, the most notable of which is Tailhook, but more routine cases also raised questions of investigative quality. At the same time, the Defense budget was decreasing, and the Government was searching for ways to accomplish DoD's mission more efficiently. Some members of Congress and some Department officials suggested that consolidating some or all of the Defense criminal investigative organizations (DCIOs)¹ would save money and improve the quality of investigations.

In the fall of 1992, the Senate Armed Services Committee, the House Armed Services Committee, the Senate Appropriations Committee, and the House Appropriations Committee all urged some action with respect to the investigative capability of the Department. Among other recommendations, the House and Senate Armed Services Committees agreed in conference to recommend that the Secretary of Defense create an Advisory Board to study a number of issues related to the investigative

capability of DoD. See H.R. Rep. No. 966, 102nd Cong., 2nd Sess. 742-745 (1992) (Conference Report). The Secretary of Defense agreed with this recommendation. He announced the formation of the Advisory Board on the Investigative Capability of the Department of Defense on November 18, 1993.

The Advisory Board's charter lists the issues the Board will examine and states that the Board will report its findings and recommendations to the Secretary of Defense in December 1994. In the Conference Report, the House and Senate Armed Services Committees listed 26 issues they thought the Advisory Board should examine.² The charter appends the Conference Report language, but it also incorporates the 26 issues in its description of the following three broad areas of inquiry for the Board:

- (1) The organization of, and the division of responsibilities among, the components responsible for investigations of major crime, fraud, and mismanagement, and other administrative investigations throughout the Department, including the DCIOs, the other investigative components of the DoD IG,³ and the

¹ There are numerous organizations within the Department of Defense that conduct criminal or administrative investigations, but only four have the specific mission of investigating major crimes: the Defense Criminal Investigative Service (DCIS), which is within the Department of Defense Office of Inspector General (DoD IG), the Army Criminal Investigation Command (USACIDC), the Naval Criminal Investigative Service (NCIS), and the Air Force Office of Special Investigations (AFOSI). These organizations are known collectively as the Defense Criminal Investigative Organizations, or DCIOs. The Service, or Military, Criminal Investigative Organizations -- USACIDC, NCIS, and AFOSI -- are known collectively as the MCIOs.

² They recommended that the Board examine these issues with respect to the investigative, audit, and inspection capabilities of the Department. We recognized, however, that examining all three categories was a task that would take significantly more resources than we had. As a result, after consultations with committee staff members, we determined to examine only the investigative capability of the Department.

³ The DoD IG has eight Assistant IGs, three of whom head divisions within our purview. The Assistant IG for Investigations is the Director of DCIS. The Assistant IG for Departmental Inquiries

Service IGs; and specifically whether procurement fraud investigations should be consolidated into one agency within the Department of Defense;

(2) The qualifications for the appointment of investigative agents, and the training, supervision, and retention of those agents; and

(3) The procedures to ensure prompt and thorough investigation of allegations concerning operational matters and the performance of persons in the chain of command; that investigative components are not subject to improper command influence while also ensuring that such components are responsive to the investigative and inspection needs of the command; and that the legal rights of individuals are protected during the course of an investigation and subsequent review.⁴

Among the 26 issues, Congress suggested that the Board study "whether allegations of homosexuality that do not involve homosexual acts should be investigated by criminal investigative organizations." We considered this issue to be made moot by implementation of the "don't ask, don't tell, don't pursue" policy. In light of the short time the policy has been in effect and its uniqueness, we have not studied it.

heads a division with three operating elements: the DoD Hotline; Special Inquiries, which, among other things, investigates allegations of reprisal against whistleblowers; and Program Integrity, which investigates, and monitors investigations of, allegations against senior DoD officials. The Assistant IG for Criminal Investigative Policy and Oversight (CIPO) promulgates criminal investigative policy, inspects the DCIOs, and manages the Voluntary Disclosure Program. See, *infra*, The DoD Investigative Structure, §I, for a discussion of the organization of the Office of the DoD IG.

⁴ This category includes examination of military police organizations, commander-directed investigations, and the Service IGs.

In addition to the areas of inquiry the charter describes, we have added three other areas of study. The House Permanent Select Committee on Intelligence requested DoD to study a number of issues in its version of the Classified Annex of the Fiscal Year 1992 Intelligence Authorization Act. H.R. Rep. No. 527, 102nd Cong., 1st Sess. (1991). Among those issues was the feasibility of separating the counterintelligence missions from the criminal investigative organizations. We adopted this as an area of study after the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) promised the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence that the Board would do so.

In the summer of 1994, we received two additional assignments. First, the Senate Armed Services Committee requested us to give specific attention to the responsibilities of the DoD IG in Antideficiency Act⁵ investigations, the extent to which investigations of senior DoD officials under the Act can be conducted in a thorough, prompt, and independent manner, and the means for determining the appropriateness of criminal or administrative sanctions. See S. Rep. No. 282, 103rd Cong., 2nd Sess. 217-218 (1994).

Second, the Congress mandated that we consider and include in our report whether the Department "should establish a separate unit to oversee all matters related to allegations of discrimination or sexual misconduct in the Department" and whether the Department needs additional data collection and reporting procedures to enhance its ability to deal with allegations of sexual misconduct. See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, section 532, 108 stat. 2663, 2760 (1994).

We have studied each of the issues described above in some detail and in the context of a number of different types of

⁵ 31 U.S.C. §§1341, 1342, 1349-1351, and 1511-1519.

investigations, including investigations by the DCIOs, police investigators, the DoD IG, and the Service IGs, as well as commander-directed investigations. During our year-long investigation and analysis of the investigative capability of DoD, we issued and received responses to over 100 detailed written requests for information; reviewed thousands of pages of documents, including investigative reports, regulations, studies, training curricula, and manuals; and spoke with well over 600 individuals inside and outside of DoD. Toward the end of this process, we circulated a draft version of our report to various components within the Office of the Secretary of Defense, to the DoD IG, and to the Services for comment. We carefully considered the comments we received and, where appropriate, we changed the report accordingly. We have met every month to hear presentations and to discuss and reach decisions on the issues before us. What follows is the result of that effort.

The first volume of this report contains all of the Advisory Board's recommendations for changes to the DoD investigative system, and the findings and analysis that led us to those recommendations. Because the Advisory Board's charter was extremely broad, and because the system works well in some areas, we have not made recommendations in all areas we examined. Moreover, there is a great deal of detailed -- but very important -- background information on which we relied to reach our conclusions. This supporting information is summarized in the second volume of this report.

Our recommendations range from the large to the minute, and they concern both quality and efficiency. For example, we studied whether consolidating all criminal investigative organizations would improve the quality of criminal investigations while reducing their cost. We found, however, that for the most part the DoD investigative organizations are lean organizations. In fact, many of our recommendations, such as those regarding training, require the Department to spend additional money. We recognize that some of our recommendations will create

funding and resource allocation issues, but we have not addressed how DoD should resolve those issues. In an era of declining resources, we do not make these recommendations lightly, but we believe the Secretary and the Congress will agree that an investigations system that runs well will, in the long run, save more than just money.

Perhaps one of the largest systemic problems with DoD investigations is a lack of attention being paid to the investigative system before problems arise. When cases like Tailhook appear on the front page of the newspapers, everyone wants to know what went wrong, but the Secretary of Defense would be better served by high-level attention to the process on an ongoing basis. We recommend that the President appoint and the Senate confirm an Inspector General for the Department and that the Secretary treat the IG as an integral member of the DoD management team. We also recommend that the Secretary convene a permanent Board on Investigations, chaired by the DoD IG, and including the Under Secretary of Defense (Personnel and Readiness), the DoD General Counsel, the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence), the heads of the military criminal investigative organizations, the Service Inspectors General, and other leaders in the investigative system. This Board should oversee implementation of our recommendations and should continue to review and recommend improvements in the Department's investigative system.

We studied various consolidation options, in particular whether all criminal investigative organizations and whether procurement fraud investigations should be consolidated. We reached different conclusions on each option. In both cases, we heard widely varying estimates of the savings that could be achieved, but even the most positive estimates were significantly lower than those of a few years ago, and none were substantial enough to be a pivotal factor in the decision. We recommend against total consolidation because we concluded from our findings that the Services

Introduction

need their own general crimes⁶ investigators and complete consolidation would create an overly large and unresponsive organization. We concluded that special agents who know the culture in which they are investigating and who are trained to deploy with their Services conduct higher quality general crimes investigations. Furthermore, we found no significant problems with the current organization of general crimes investigations. These conclusions, however, do not apply to procurement fraud investigations. We found the current decentralized system of procurement fraud investigations -- with each Service and the DoD IG providing its own investigators, sometimes one from each on a single case -- to be inefficient and sometimes ineffective. With one cohesive fraud unit, special agents can spend their time investigating cases rather than fighting over who will take credit for them.

There is a perception, principally outside DoD, that the elements of DoD have difficulty engaging in the type of self-critical analysis that quality investigations require. This was, of course, a major focus of our investigation. We found that the criminal investigative organizations largely do not have problems in this area. The DCIOs all have significant organizational and regulatory safeguards that protect -- as well as is possible -- against improper influence on investigations. To the extent we found problems with self-analysis, they are reflected in non-criminal investigations, and we recommend that the Services and the DoD IG increase attention to the independence and quality of those investigations.

The other issues we studied, ranging from training of all types of investigators to data collection and analysis, all go to the quality of investigations. Our recommendations on these issues are numerous, but much of what we describe in Volume II will suggest to others additional

improvements that can be made. The descriptive sections of our report also should provide a background for those who carry on with our work. For, although this Board's charter is limited in time, we see our mandate as an iterative one, requiring constant vigilance on the part of the Secretary, the DoD IG, and the Services.

⁶ We use the term "general crimes" to describe crimes against persons, such as assault and rape, crimes against property, such as breaking and entering and theft, and crimes involving the sale or possession of controlled substances.

DOD INVESTIGATIVE STRUCTURE

The Department of Defense investigative structure is extremely complex. DoD is the only executive department responsible for policing an indigenous population -- the Services -- and because of that it has many investigative organizations that have no analogue anywhere in the federal government. The Advisory Board reviewed DoD's investigative capability both at the level of the Office of the Secretary of Defense (OSD) and in the Services, and for criminal and non-criminal investigations. What follows is a brief sketch of the DoD investigative structure.

I. Department of Defense Inspector General

Congress established the DoD Inspector General in 1982. The DoD IG is charged with being the principal advisor to the Secretary of Defense for "matters relating to the prevention and detection of fraud, waste, and abuse" within the Department; with initiating, conducting, and supervising such investigations in DoD as the IG considers appropriate; and with investigating "fraud, waste, and abuse uncovered as a result of other contract and internal audits, as the Inspector General considers appropriate." Finally, Congress gives the DoD IG the responsibility to "develop policy, monitor and evaluate program performance, and provide guidance with respect to all Department activities relating to criminal investigation programs." The DoD IG reports directly to the Secretary of Defense and Congress. The DoD IG has a Deputy IG and eight Assistant IGs. The Advisory Board has reviewed three divisions in the office of the DoD IG: the office of the Assistant IG for Investigations, which includes the Defense Criminal Investigative Service (DCIS); the office of the Assistant IG for Criminal Policy and Oversight (CIPO);

and the office of the Assistant IG for Departmental Inquiries.⁷

A. Defense Criminal Investigative Service

DCIS is the criminal investigative arm of the DoD IG and one of the four major Defense criminal investigative organizations. The Director of DCIS, who is also the Assistant IG for Investigations, reports to the DoD IG. DCIS was established in 1981 as a world-wide civilian federal law enforcement agency empowered to investigate suspected criminal fraud activities involving DoD components and DoD contractors. DCIS agents conduct investigations of suspected criminal fraud violations and conduct fraud awareness briefings to all elements of DoD. DCIS primarily investigates contract and procurement fraud, antitrust violations, bribery, corruption, and large-scale thefts of government property. DCIS has jurisdiction for fraud investigations involving the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff, the Defense agencies, and any other investigation that the DoD IG or a designated representative deems appropriate.⁸

⁷ Five of the Assistant IGs -- those for Audit, Inspections, Analysis and Follow-up, Administration and Information Management, and Audit Policy and Oversight -- head divisions that, although extremely important to the work of the DoD IG, are not directly relevant to the issues of criminal and administrative investigations.

⁸ DoD Instruction 5505.2. See, *infra*, Findings and Recommendations, §II.A.1, for further discussion of DoD Instruction 5505.2 and DCIS's jurisdiction. (Hereinafter, unless otherwise specified, all section references in this volume are to Vol. I, Findings and Recommendations.)

B. Criminal Investigative Policy and Oversight

CIPO is the office of the DoD IG that is responsible for developing criminal investigative policy and overseeing the criminal investigative organizations in DoD.⁹ CIPO's mission is to promote coordination and cooperation and to improve the effectiveness of the Defense criminal investigative organizations. It conducts oversight reviews, identifies and develops policy, and manages DoD programs related to fraud and fraud investigation remedies. The only operational investigative responsibility that CIPO has is a recent congressional mandate that it reinvestigate some suicides that have been investigated by the Services.¹⁰

C. Departmental Inquiries

Departmental Inquiries is the DoD IG office that runs the DoD Hotline and investigates matters that are non-criminal or unlikely to result in prosecution. Departmental Inquiries is divided into three operating elements: the DoD Hotline, Special Inquiries, and Program Integrity. The DoD Hotline Directorate serves as an intake office for allegations of fraud, waste, abuse, and mismanagement. If allegations warrant investigation, the DoD Hotline refers them to another element within or outside of DoD IG. The Special Inquiries Directorate is responsible for conducting investigations of allegations of waste, mismanagement, whistleblower reprisal, and other matters as the DoD IG or the Assistant IG for Departmental Inquiries directs. The Program Integrity Directorate receives, evaluates, and

⁹ CIPO has provided oversight and policy direction to the DCIOs. Although the Service police organizations and Marine Corps CID also conduct criminal investigations, CIPO has not provided oversight or developed policy for these organizations.

¹⁰ See the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, §1185 (1993)

refers or investigates allegations of misconduct against senior DoD officials. The Hotline Directorate and the Program Integrity Directorate review the results of each inquiry they assign to another DoD or IG component for investigation.

II. The Military Criminal Investigative Organizations

The military criminal investigative organizations (MCIOs) are the major criminal investigative elements of the Services. These organizations, the United States Army Criminal Investigation Command (USACIDC), the Naval Criminal Investigative Service (NCIS), which serves the Navy and the Marine Corps, and the Air Force Office of Special Investigations (AFOSI), are responsible for the investigation of most major crime in the Services. NCIS and AFOSI are responsible in their Services for fraud, general crimes, and counterintelligence investigations. USACIDC investigates fraud and general crimes; Army Military Intelligence (Army MI) is responsible for counterintelligence investigations in the Army.

A. The Army

1. United States Army Criminal Investigation Command

USACIDC is an Army major command; its agents report through a "stovepipe" chain of command to a USACIDC commander, instead of to non-USACIDC local commanders. The USACIDC Commanding General is a major general (two-star) who reports directly to the Army Chief of Staff. USACIDC's primary mission is to provide independent criminal investigative support to all U.S. Army elements for "serious" crimes, which are those for which the maximum punishment under the Uniform Code of Military Justice is confinement for one year or more. USACIDC also on occasion investigates sensitive or special interest

matters that are not felonies but require an investigation by experienced, independent agents. In addition to its investigative responsibilities, USACIDC provides protective services for senior officials in DoD and the Department of the Army. USACIDC also runs the most comprehensive forensic laboratory system in DoD and manages the Army Crime Records Center, which in turn operates the Army polygraph program. USACIDC is composed primarily of military personnel, including commissioned officers, warrant officers, and enlisted personnel. The majority of civilian agents in USACIDC are assigned to major procurement fraud investigations.

2. Army Military Intelligence

Unlike the other Services, the Army always has conducted counterintelligence activities, including counterintelligence investigations, within its military intelligence structure, not its criminal investigative structure. Army counterintelligence personnel are not assigned to one central organization in the same way that USACIDC, NCIS, and AFOSI investigators are: there is no single Army counterintelligence stovepipe agency. All Army counterintelligence personnel, however, follow the policies and directives of the Deputy Chief of Staff for Intelligence, the Army's senior official of the Army intelligence community. Army MI counterintelligence personnel conduct counterintelligence investigations, such as investigations of treason, espionage, subversion, and sedition. They also investigate counterintelligence aspects of terrorist activities and known or suspected leaks of classified information. Army MI counterintelligence personnel may conduct personnel security investigations outside the United States.¹¹ In addition to their investigative responsibilities, Army MI counterintelligence personnel conduct counterintelligence operations, collection, and analysis and production. Army MI is

composed primarily of military personnel, but it has some civilian counterintelligence agents.

B. Naval Criminal Investigative Service

NCIS is the only MCIO that uses primarily civilian agents. It is a stovepipe organization with a civilian Director who reports to the Secretary of the Navy through the Navy General Counsel, as well as to the Chief of Naval Operations on naval security matters. NCIS serves the Navy and the Marine Corps. Like USACIDC, NCIS investigates serious crime, including general crimes and fraud. It also conducts counterintelligence investigations and provides Naval security support. NCIS has a Special Agent Afloat Program, which assigns agents to deployed Navy aircraft carrier battlegroups.

C. Air Force Office of Special Investigations

AFOSI, like the other MCIOs, is a stovepipe criminal investigative organization. The AFOSI Commander is a brigadier general (one-star) who reports to the Secretary of the Air Force through the Air Force Inspector General. AFOSI investigates all allegations of major crimes in the Air Force, including general crimes and fraud, provides counterintelligence services to the Air Force, the DoD Industry Security Program, and the U.S. Arms Control Treaty and Inspection Teams, and is the executive agency for investigations involving the Army and Air Force Exchange Service. AFOSI is comprised primarily of military personnel, including officers and enlisted personnel. Sixteen percent of AFOSI's special agents are civilian.

¹¹ The Defense Investigative Service (DIS) conducts personnel security investigations within the continental United States.

III. Police Investigators

Each Service has police organizations responsible for, among other things, law and order in the Services. In addition to police personnel, these organizations have personnel who provide investigative support for crimes that fall below the MCIOs' investigative jurisdiction. These are police investigators. For the most part, the investigative activity of these police investigators is restricted to misdemeanor crimes and is limited to the boundaries of military installations or ships. Police investigators are not members of stovepipe organizations; in most cases they function under the direction of installation security officers or military commanders.¹²

In the Army, the military police (MPs) on each installation have a military police investigations (MPI) subgroup to which the police investigators belong. Most MPI investigators are MP enlisted soldiers; however, the Army also employs some civilian civil service personnel in these positions. These investigators, like the other MPs, report through the chain of command to the provost marshal, who is a member of the local command. Similarly, the Air Force has the security police (SP), which has security police investigations (SPI) subgroups on installations. SPI investigators primarily are enlisted airmen. These investigators report through the chain of command to the chief of security police, who reports to the local commander. The Navy has a somewhat different structure from the other Services. There are essentially two naval police investigator forces: active duty military masters-at-arms (MAA) investigators, and

¹² There are some organizations in the Office of the Secretary of Defense that also provide investigative services below the major crime level. These are the Defense Logistics Agency and Defense Protective Services. We describe the investigative operations of these organizations in Volume II of this report. In addition, the Defense Investigative Service is an OSD-level agency that conducts personnel security investigations. The Board has not examined DIS's operations.

civilian civil service police investigators.¹³ Typically, the MAA investigators work on ships and the civilian investigators work on shore installations, but that is not always the case. Whether civilian or MAA, the investigators report to the chief of security on the installation or ship, who in turn reports through the chain to the commander. In the Navy, unlike the other Services, the MCIO -- NCIS -- sets policy for police investigators, although it does not have operational control over them.¹⁴

IV. Marine Corps Criminal Investigation Division

The Marine Corps has a criminal investigative unit -- the Marine Corps Criminal Investigation Division (Marine Corps CID) -- that, although organized much like the police investigative units in the other Services, investigates more than misdemeanor crime for the Marine Corps. Marine Corps CID investigators receive training similar to MCIO investigators. Indeed, they receive the same training as the Army's USACIDC investigators. Moreover, during deployments, Marine Corps CID investigators take over the entire criminal investigative jurisdiction for the Marine Corps. Marine Corps CID is not a stovepipe organization; its investigators report to the

¹³ Some of the civil service civilians are job series GS-1810 (general investigators) and GS-1811 (criminal investigators), but an undetermined number are job series GS-083 (police). The U.S. Civil Service Commission describes GS-083 positions as "[l]aw enforcement positions [that] involve conducting short-term investigations to determine the immediate circumstances of suspected violations or mak[ing] an immediate decision that there may or may not be a basis for arrest or questioning."

¹⁴ The Marine Corps also has military police investigators who are used essentially as uniformed patrol investigators to conduct extremely brief investigations of minor incidents such as domestic disturbances.

local provost marshal who reports to the local chain of command.

V. Service Inspectors General

Each Service has an inspector general (IG) system. The Service IGs share some characteristics with the IGs that Congress created pursuant to the IG Act, including the DoD IG, but there are many critical differences. Most importantly, the IGs in the military are not intended to be independent of the local commands. Their purpose is to be the "eyes and ears" of commanders at every level of the Service. IGs in the Services conduct investigations, and indeed they carry a significant part of the responsibility for non-criminal investigations in the Services. Each Military Department has a headquarters IG who reports directly to the Secretary and to the senior military leader in the Service; these are the Army IG, the Naval IG, and the Secretary of the Air Force IG. The Marine Corps has a headquarters IG -- the IG of the Marine Corps (IGMC) -- that is actually in the office of the Naval IG as Deputy Naval IG for Marine Corps Matters. The IGMC reports to the Naval IG on policy matters, but

reports directly to the Secretary of the Navy and the Commandant of the Marine Corps on Marine Corps matters. Below the headquarters level, each Service has IG personnel, part of whose function is to conduct or initiate non-criminal investigations.

VI. Commander-Directed Investigations

By far the greatest number of investigations in the Services are conducted not by any investigative organization but at the direction of commanding officers. Each military commander has the inherent authority to order an investigation and choose an officer or senior enlisted person to conduct it. The ability to conduct investigations is a tool for the commander to gather facts and keep abreast of what is happening in his or her command. These investigations range from extremely informal to formal and are considered essential to the military commander's ability to maintain good order and discipline.

FINDINGS AND RECOMMENDATIONS

I. Oversight and Policy

Many of the findings and recommendations in this report are sufficiently important to merit the personal attention of the Secretary of Defense, while some are relatively modest and can be addressed and implemented at levels below that of the Secretary. None of the issues we address is more important, however, than the need for leadership of, and teamwork among, the Department's investigative units.

A. The Issues

On Capitol Hill, among the public, and among the men and women in the armed forces, there has been an erosion in confidence in the integrity, uniformity, and professionalism of DoD investigations. Much of this doubt is based more on perception than reality. Unfortunately, even a few shortcomings, particularly if they are notorious or distorted, reinforce perceptions.

We have found much to commend in the investigative work of the DoD agencies. We also have identified some significant shortcomings that must be remedied. Some of these shortcomings have come to light only recently, but others have existed for a long time. As the Deputy DoD IG stated: "These problems are not new ones."¹⁵

Investigations are an immense responsibility with significant effect on DoD personnel and the public perception of the Department. A few statistics help illustrate the magnitude and importance of the DoD investigative mission. In 1993, the MCIOs opened a total of 38,268 felony investigations; DCIS opened 877

investigations; the Service police organizations opened 116,473 criminal investigations; and on any given day a large number of Service Inspector General and commander-directed investigations are ongoing.¹⁶ Ultimately, the Secretary of Defense is responsible for all of these investigations, but he cannot be expected to focus on the myriad of policy issues that regularly arise. The Secretary must be able to rely on members of his management team to develop and implement investigative policies in those areas that transcend the parochial interests of any given Service. And, he needs the active cooperation of the Services themselves.

The organizational structure now existing within the Office of the Secretary of Defense does not lend itself to giving the Secretary of Defense a coordinated mechanism to fulfill his responsibilities regarding investigations in the Department. The first problem involves the role given the DoD IG in this area. Congress has given the DoD IG statutory authority to "develop policy" in the area of criminal investigations,¹⁷ but neither Congress nor the Secretary has given the DoD IG authority to develop administrative investigative policy except in limited circumstances.¹⁸ Moreover, the IG Act

¹⁶ It is impossible to calculate how many Service Inspector General, commander-directed, and other administrative investigations are active at any given time.

¹⁷ The DoD IG sets policy for the DCIOs with respect to fraud and general crimes. The Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) has responsibility for setting policy, including criminal investigative policy, in the area of counterintelligence. Neither the DoD IG nor anyone in OSD sets policy regarding nonfelony criminal investigations, although this area is the DoD IG's responsibility under the terms of the IG Act.

¹⁸ The DoD IG is the proponent of some DoD Directives and Instructions establishing policy for the

¹⁵ Interview of Derek J. Vander Schaaf, Deputy DoD IG (June 28, 1994).

specifically enjoins the DoD IG from having "program operating responsibilities."¹⁹

The second problem arises out of the role given the Office of the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) (C3I) with respect to investigations. The Office of the Assistant Secretary of Defense (C3I) sets counterintelligence policy for the Department,²⁰ including criminal investigative policy in this area.²¹ In addition, the office has a three-pronged role regarding criminal investigations beyond counterintelligence. First, the Office of the Assistant Secretary of Defense (C3I) develops policy relating to protective services,²² unauthorized disclosure of

conduct of administrative investigations, such as DoD Directives 7070.1, 7050.6, and 5505.6, regarding Hotline cases, whistleblower reprisals, and allegations against senior officials, respectively. Nonetheless, the DoD IG does not have authority to set, and neither that office nor any other in OSD sets policy regarding the overwhelming majority of administrative investigations occurring within DoD, including military IG and commander-directed investigations.

¹⁹ The IG Act does not define "program operating responsibilities." DoD Directive 5106.1, *Inspector General of the Department of Defense*, assigns to the Secretaries of the Military Departments functional responsibility for maintaining authority, direction, and operational control over their audit, inspection, and investigative organizations, including responsibility for their effectiveness and the scope of their activities. The DoD Comptroller is responsible for supervising and directing the formulation and presentation of DoD budgets, interacting with the Congress on budgetary and fiscal matters, execution and control of approved budgets, and maintaining effective control and accountability over the use of all financial resources of the DoD. See *Organization and Functions Guidebook, Office of the Secretary of Defense*, April 1994 (prepared by the Directorate for Organizational and Management Planning, Office of the Secretary of Defense).

²⁰ DoD Directive 5240.2, *DoD Counterintelligence*.

²¹ See, *infra*, §IV.A, for a discussion of counterintelligence policy within DoD.

²² Interview of John T. Elliff, Director of

classified information,²³ and, in coordination with the DoD IG, sets policy relating to polygraphs²⁴ and the Defense Clearance and Investigations Index.²⁵ Second, the office has "resource management oversight" responsibility for the DoD Security and Investigative Activities budget²⁶ and the Criminal Investigations budget,²⁷ which are the funding sources for the DCIOs, including DCIS. Finally, the Office of the Assistant Secretary of Defense (C3I) is responsible for establishing and implementing information management policy, processes, programs, and standards relating to automated data processing (ADP) within the Department, including that related to criminal and administrative investigative programs.²⁸

Counterintelligence and Security Programs, Office of the Assistant Secretary of Defense (C3I) (Nov. 8, 1994).

²³ DoD Directive 5137.1, *Assistant Secretary of Defense for Command, Control, Communications, and Intelligence, (ASD (C3I))*.

²⁴ *Id.*; DoD Directive 5210.48, *DoD Polygraph Program*.

²⁵ Interviews of John T. Elliff, Director of Counterintelligence and Security Programs, Office of the Assistant Secretary of Defense (C3I) (Nov. 8, 1994); Interview of Peter R. Nelson, Deputy Director for Personnel Security, Office of the Assistant Secretary of Defense (C3I) (Mar. 10, 1994). An authorizing directive for this responsibility currently does not exist. See, *infra*, §III.A.1.b(4)(b), and Vol. II, Supplemental Reports, §II.D, for discussion of the Defense Clearance and Investigations Index.

²⁶ DoD Directive 5137.1. This budget funds NCIS and AFOSI.

²⁷ See Memorandum from the Office of the Assistant Secretary of Defense (C3I), Intelligence Program Support Group, to the Advisory Board (May 20, 1994). Specifically, the Office of the Assistant Secretary of Defense (C3I) has responsibility for Program Elements 0901520X and 0901520A in the Defense budget which fund DCIS and USACIDC.

²⁸ DoD Directive 5137.1.

Thus, even before reaching the role of the Services in investigative policy, the status quo calls for, at the OSD level, development of criminal investigative policy under the DoD IG, with the Office of the Assistant Secretary of Defense (C3I) responsible for investigative resource management, information management, and counterintelligence oversight, including that relating to criminal investigations. This arrangement is complicated by the fact that, at present, neither the DoD IG nor the Office of the Assistant Secretary of Defense (C3I) is exercising its existing authority to the fullest, particularly in the case of the Assistant Secretary of Defense (C3I). And each is prevented, by statute, from having the authority of the other. In other words, the DoD IG cannot provide program management for investigative resources, and neither the Assistant Secretary of Defense (C3I), nor anyone in OSD other than the DoD IG, with limited exceptions, can develop criminal investigative policy for the Department of Defense.²⁹ Moreover, there are no existing regulations defining how the Office of the Assistant Secretary of Defense (C3I) and the DoD IG jointly can best serve the Secretary, and thus the Department, given their distinct yet complementary responsibilities.

Examining the relationship between the DoD IG and the Services in the area of criminal investigative policy, we found coordination was no better at this level. Too often the efforts of the DoD IG have met with Service resistance, while Service attempts to standardize policy have languished at the implementation stage. Although the Office of the DoD IG has been given the authority to develop criminal investigative policy, neither

the DoD IG nor the Services have been able to create an effective mechanism to make DoD-wide criminal, or administrative, investigative policy work.

For example, in 1990, the three MCIOs formed the Tri-Service Working Group to identify ways to integrate and consolidate MCIO operations to save money and accommodate declining endstrength targets while maintaining level service to DoD. The Working Group determined that collocation of select MCIO fraud offices alone could save over \$1 million per year in payroll and leasing expenses and allow the MCIOs to cut 18 personnel positions in the process. Yet, of 19 offices recommended for collocation, only 4 were. Other examples abound.³⁰

Similarly, although we recommend elsewhere in this report that all Service IGs should receive basic IG training, if the Secretary accepts this recommendation, no mechanism exists to make it happen. In fact, there is no forum in which the Services and any OSD element can discuss whether uniform training is a good idea. In a similar vein, no one within DoD now seeks to identify and address issues that cut across criminal, fraud, counterintelligence, and administrative investigations. For example, the need to determine "what went wrong and how do we fix it" in administrative investigations is similar to the need to conduct "damage assessments" in counterintelligence investigations. In both cases, the investigator must recognize early on that his or her actions may foreclose the prosecutive option, and lessons learned in one type of investigation may well have value in the other. Again, however, no mechanism exists either to identify the similarities and the lessons or to encourage the conversation -- even within a given Service.

²⁹ The Under Secretary of Defense (Personnel and Readiness) has OSD-level oversight responsibility for equal opportunity, discipline, and separation of all DoD personnel, both military and civilian. See DoD Directive 5124.2, *Under Secretary of Defense for Personnel and Readiness (USD(P&R))*, §D.1.d. Thus, the Under Secretary is responsible for making and overseeing investigations policy relating to these areas. Moreover, as stated earlier, the Assistant Secretary of Defense (C3I) sets criminal investigative policy in discrete areas.

³⁰ For example, the DoD IG has been unable to establish a DoD-wide policy on electronic surveillance for ten years. See, *infra*, §IX.A.5.a, for a discussion of DoD investigative electronic surveillance policy. Similarly, innovations such as standardizing the DoD investigations vocabulary and report writing have not been made.

Meanwhile, though charged with doing so, the Office of the Assistant Secretary of Defense (C3I) does not exercise leadership in overseeing the DCIO budgets and advising the Secretary concerning the need for and allocation of investigative resources. Though we did not discern any diminution in the quality of DCIO investigations as a result of this lack of attention, the fact remains that no one at the OSD level is advising either the Comptroller or the Secretary on DCIO resource issues. This responsibility has devolved to the Services and DCIOs through OSD neglect. This is significant because, under the status quo, the Services can reprogram appropriations both Congress and the Secretary of Defense intend for MCIO use to other uses. In addition, absent OSD-level management review of investigative budgets, inefficiencies in DCIO programs -- redundant basic agent training, for example -- persist.

Efforts to rationalize DoD investigative programs have stalled for several reasons: a lack of attention at a sufficiently high level within the Department; an OSD organization that does not promote strategic decision making in the investigative area; unseemly agency squabbling over jurisdiction; and a lack of unity of purpose among the members of the DoD investigative community. In a word, what is lacking is "leadership."

The Department of Defense simply is too big and complex to rely on ad hoc and free-form policy formulation. In terms of investigative policy needs, the Services are far more alike than they are different, and will become only more so as we enter the 21st century.

B. Possible Solutions

No task absorbed more of the Board's attention than the search for a resolution of these issues. We considered several alternative solutions but found none of them entirely satisfactory. Among them were (1) continuing to rely solely on the Office of Inspector General to develop and implement investigative policy; (2) consolidating the Defense Department investigative programs;

and (3) creating an Office of Investigations attached to the OSD staff. For the reasons described below, we rejected each of these. Instead, we recommend that the Secretary create a Board on Investigations to provide a forum for developing and overseeing the implementation of investigative policy.

The terms of the IG Act, the experience of the last several years, and logic suggest that the statutory grant of authority to the DoD IG is not, by itself, sufficient to enable the Department of Defense to manage the entire range of its investigative responsibilities. The Advisory Board discussed at length whether some of the problems we identified could be resolved if there were greater stability in the Office of Inspector General. We considered the suggestion that the Department implement the other recommendations contained in this report and give a new Inspector General the opportunity to establish a more productive working relationship with the Services. Ultimately, however, we were not sufficiently optimistic that the problems that had led to the creation of this Advisory Board would be solved merely with the appointment of an Inspector General or that the future would bring greater stability to that Office than it has experienced in the past. Moreover, greater stability within the Office of DoD IG would not address the many problems contained in this report that relate to inter-Service or OSD-Service relationships that concern the DoD IG only in its general oversight role.

We also considered whether to consolidate the DCIOs, Service IGs, and Service police organizations, but we found compelling the Service arguments that responsiveness to the time-sensitive and specialized needs of commanders, as well as support to the primary mission of the Department -- defending the United States and its interests -- would be degraded.³¹

The alternative that generated the most intense debate was the staff proposal to create

³¹ See, *infra*, §III.B.1.a, for a discussion of total consolidation of the DCIOs.

an OSD-level Office of Investigations, headed by a Senior Official for Investigations, to act as the focal point for DoD investigations policy development and implementation. Creation of such an office would have the advantage of providing an unambiguous and accountable chain-of-command from the investigator in the field through the Service Secretaries to the Secretary of Defense. By giving the new office at least some power over MCIO budgets³² and imbuing it with the Secretary's inherent authority, the hope was that it would have the ability to make and enforce policy at all levels.

In the end, however, we were reluctant to recommend creation of a new bureaucracy to address problems that we believe can be handled through collaboration among the DoD Inspector General, Office of Secretary of Defense, and the Services. In addition, creation of an Office of Investigations inevitably would undermine the congressionally mandated authority of the DoD IG and would have required amendment of the Inspector General Act of 1978.³³ We were unwilling to hinge the implementation of our recommendations on the uncertainties of such a drastic structural change.³⁴

³² This power could have been derived from a transfer of the Security and Investigative Activities and Criminal Investigations budgets, and associated personnel, from the Office of the Assistant Secretary for Defense (C3I) to the new office. Leaving these resources and responsibilities with the Office of the Assistant Secretary for Defense (C3I), and placing responsibility for the entire panoply of DoD investigations in that office would have been inappropriate given the office's intelligence mission and focus.

³³ For example, language granting the IG authority to "develop policy" would have to be struck from §8(c)(5) of the Act. The MCIOs have argued that the DoD IG's criminal policy-development function combined with its oversight role creates a conflict of interest. To the extent a conflict exists, it is a conflict Congress created by giving the DoD IG oversight responsibilities over criminal investigations in addition to responsibility for developing criminal investigative policy.

³⁴ Of note, none of the DoD components asked to

C. Recommendations

First, it is of critical importance that an Inspector General be appointed immediately. The Deputy IG and the staff of the IG's office have done a very good job for the past three years, but it is not possible for a Deputy IG to exercise the full authority of the office nor is the Secretary likely to make the Deputy IG an integral part of his management team.³⁵

But the appointment of an Inspector General alone will not, for the reasons discussed above and elsewhere in this report, resolve the problems of investigative coordination and unified policy making. There must be a mechanism for bringing together the Department's investigative units and providing a forum in which they can consider jointly the policy and operational issues that implicate the interests of all those units. These issues also must be given a prominence on the Secretary's agenda that they previously have achieved only in times of crisis, and the commitment to their resolution must carry the weight of the Secretary's authority.

We believe that these goals can be achieved best by having the Secretary establish a Board on Investigations, reporting to him and chaired by the Inspector General. In addition to the DoD IG, the Board should consist of at least the following members: the Undersecretary of Defense (Personnel and Readiness)³⁶ or his representative, the

comment on this recommendation countered or even addressed the Advisory Board's reluctance to recommend creation of a new bureaucracy nor did they address the Advisory Board's concern with the need for an amendment to the Inspector General Act.

³⁵ The last presidentially appointed Inspector General left office on November 14, 1991. The Deputy IG has filled that role since then and for a total of five of the past nine years. Testimony of Derek J. Vander Schaaf, Deputy DoD IG, before the Advisory Board (Apr. 8, 1994).

³⁶ In addition to responsibility for OSD-level oversight of equal opportunity, discipline, and

Assistant Secretary of Defense (C3I) or his representative, the DoD General Counsel, the Commanding General of USACIDC, the Director of NCIS, the Commanding General of AFOSI, and the Inspectors General of the Army, Navy, Air Force, and Marine Corps.³⁷ In creating the Board, the Secretary must communicate to the entire Department his commitment to prompt resolution of investigative policy and program issues and must underscore in unequivocal terms his expectation that the members of the Board will cooperate to that end.³⁸

The Secretary should assign to the Board the following responsibilities:

- (1) Advising the Secretary concerning, and overseeing the implementation of, the

separation of all DoD personnel, the Under Secretary of Defense (Personnel and Readiness) is responsible for several other areas addressed in the findings and recommendations of this report, including psychological autopsies, the Defense Incident Based Reporting System (DIBRS), and recruiting and retention of investigators.

³⁷ We received several comments about the membership of the Secretary's Board on Investigations. Some proposed additional members; one expressed concern that the Board would not include civilian representatives of the Service Secretaries. We believe the membership we recommend is important if the Board is to carry out its functions. There is also virtue to keeping the Board to a manageable size. Nonetheless, the Secretary may choose to extend Board membership to other interested parties.

³⁸ The Board should have a small staff, consisting of detailees from the DoD IG and the Services, to coordinate its work and prepare and disseminate the necessary paperwork. To function effectively, the Board should meet at least monthly and more frequently as needed. Board members should be required to attend personally except in the most unusual circumstances, and if they are unable to attend, their delegates should have plenary authority to speak on their behalf. The Inspector General, as chair of the Board, should meet with the Secretary at least quarterly to report on the progress of the Board in implementing Advisory Board recommendations and other issues within the Board's purview.

recommendations of this Report.

- (2) Developing and overseeing the implementation of investigative policy, both criminal³⁹ and administrative.
- (3) Monitoring and evaluating, on an ongoing basis, DoD investigative training programs; investigator qualification standards; recruitment and career progression policies; support functions such as automated data processing; collection, analysis, and reporting of data; and organizational reforms such as functional consolidation, integration, and collocation.⁴⁰
- (4) Advising the Secretary concerning the need for and allocation of investigative resources.⁴¹

More broadly, we envision the Board serving as a forum in which all members of the DoD investigative community will be able to raise, discuss, and resolve issues of policy that cut across that community. Although the goal should be, where possible, to develop policy by consensus, we recognize that such consensus may not be achieved readily in every case. It may be that certain critical

³⁹ This is not intended to interfere with the DoD IG's statutory authority to develop criminal investigative policy, nor did the Office of DoD IG express a concern in this regard in its comments on our draft report.

⁴⁰ Any consideration of matters such as consolidation of training, laboratories, or technical services, collocation of MCIOs and military police investigators, or integration of Service police investigators and MCIOs would require staffing and detailed planning by experts from the Services.

⁴¹ We recognize the Office of the Assistant Secretary of Defense (C3I) has this responsibility at present.

policy questions will need to be referred to the Secretary for resolution, but we expect that to occur only in exceptional circumstances.⁴²

We do not anticipate that the Board will have any direct operational responsibilities. The Secretary should, however, look to the Board for advice and assistance in the handling of particularly sensitive investigations -- those of such sensitivity or notoriety that they require the Secretary's personal attention and oversight. The need for such high-level oversight is evident if the Department again confronts cases like Tailhook or the USS Iowa explosion.

The Secretary must be able to marshal appropriately skilled resources to investigate such incidents and allegations. Although we expect that the DoD IG will be able to investigate some of these matters, IG investigators should not, for example, conduct general crimes investigations, particularly those involving offenses under the Uniform Code of Military Justice.⁴³ In such cases, the Board would be able to call upon the resources of the MCIOs; or it could recommend creation of a task force or other ad hoc investigative team composed of agents from a number of units.

Use of such a task force might be particularly appropriate for investigation of major operational failures, where the work of an OSD-level unit would be seen as having greater credibility than that of the Service involved. Such incidents might have included the USS Iowa explosion, the failed attempt to rescue American hostages in Iran (Desert One), the downing of the Iran Airbus by the USS Vincennes, the Task Force Ranger raid in Mogadishu, and the recent downing of two U.S. helicopters over northern Iraq. The mechanism for such OSD

reviews does not now exist, and we believe that the absence of that capability jeopardizes effective civilian oversight and control of the military.

Our recommendation that the Secretary establish a Board on Investigations should help fill the leadership vacuum that currently exists regarding DoD investigative policy and oversight. This Board will provide a forum for affected DoD components to be involved in the policy development process. Such a forum has not existed heretofore. With the support of the Secretary of Defense and the efforts of the qualified individuals who will make up this Board, DoD will be able to move forward and resolve the many troublesome issues that already have surfaced with respect to DoD's investigative capability, as well as those issues that inevitably will arise in the future.

⁴² The DoD IG still will have statutory authority to develop criminal investigative policy. The DoD IG does not, however, have the authority to develop administrative investigative policy in the overwhelming majority of circumstances.

⁴³ See, *infra*, §III.B.1.b.

II. Investigation of Procurement Fraud

A major investigative function of all four of the DCIOs -- and the area that has resulted in the most controversy over jurisdiction -- is the investigation of procurement fraud.⁴⁴ Procurement fraud⁴⁵ investigations range from relatively minor base-level fraud to extremely complex and wide-ranging matters like the ILLWIND investigation, which last for years, involve many millions of dollars, and employ the most sophisticated investigative techniques. A first-rate procurement fraud investigative capability within DoD is critical. The Secretary of Defense, the Service Secretaries, and commanders of military installations all must procure goods and services within their areas of responsibility -- from fruits and vegetables for the commissary to major weapons systems. They all must have access to a responsive investigative capability.

A. Findings

1. The Status Quo and DoD Instruction 5505.2

Among the more visible of the DoD IG's duties have been the office's policy and operational responsibilities for procurement fraud investigations. When the DoD IG was created, DCIS and all three MCIOs were conducting procurement fraud investigations. In an attempt to promote efficiency and cooperation among these organizations, the DoD IG, through CIPO, promulgated DoD

Instruction 5505.2, *Criminal Investigations of Fraud Offenses*, which established the jurisdictional boundaries of the DCIOs for procurement fraud purposes.⁴⁶ Rather than promote harmony, however, the instruction has, since its inception, created friction and confusion among the DCIOs. The DoD IG issued the original version of Instruction 5505.2 in 1984; there have been several revisions and proposed revisions issued since then. Although with each issuance the specific disagreements differ, the disagreements among the DCIOs over Instruction 5505.2 come down to a controversy over jurisdiction: The MCIOs perceive the DoD IG as trying to accumulate all procurement fraud jurisdiction in DCIS, to the detriment of the Services and the MCIOs; the DoD IG perceives the MCIOs as trying to retain that same jurisdiction to increase their own power and prestige, without regard for the best interests of DoD.

On its face, DoD Instruction 5505.2 appears benign. The Instruction sets forth in detail who will conduct which investigations. It also encourages the DCIOs to conduct joint investigations whenever appropriate. Examples of appropriate jointness include DCIS investigations involving a Service, an MCIO investigation involving a Unified⁴⁷ or Specified Command,⁴⁸ or cases in which more than one Service is a victim of the fraud.

Instruction 5505.2 is designed to ensure that all parties are aware of relevant fraud investigations. For example, the Instruction requires DCIS to notify promptly the appropriate MCIO when DCIS initiates an investigation affecting the pertinent Service's personnel, activities, or contracts, including

⁴⁴ No matter how well DoD investigates procurement fraud, the overall effectiveness of these investigations depends upon the continued commitment of the Department of Justice to prosecute these matters. We encourage DOJ to maintain procurement fraud prosecutions as a high priority.

⁴⁵ We use the term "procurement fraud" generally throughout this report to mean fraud related to Defense contracts.

⁴⁶ See Vol. II, Supplemental Reports, §I.A, for a discussion of the history of DoD Instruction 5505.2.

⁴⁷ Unified Combatant Commands are composed of assigned components of two or more Services.

⁴⁸ Specified Combatant Commands are composed of forces from one Service, but may include units that have representation from other Services.

those administered by Defense Logistics Agency (DLA). The MCIOs must notify DCIS of all investigations the Instruction assigns to DCIS, as well as any significant allegations of fraud they do not investigate.⁴⁹ The Assistant IG for CIPO is responsible for monitoring the activities of the DCIOs "with a view toward avoiding duplication while providing effective coverage, coordination, and cooperation."⁵⁰ The Assistant IG for CIPO also is the primary authority for resolving jurisdictional disagreements that the DCIOs cannot resolve themselves, at either the local or headquarters level.

Despite the apparent reasonableness of the Instruction, it provides for joint investigations too often and this causes friction between DCIS and the MCIOs. Under the Instruction, DCIS and the appropriate MCIOs should investigate jointly cases that involve contracts awarded by a Service and administered by DLA. The MCIOs assert this requirement means that most procurement fraud investigations are conducted jointly because DLA administers most contracts in DoD. For example, we were told that DLA administers almost 99 percent of all Navy-awarded contracts. The friction arises because each MCIO believes this is an unnecessary infringement upon its responsibility to conduct investigations for its respective Service Secretary, while the DoD IG believes it is responsible for conducting all DoD fraud investigations.

We recognize that DoD Instruction 5505.2 alone could not result in the acrimony we heard from the DCIOs, so we asked each of them to provide examples of successful and unsuccessful joint cases. Our review of these joint cases disclosed that the problems arise internally among the DCIOs and do not affect DoD's relationship with the Department of Justice. Although the DCIO disputes may have resulted in inefficiencies, so far as we

can determine they have not affected the ultimate outcome of any investigation. For example, Assistant U.S. Attorneys throughout the country told us they have heard of disputes among the DCIOs over jurisdiction. Few, however, actually have witnessed such a dispute, and none thought the "turf battles" ultimately affected an investigation negatively.

One of the biggest problems with joint investigations is the lack of effective leadership. Although DoD Instruction 5505.2 mandates or suggests "jointness" in many cases, it does not provide a workable process for determining which agency is the lead agency nor does it define the responsibilities of that agency.⁵¹ Each DCIO told us it prefers not to determine the lead agency on a case to avoid fighting over it. A number of Assistant U.S. Attorneys were frustrated at having to provide the leadership role that the DCIOs apparently cannot.

The lack of effective leadership from the beginning of the investigation results in inefficiencies and duplication of effort. Agents proceed on their own course, either because they ignore the overall strategy or because there is no strategy. When agents do work together, they frequently do so in a duplicative manner. We heard of situations in which all four DCIOs sent an agent on an interview or to a meeting when one or two agents would have sufficed. In other instances, we found each agency on a case submitting a separate report of the investigation to its headquarters files when one would have sufficed.

The lack of an effective system for assigning investigative responsibilities also results in acrimony among the agents and waste of resources. One agency or another

⁴⁹ DoD Instruction 5505.2 §E(2) (July 16, 1990). An example of such fraud is when a contractor is alleged to have submitted a false claim on a contract awarded by a Service and administered by DLA.

⁵⁰ *Id.* at §E(1)(a).

⁵¹ See Interview of Richard Poole, Senior Attorney, Fraud Section, Criminal Division, DOJ (Apr. 14, 1994). Mr. Poole gave his analysis of these issues in the five-year joint investigation of the Bicoastal Corporation for defective pricing on Army, Navy, and Air Force contracts. See Vol. II, Supplemental Reports, §I.B, for discussion of the Bicoastal investigation.

frequently is perceived as not "pulling its weight"; yet, the agencies will claim equal credit at the end of a successful investigation. More than one Assistant told us the DCIOs "throw bodies at an investigation" to be able to claim credit for its success. Being able to claim large recoveries at the end of each fiscal year allows a DCIO to demonstrate its prowess in the procurement fraud arena and, by extension, in all areas of crime it investigates. To justify its budget and personnel requirements, each of the DCIOs has an incentive to attempt to gain as great a share as possible of each successful DoD fraud investigation.

2. Quality

Attorneys who work closely with DoD procurement fraud agents generally are satisfied with the quality of those agents and the support they provide to prosecutors. Nevertheless, most would agree with the statement of the Department of Justice Deputy Chief of the Fraud Section, who said the quality of the agents she has encountered "cuts across the board."⁵² Prosecutors and defense attorneys identified DCIS, NCIS, and AFOSI procurement fraud agents and programs as ranking among those at the top of the federal law enforcement hierarchy. Many, however, noted that the USACIDC program is deficient in the level and quality of support provided in procurement fraud investigations.

We identified two related problems regarding the general quality of DCIO fraud agents: agents do not take civil cases seriously enough, and agents are reluctant to acknowledge that some cases simply do not warrant a criminal investigation. Both problems seem to stem from the manner in which agents are "rewarded" for their work. In general, agencies reward those agents with the most indictments or convictions, just as Congress rewards those agencies with the most indictments or convictions. This

system can discourage agents from working with a civil fraud attorney to achieve civil fines, which often can be substantial. Not surprisingly, the biggest complaint about the DCIOs from most DOJ civil attorneys is that the agents disappear once the criminal case closes. This system also discourages an agent who has spent a year or two investigating a case from looking at the evidence objectively. Because of the complexity of many fraud statutes, it may take an agent that long to determine whether criminal activity has occurred at all. But, many defense attorneys noted, once an agent has spent that long on a case, the system demands that the agent find criminal activity.⁵³

Assistant U.S. Attorneys frequently selected DCIS as having the most effective procurement fraud agents. We believe a major reason that DCIS agents often are ranked as highly effective is that, unlike the three MCIOs, which investigate general crimes and (in the case of NCIS and AFOSI) foreign counterintelligence in addition to fraud, DCIS investigates primarily procurement fraud. DCIS was established in 1982 with fewer than 100 agents absorbed from other agencies. Today, DCIS has approximately 385 agents, and it hired most of those agents from other criminal investigative agencies.⁵⁴ As a consequence, while the MCIOs were training new agents to conduct procurement fraud investigations, DCIS had experienced agents capable of conducting complex fraud investigations from the outset. This start and the agency's concentration on fraud have given DCIS a boost in the eyes of most Assistant U.S.

⁵³Recognizing the inherent bias of defense counsel on this issue, we nonetheless believe the problem to be one worthy of consideration.

⁵⁴ DCIS is the largest fraud investigative unit, with agents located throughout the United States. NCIS and AFOSI both have sizeable fraud units, with 140 and 112 special agents respectively. USACIDC developed a separate procurement fraud unit later than the other MCIOs. As a result, although it is authorized 112 special agents for procurement fraud, it has fewer than 80 special agents dedicated to this area.

⁵² Interview of Barbara Corprew, Deputy Chief, Fraud Section, Criminal Division, DOJ (Feb. 28, 1994).

Attorneys. As its more experienced agents retire, however, DCIS is beginning to hire inexperienced agents immediately out of college. Although these agents may bring accounting backgrounds or other important skills, DCIS will have to act cautiously so that its overall quality does not decrease while the new agents gain experience.

USACIDC's procurement fraud program does not measure up to the level of quality exhibited by the other three DCIOs, largely, we believe, because of the relative youth of USACIDC's dedicated fraud program, the low number of agents in the program, and the lower priority USACIDC gives procurement fraud investigations in relation to that given general crime investigations. USACIDC has not emphasized procurement fraud to the same extent as the other MCIOs in part because of circumstances beyond its control, but also because the Army simply does not have as many expensive, high technology procurement programs as the Air Force and the Navy. In fact, although this is not the Department of the Army's official position, some senior Department of the Army officials indicated they would consider consolidating major procurement fraud investigations at the OSD level.

NCIS procurement fraud agents and investigations generally are of the same quality or close to the same quality as those of DCIS and AFOSI. NCIS began conducting fraud investigations with fewer than 20 agents in 1982, and it currently has approximately 140 civilian agents investigating procurement fraud. Two events increased the quality of NCIS procurement fraud investigations. First, NCIS began creating regional procurement fraud offices in 1986. These offices combine experienced fraud supervisors and agents in one office in each region, and the agents assigned to these offices concentrate their time and resources on procurement fraud investigations. One Assistant U.S. Attorney who has worked with NCIS since 1980 described these regional offices as making a "powerful difference" in the quality of NCIS agents and

investigations.⁵⁵ The second event was the ILLWIND investigation, which NCIS initiated and conducted with the FBI. The investigation began in 1986, lasted almost eight years, and provided numerous NCIS fraud agents experience conducting complex fraud investigations.

AFOSI fraud agents differ from DCIS, USACIDC, and NCIS fraud agents in that they are a mixture of civilian, officer, and enlisted personnel. This mixture has both its positive and negative aspects. Assistant U.S. Attorneys told us they cannot tell whether an agent is military or civilian because all agents wear civilian clothes and Assistants do not inquire as to an agent's status. Meanwhile, Air Force commanders identify with AFOSI agents because some of them are military. Air Force commanders seem to accept and understand AFOSI agents -- military and civilian alike -- more than Navy commanders do NCIS civilian agents. On the other hand, a number of Assistant U.S. Attorneys complained of military agents transferring in the middle of long and complex investigations, and the time it takes to educate new agents on the cases.

3. Responsiveness and Independence

We found that Assistant U.S. Attorneys are concerned about the MCIOs' independence from improper command influence, and commanders are concerned about DCIS's responsiveness. A few Assistant U.S. Attorneys expressed concern about the MCIOs' independence, and others hinted at it. None of them, however, had a concrete example of a lack of independence or of undue command influence that affected the outcome of an investigation or prosecution.⁵⁶ Some Assistant U.S.

⁵⁵ Interview of James Metcalfe, Assistant U.S. Attorney, Eastern District of Virginia (Apr. 15, 1994).

⁵⁶ DCIS cited two cases as examples of command influence and interference by the military. The Director of DCIS, however, told us this type of interference is very rare in the Services, and in most

Attorneys are not comfortable when MCIO agents communicate with commanders about investigations; they are concerned that commanders may take action that will compromise the investigation. They do not understand that in the military the need for confidentiality in an investigation must be balanced with commanders' need to know what is happening within their commands.

Commanding officers and other Service officials, on the other hand, believe that DCIS agents are independent to the point of not being responsive to the needs of the customer.⁵⁷ We heard of military officials attempting unsuccessfully to obtain information from DCIS during or after investigations that they needed to make contract decisions or decisions regarding how to treat subjects of an investigation. For example, the Navy Remedies Coordinator told us that it takes 90 days from indictment to obtain from DCIS information relevant to suspension or debarment proceedings.⁵⁸

4. Remedies Programs

DCIO fraud investigations contribute significantly to DoD's contractual and administrative remedies. Each Service and DLA has its own system of remedies beyond the criminal and civil remedies that DOJ seeks. Few of these remedies can be achieved without DCIO investigative support.

cases in which commanders are informed about investigations, that practice is necessary and causes no problems. Interview of Donald Mancuso, Assistant IG for Investigations (Oct. 12, 1994). We also discussed these cases with the Assistant U.S. Attorneys responsible for them, both of whom stated that the actions the respective servicemembers took did not affect the outcomes of those cases.

⁵⁷ We are not referring here to those instances in which DCIOs have valid reasons for withholding information.

⁵⁸ Interview of John M. Farenish, Counsel, Procurement Integrity Office, Office of the Navy General Counsel (Apr. 29, 1994); accord Interview of Colonel J. Thomas Holloman, USA, Chief, Procurement Fraud Division (Apr. 26, 1994).

These remedies are significant because each can affect the award of contracts, recovery of funds, a corporation's ability to contract with DoD and an employee's ability to remain in government service.

DoD Directive 7050.5, *Coordination of Remedies for Fraud and Corruption Related to Procurement Activities*, highlights the importance of non-criminal remedies to DoD and establishes responsibilities and procedures for the DCIOs. The directive requires the DCIOs to "notify, expeditiously in writing, the centralized organization for the affected DoD component of the start of all significant investigations involving fraud or corruption related to procurement activities."⁵⁹ The directive provides a number of specific actions the DCIOs must take to assist procurement officials in applying remedies.

We interviewed senior procurement and remedies officials from each of the Services and DLA. We found that each Service is satisfied with the support it receives from its respective investigative organization, but none of the Services is satisfied with the support DCIS provides their remedies programs. Each Service has established a system to call upon its own investigative organization to provide the suspension and debarment information at the earliest possible date, or to find the information after the investigation is completed. Army suspension and debarment officials and Army materiel commanders, for example, commented positively on USACIDC's responsiveness in this area. The procurement fraud attorney system the Army has established at its procuring activities, with attorneys located on the bases with USACIDC agents, enables them to work closely together. Remedies coordinators and debarring officials from each of the Services expressed concern that DCIS does not give them information necessary for remedial actions in a timely manner. These officials often are confronted with having to make repeated requests of DCIS to provide information during the

⁵⁹ DoD Directive 7050.5 §E.2.

investigation or after it, so that the officials can complete required administrative actions.⁶⁰ DLA, on the other hand, is comfortable with the information DCIS provides.

B. Recommendations

1. Consolidate Procurement Fraud Investigations Under the DoD IG

After reviewing the existing problems with procurement fraud investigations, our challenge was to recommend a system for investigating procurement fraud that achieves departmental goals while it also accommodates the legitimate, but competing, priorities of the interested groups as efficiently and effectively as possible. Consolidation of procurement fraud investigations is the best method to meet these goals.⁶¹ We do not, however, believe it or any of the other options we considered are likely to save money for the Department.⁶²

⁶⁰ This year, CIPO initiated review of the Services' compliance with DoD Directive 7050.5. In light of our findings, we suggest it also review the compliance of DCIS.

⁶¹ Some respondents to our draft report suggested that the decision whether to consolidate should be studied further. This issue has been studied enough. Continued indecision accomplishes nothing and weakens the morale of special agents.

⁶² According to the DoD Comptroller's Office, DoD downsizing has rendered any prior savings calculations unreliable. See Testimony of Kenneth Schreier, Analyst, DoD Comptroller's Office, before the Advisory Board 28 (July 8, 1994). The latest estimate of the Comptroller's Office is that consolidation of procurement fraud investigations would save at most \$13.7 million over the next five years. FY 1994 Update to DMRD 996 Consolidation of the Major Procurement Fraud Component of the Service Investigative Agencies 3 (June 30, 1994). We find even this calculation highly unreliable. For example, this figure is premised on the DoD IG's being able to conduct all major procurement fraud investigations that the Services now perform with

Before concluding that consolidation of all procurement fraud investigations in the Office of the DoD IG was the best solution to overcome the problems we describe in the previous section, we looked at a number of options, ranging from maintaining the status quo to disestablishing the Defense Criminal Investigative Service.

Procurement fraud investigations cannot remain as they are today. As we have discussed, the current system of joint investigations, which DoD Instruction 5505.2 encourages, creates uncertainty and turf battles among the DCIOs, as well as investigative overlap that wastes scarce resources and impedes effectiveness. All of the DCIOs identified DoD Instruction 5505.2 as a cause of conflict in procurement fraud cases. In addition, under the current system, DOJ attorneys and others must contact two or more agencies to coordinate a case or policy. We believe it is essential that DOJ and others who deal with DoD procurement fraud investigations have one place to look when they need help and one organization to hold accountable when there are problems.

Merely revising DoD Instruction 5505.2 would not solve the problems surrounding joint investigations and could create problems of its own. For instance, one option would have been to rewrite the Instruction so that the contracting Service would investigate any associated allegations of fraud even if DLA administered the contract. This would have eliminated a large percentage of joint cases, but it would have created new complexities when the allegation involved a contract or contractor with multiple Service interests, or the allegation otherwise warranted multiple agency involvement. For example, one Justice Department attorney told of a bid-rigging scheme among painting contractors who perform work at all the major military

only an additional 384 agents, supervisors, and support staff, rather than the 462 personnel the MCIOs currently dedicate to procurement fraud. There are wide-ranging opinions as to the number of additional agents necessary for an all-civilian agency to investigate procurement fraud adequately, most of which exceed the DoD IG's estimate.

installations in Japan.⁶³ Such a multiple-Service fraud requires a joint investigation to be effective. In addition, a revised Instruction 5505.2 would not eliminate jurisdictional confusion or redundancy completely, nor would it eliminate the difficulties of coordinating four procurement fraud agencies.

We considered revising DoD Instruction 5505.2 in conjunction with collocation of DCIO fraud agents in certain areas of the country. Under this alternative, fraud agents would share office space as well as all other overhead expenses to save money, and the shared quarters theoretically would facilitate exchange of information among the different agencies to combat fraud in these locations. We found, unfortunately, that existing collocated offices currently conduct very few, if any, joint investigations and do not share information. Furthermore, senior DCIO personnel indicated that collocation would not end the acrimony between the MCIOs and DCIS nor would it work successfully absent a solution to the problems at the headquarters level.⁶⁴ The Chief, Policy and Plans Division, USACIDC, opined that a joint office with DCIS would not be workable because DCIS would not consider the MCIOs as equals and would tend to take over the cases.⁶⁵ Thus, it seems the only benefit to collocation, with or without a revised instruction, would be a reduction in overhead expenses.

We also studied the "disestablishment" of DCIS and the consolidation of all procurement fraud investigations in the MCIOs. Disestablishment would eliminate one of the redundant procurement fraud

investigative organizations, presumably with less disruption than eliminating three major procurement fraud missions would cause. Because most joint investigations, and certainly the investigations in which we found the most rancor -- those between DCIS and one of the MCIOs -- would be eliminated, disestablishment of DCIS would eliminate some redundancy and perhaps much of the current feuding in joint investigations. Moreover, disestablishment of DCIS would be less likely to create the problem that many commanders fear -- lack of responsiveness at the base level -- because the MCIOs would retain the fraud mission.

Nonetheless, we rejected the option of disestablishment because it would face major hurdles, some of which would be insurmountable. First, without DCIS and absent complicated executive agency arrangements, there would be no organization devoted to fraud concerning the Defense agencies. Although some of these agencies, such as the Department of Defense Dependent Schools (DoDDS), are located at the installation level and could be investigated by the local MCIO, most of the agencies are not. Second, eliminating DCIS could be seen as interfering with the DoD IG's statutory responsibilities to investigate fraud in the Department, and, if so, legislation would be necessary to effect disestablishment. Third, disestablishment would not eliminate all redundancy and overlap; three agencies would remain in major defense procurement fraud investigations. Thus, joint investigations would continue, and DOJ attorneys still would find it necessary in some cases to contact more than one agency about an investigation, a practice they say is overly time-consuming, ineffective, and frustrating.

a. Consolidation into One Procurement Fraud Agency

After considering the approaches discussed above, we concluded that combining a cadre of well-trained civilians in one new organization to investigate defense procurement fraud is the best option for the Department of Defense. These individuals should be trained specifically to investigate

⁶³ Interview of Jonathan P. Welch, Trial Attorney, Office of Foreign Litigation, Commercial Litigation Branch, DOJ (Feb. 17, 1994).

⁶⁴ See, e.g., Interview of Ernest A. Simon, Assistant Deputy Director for Fraud, NCIS (Apr. 21, 1994); Interview of John Keenan, Director, Investigations Operations Directorate, DCIS (Apr. 22, 1994).

⁶⁵ Interview of Mervin G. McConnel, Chief, Policy and Plans Division, USACIDC (Apr. 21, 1994).

defense procurement fraud and should investigate only those types of crimes throughout their DoD careers.⁶⁶ They should be civilians so that they will not be subject to transfer to a different location every few years as military personnel are. No longer will prosecutors face the prospect of having an agent transferred while a fraud investigation is ongoing.⁶⁷

Procurement fraud consolidation will abolish joint investigations, as well as the confusion between the DCIOs over joint investigations. No longer will two or three agents need to meet with a prosecutor when one would suffice. With consolidation, prosecutors will need to contact only one agency for each investigation and will be able to work with only one agency to coordinate training or other policy issues.

A consolidated fraud agency has the advantage of being able to spot multi-jurisdictional fraud -- multiple acts of fraud by the same contractor in different judicial districts -- more easily because all fraud cases, including base-level fraud, will be reported to it. As we discuss below, even with a consolidated agency, the MCIOs should continue to investigate single-jurisdiction, base-level fraud; nevertheless, we would have the MCIOs report those cases to the consolidated agency.

Although there are potential disadvantages to consolidating procurement fraud investigations into one agency, we believe that many of these can be ameliorated

⁶⁶ We recommend that, in addition to having a bachelor's degree, fraud agents should receive additional training in accounting, contract management, acquisitions, law, or engineering. This additional training should continue throughout an agent's career. See, *infra*, §VIII.A.2, for a discussion of fraud agent training.

⁶⁷ Losing the detailed knowledge that an agent has gained on a particular case can be devastating to a criminal prosecution or civil lawsuit. Having to bring a new agent up to speed exacts a cost in terms of time and money and can harm an investigation needlessly.

through the manner in which consolidation occurs. The biggest concern we have heard is that a consolidated agency will not be responsive to the needs of the Services. For example, the Service Secretaries fear that, without a fraud investigative unit under their command, they will be unable to fulfill their statutorily mandated acquisition and procurement responsibilities. They are concerned that they will have to "wait in line" to have their needs met or that the investigative priorities of the consolidated unit will differ from theirs, especially if it is placed under the DoD IG. Service suspension and debarment agencies, based on the current actions of DCIS, question whether a consolidated agency will communicate with them frequently and thoroughly enough to maintain effective remedies programs. The Service materiel commands also worry about the responsiveness of a consolidated unit and how it will affect their ability to manage Service procurement. Commanding officers, particularly those responsible for military installations, fear that a consolidated agency will not be interested in smaller fraud cases that may not be worth much money but that have a devastating effect on morale and readiness.

These are real concerns, but the Service Secretaries rely on Defense agencies to fulfill their responsibilities in other areas, and we see nothing that makes procurement fraud significantly different. For instance, major procurement fraud investigations, like major procurement contract administration, generally are long-term, document intensive projects that do not require immediate responses. This contrasts with the quick response often required in general crimes investigations.⁶⁸ Indeed, the Services rely on DLA, through the Defense Contract Management Command, to administer nearly all their procurement contracts.⁶⁹ If a

⁶⁸ See, *infra*, §III.B.1.a, for a discussion of consolidation of general crimes investigations.

⁶⁹ None of the respondents to our draft report opposed to procurement fraud consolidation addressed the similarities between the role of DLA and a consolidated fraud unit.

consolidated agency is not responsive to the Services' needs, the Secretaries have a forum in which to bring these failures to the attention of the DoD IG -- the Secretary's Board on Investigations.

In addition to the Secretary's Board on Investigations, Service Secretaries will have a second means of ensuring responsive investigations. The MCIOs must retain the capability to investigate base-level fraud in those areas for which a commander is responsible or that have an immediate effect on base personnel and family members. Commanders in the field primarily are concerned with base-level fraud, not major procurement fraud. A Navy admiral told us that his priorities are to suppress general crime activities such as drugs, gangs, assaults, and prostitution. He felt procurement fraud lent itself to consolidation because it is a national-level issue that does not affect the local area base commander and would be investigated better by a DoD-level agency that can concentrate on large-scale, high-profile cases.⁷⁰ A former Army commander stated that installation commanders are not concerned about procurement fraud that takes place out of their area of responsibility. As a result, he opined, procurement fraud above the installation level should be consolidated.⁷¹ While agreeing that consolidation may be possible, an Army general recommended that installation level fraud remain with the MCIO.⁷² A Marine colonel who has served in a variety of command and staff assignments throughout his career stated he had no opinion on the consolidation of procurement fraud investigations because he believes it is not a

base-level priority.⁷³ But, servicemembers and their families have a direct interest in services such as payroll, commissaries, schools, and base construction, and any glitches need to be investigated promptly. Commanders also should retain the capability to request a prompt and thorough investigation of items for which they can be held criminally liable. A commander cannot afford to wait in line to have these investigations completed.

Finally, with only one agency investigating procurement fraud, if Service needs are not met, that agency will not be able to shirk responsibility by pointing a finger at someone else. Nevertheless, the new consolidated agency must take some concrete steps to ensure responsiveness. The organization, for example, should consider designating a high ranking manager as the liaison for remedies coordination and implement a system for ensuring that Service remedies coordinators and debarment officials have timely access to necessary information. The organization should establish a vehicle for regular communication with the MCIOs, sharing the latest fraud investigative techniques and other expertise with agents conducting installation-level fraud. These and other reforms should result in an efficient, effective, and responsive consolidated fraud organization.

We believe that consolidating procurement fraud investigations into one agency while leaving the MCIOs with the capacity to respond to base-level fraud is the best organizational solution for procurement fraud investigations. Leaving the MCIOs with any residual fraud capacity, however, has the potential to encourage them to recreate their own major procurement fraud units, causing the same jurisdictional conflicts that exist between the agencies now. To avoid this scenario, the jurisdictional line between the consolidated fraud unit and the MCIOs needs to be drawn with as much precision as possible, and the Secretary's Board on

⁷⁰ Interview of Rear Admiral Frances K. Holian, Commander, San Diego Naval Base, CA (Apr. 13, 1994).

⁷¹ Interview of Colonel Thomas J. McHugh, USA, Inspector General, Arizona National Guard (Mar. 8-9, 1994).

⁷² Interview of Lieutenant General Henry H. Shelton, USA, Commander, XVIII Airborne Corps, Ft. Bragg, NC (Mar. 21, 1994).

⁷³ Interview of Colonel Elijah D. Clark, USMC, Circuit Military Judge, Camp Pendleton, CA (Apr. 11, 1994).

Investigations must ensure the investigative agencies stay on their side of that line. With program budget authority over the DCIOs, the Assistant Secretary of Defense (C3I), a member of the Board on Investigations, can play a pivotal role in encouraging investigative agencies to remain within their respective jurisdictions. The Board on Investigations also must decide disputes as to where a class of cases falls.

During the course of our investigation we have studied other consolidations, such as the Defense Investigative Service, Defense Contract Management Command, DFAS, and the Army/Air Force Exchange Service. We saw problems with some of these consolidations, particularly with implementation. Although we conclude procurement fraud investigations should be consolidated, these implementation problems must be avoided. Probably the most important thing we learned is that adequate start-up time significantly improves the chances of a consolidation's success. The Secretary's Board on Investigations should listen to the unit's customers and treat consolidation as a process rather than a one-time event. With time, the Board will be able to remove glitches gradually from the system, rather than having to deal with them all at once. Furthermore, the customers of the new consolidated fraud agency -- the commanders and prosecutors who will be relying on the unit -- must be educated on how the new system will work, as well as what problems may occur during the implementation phase.

b. Location of the Consolidated Unit

The consolidated defense procurement fraud investigative unit -- the Defense Fraud Investigative Service (DFIS)⁷⁴ -- should be placed inside the Office of the DoD IG, with DCIS forming its nucleus. DCIS originally

was intended to be just such a specialized unit, and consolidation under the DoD IG would be consistent with congressional intent that the DoD IG ferret out waste, fraud, and abuse in the Department. Furthermore, placing the unit under the DoD IG means no new organization or infrastructure need be created; what exists now simply will be expanded. Coordination with key fraud programs already located within the Office of the DoD IG, such as the Voluntary Disclosure Program and False Claims Act enforcement, will be easier with the consolidated fraud unit located under the DoD IG.

We considered whether the consolidated fraud unit should be placed somewhere other than in the DoD IG's office, but decided against this option. Under the status quo, the MCIOs argue that the DoD IG cannot accomplish his or her oversight role of the entire Department objectively when one of the office's units, namely DCIS, is in direct competition with the MCIOs for funding, cases, and prestige. To the degree this conflict exists, consolidation will reduce its effect in that the consolidated fraud unit usually will not be in direct competition with the MCIOs for cases. The MCIOs argue further that there is an inherent conflict in the DoD IG creating policy for all DCIOs through CIPD while having operational control over DCIS. To the extent there is a conflict, however, it is one Congress created when it gave the DoD IG the responsibility for fraud investigations, as well as for criminal policy and oversight. Given that Congress has made the DoD IG responsible for ferreting out fraud, waste, and abuse within DoD, the DoD IG needs an investigative arm for doing so. Thus, it would be duplicative to maintain an investigative arm within DoD IG while creating a consolidated fraud unit outside DoD IG. The DoD IG's statutory duties and the costs of creating a new infrastructure underlie our conclusion that DFIS belongs within the Office of the DoD IG.

⁷⁴ This name change -- from DCIS to DFIS -- reflects the Advisory Board's strong belief that this new agency should focus on all fraud remedies, not just criminal ones, and that this agency should concentrate on fraud investigations.

c. Jurisdiction of the Consolidated Unit

If procurement fraud investigations are to be consolidated in one unit -- the new DFIS -- it is crucial that the jurisdiction of the new unit be delineated plainly. Otherwise, the infighting and lack of cooperation among the DCIOs will continue. Furthermore, the Secretary's Board on Investigations will find itself making arbitrary distinctions and unable to say whether DFIS is meeting the needs of the Services.

Drawing the jurisdictional line for the new procurement fraud unit was a difficult task. Ultimately, we concluded the consolidated unit must be responsible for investigating all fraud in DoD with the exception of installation-level fraud. The cases assigned to DFIS will tend to be more complex, time consuming, and document intensive than those assigned to the MCIOs; they also will tend to involve multiple-service and Defense agency contracts. Therefore, it is appropriate for a consolidated unit of specially trained agents to investigate them. Installation-level cases, meanwhile, are the ones that are important to commanders in their role as "mayor" of the installation and for which the commanders require a responsive indigenous investigative capability. The MCIOs are now responsive to commanders' needs on these investigations, and they should remain responsible for them.

The MCIOs should continue to investigate fraud directed at or affecting individual installations. This encompasses fraud directed at activities for which installation commanders have contracting authority or for which they are otherwise responsible, especially those activities affecting the health, welfare, or morale of servicemembers and their families. Specific examples include on-base building construction, repair, and maintenance for which the base contracted; on-base road construction and repair; and on-base environmental clean up. The MCIOs should have investigative jurisdiction over the activities of certain Defense agencies, such as DFAS and DoDDS, when their activities are

directed toward individual servicemembers or their families. The MCIOs also should be responsible for fraud relating to locally purchased goods and individual theft at commissaries located on military reservations.

Some of the installation-level cases we describe will involve large amounts of money, but most will be smaller cases and the scope of the fraud will affect a narrower population than the fraud DFIS will investigate. Because the MCIOs will report all fraud cases, even those within their jurisdiction, to DFIS, that agency will be able to recognize those cases that appear to involve installation-level fraud but, in fact, transcend an individual installation. For example, DFIS will be able to detect and investigate cases in which a contractor engages in bid-rigging on several bases or an environmental clean-up contractor violates contract specifications in similar ways at more than one installation.

d. The Organization of DFIS

DFIS could be organized and staffed in a number of ways. Under the approach we initially preferred, some portion of the MCIOs' procurement fraud positions would have been added permanently to DFIS and the people currently in those positions would have been given the opportunity to move with them. The MCIOs, however, would have retained some agents experienced in procurement fraud. Some of the retained agents would have worked on or supervised more junior agents working on installation-level fraud; others would have rotated through DFIS. During their tours of rotation, agents would have been under the operational control of the DoD IG, but they would have remained employees of their respective MCIOs.⁷⁵

We believed an integrated agency had several advantages over a single-Service or

⁷⁵ We did not attempt to resolve the issue of which agency's budget would have been charged for these agents.

single-agency organization. An integrated DFIS would have benefited from the fresh ideas and perspectives of Service personnel. It may have fostered improved cooperation and communication among the Services and the DoD IG by bringing DCIO counterparts together. The influx of MCIO personnel would have acquainted DoD personnel and agents from the other MCIOs with needs and missions of the other Services.

Perhaps more importantly, we believed the Services would have benefited from added DFIS responsiveness: agents who knew the concerns and needs of the Services would have been working on major procurement fraud at the DoD level. In addition, after a tour, an agent would have returned to the parent MCIO with additional fraud experience to apply to installation-level fraud. Integration also would have avoided a result that agents, commanders, and prosecutors have feared: that consolidation would result in local sources of information being lost. We concluded that would have been less likely to occur when an MCIO agent on base could speak to another MCIO agent who happened to be assigned to DFIS at the time.

Integration also would have allowed the staffing of DFIS to be implemented more gradually than complete consolidation would, preventing major upheaval and disruption in the process. For example, the Secretary's Board on Investigations initially could have moved only a limited number of permanent positions and rotated the remainder until it had a better sense of what the new agency needed to complete its mission. This also would have allowed fraud agents currently working for MCIOs additional time to determine whether they were better suited for major procurement fraud investigations or a mixture of general crimes and installation-level fraud.

We foresaw that there would be disadvantages to an integrated fraud unit, but we believed that they would be outweighed by the advantages, particularly in the eyes of the Services. When we circulated a draft of our report, however, we learned that neither the Services nor the DoD IG agreed with our

assessment.⁷⁶ The Navy agreed with the concept in principle, but only if the new agency were outside the Office of the DoD IG with full integration of MCIO resources at every level of staffing and operations. As we noted earlier, this is not a feasible option in light of the DoD IG's statutory responsibilities. The Army, the Air Force, and the DoD IG did not agree with integration even in principle. The Army questioned the utility of the concept and argued that the practical problems, such as personnel management, payroll, work allocation, and staffing equity, were more difficult than we envisioned. The Air Force and the DoD IG concurred. The following comments of the Air Force summarize the opposition:

"Integration" is the least desirable of any fraud investigative options, because Service Secretaries retain a critical and substantial responsibility, yet lose control [of] a vital execution tool and then still have to pay the bill.

To work successfully, integration would have required cooperation and enthusiasm from the Services and the DoD IG. Their universal opposition to the plan led us to conclude that it is not the best method of consolidation.

We recommend instead that the Secretary transfer the major procurement fraud resources of the MCIOs to the Office of the DoD IG, where they will be merged with the resources of DCIS to create DFIS. Sufficient resources should be left with the MCIOs to continue their installation-level fraud missions. Those fraud agents and supervisors who are qualified civilians, as well as support personnel, should be offered the opportunity to join the new agency.⁷⁷ The Board on Investigations should oversee the transfer of resources to minimize the disruption to ongoing investigations.

⁷⁶ OSD components also disagreed with our proposed organizational structure.

⁷⁷ Only those agents who are civilians with at least a bachelor's degree should be allowed to move to the new procurement fraud unit.

Because the consolidated unit will not be integrated, it is even more important that it adopt the suggestions we have made to improve its responsiveness to the Services.

2. Create a Better System for Rewarding Agents

Good supervisors should be able to measure the quality of an agent's performance without an undue emphasis on standards such as the number of indictments and convictions. The Secretary's Board on Investigations should work with agents, supervisors, and prosecutors to create more realistic standards on which to judge an agent's performance. These standards could incorporate indictments and convictions, but they should be broader than just those two measures. New standards should increase agents' willingness to work on civil cases and should make it easier for them to be more objective about whether a case requires a criminal, civil, or administrative remedy, or no remedy at all.

3. Emphasize Non-Criminal Remedies

The new consolidated unit must emphasize all fraud remedies, not just the criminal ones. DFIS must work with the Services far more closely than DCIS does to further contractual and administrative remedies. DFIS also must be responsive to DOJ's Civil Division in its pursuit of civil remedies. Today, administrative and civil remedies are as important as -- or even more important than -- criminal remedies in deterring procurement fraud.^{7 8}

⁷⁸ As an illustration, the Department of Defense recovered more than \$578 million in civil settlements and judgments in fiscal year 1994.

III. Investigation of General Crimes

The investigation of general crimes -- which we define to include all of the "city detective" crimes, such as violent crimes, sex crimes, thefts and larcenies, and drug crimes -- is the primary mission of all of the Service criminal investigative organizations. This includes the MCIOs, the police organizations, and the Marine Corps CID. This emphasis on general crimes distinguishes these organizations from most of their fellow federal law enforcement organizations. These organizations exist to police a population -- the Services -- and to promote good order and discipline.

A. Findings

1. DCIOs

a. DCIS

Unlike the other DCIOs, DCIS's primary mission is not general crimes investigations; it is the investigation of procurement fraud cases. Nonetheless, on occasion the DoD IG calls upon DCIS to conduct an investigation of a general crime. The most noteworthy example of this is DCIS's investigation of Tailhook.⁷⁹ Because of the numerous

⁷⁹ Throughout this report we refer to investigations of Tailhook. Because these investigations are perhaps the most notorious in recent DoD history, and because they provide examples of many of the problems we have identified, we have found them very useful to our study. Very briefly, the Tailhook investigations all stem from alleged incidents of criminal assault, sexual harassment, and other misconduct that occurred at the Tailhook Convention, an annual gathering of Navy and Marine Corps aviators, held in September 1991 in Las Vegas, Nevada. After reports of the incidents at the Tailhook Convention came to the attention of the Navy's leadership, both the Naval Investigative Service (now NCIS) and the Naval IG conducted investigations of the incidents. Later, at the request of the Secretary of the Navy, the DoD IG conducted two investigations

criticisms we heard during the course of the interviews we conducted concerning DCIS's investigation of Tailhook, we believe DCIS's handling of this case requires discussion.

A common theme in the criticisms we heard of DCIS's Tailhook investigation was that DCIS investigators did not understand the military justice system, the Uniform Code of Military Justice, and investigative practices in a military environment. This is not surprising. DCIS's primary mission is investigation of fraud; DCIS training for its agents does not include training in general crimes investigations and DCIS agents do not ordinarily gain experience in general crimes investigations.⁸⁰ The Assistant IG for Investigations, who is the Director of DCIS, told us that many DCIS agents have extensive experience with general crimes investigations, many of them in the military setting, before they come to DCIS, and DCIS staffed the Tailhook investigation with these investigators. He agreed, however, that the general crimes and military experience of these investigators was, for the most part, not current and that MCIO investigators would have been more comfortable with the military

related to Tailhook. The first DoD IG investigation resulted in a report known as *Tailhook I*, which evaluated the Navy's conduct and management of its investigations. The Departmental Inquiries Division of the DoD IG was primarily responsible for the investigation of the *Tailhook I* report. The second DoD IG investigation was a reinvestigation of the incidents at the 1991 Tailhook convention; the report of that investigation is known as *Tailhook II*. Investigators from DCIS conducted the bulk of this second DoD IG investigation.

⁸⁰ DCIS does conduct some general investigations as a part of its mission. A Memorandum from the Director, Program Review and Analysis, DCIS, for the Advisory Board (Nov. 10, 1994) reported that during fiscal years 1991-1993, 6 percent of DCIS investigations pertained to theft. An additional 8 percent of DCIS investigations were identified as "other, which included pay and allowance, commissary, gratuities, customs violations, forgery, etc, which are either non-procurement fraud or general crimes in nature." DCIS conducts very few, if any, persons-related criminal investigations.

justice system than were the DCIS investigators.⁸¹

Another problem for DCIS in the Tailhook investigation, which perhaps exacerbated problems caused by lack of familiarity with Uniform Code of Military Justice general crimes investigations, was that DCIS did not obtain sufficient legal advice from experienced Navy prosecutors. From the beginning of the investigation, DCIS management requested that the Navy assign the prosecutors who actually would prosecute the Tailhook cases. The Navy could not do this until a convening authority had been appointed, which did not happen until late in the investigation.⁸² According to the Assistant IG for Investigations, DCIS did consult regularly with a senior Navy JAG officer, a lawyer from the DoD General Counsel's office with experience as an Army JAG officer, and lawyers from the local Navy Legal Services Offices (NLSOs) at Navy and Marine Corps installations. DCIS did not, however, ever request that NLSO lawyers who would not necessarily be the lawyers prosecuting the cases be assigned to provide advice throughout the investigation. The reason for this, according to the Assistant IG for Investigations, was that he believed DCIS had sufficient general legal advice, but what it needed was the kind of help only the prosecutors on the individual cases could give, such as further direction about how the cases would be pursued. For example, he wanted to be able to decide issues such as whether the Navy was interested in pursuing officers whose only offense was public drunkenness.⁸³ DCIS

management believed it would have access to these prosecutors sooner than it did.⁸⁴ Although there is no doubt working with the prosecutors for the actual cases would have been extremely useful, in an investigation as massive and difficult as Tailhook, DCIS also would have benefited from advice from additional, experienced Navy JAG officers, whether or not they ultimately would have prosecuted the cases.

By far, the most frequent criticism of DCIS's Tailhook investigation is that it relied too heavily on the use of reports of interview that contained only summaries and that those summaries were useless from a prosecutorial standpoint.⁸⁵ One Navy senior defense counsel we interviewed, who was the head defense counsel for those charged in the Tailhook investigation, explained that he reinterviewed 200 people whom DCIS had questioned during the course of its investigation and only two of those individuals said DCIS's summary of their interview was accurate. In one case, he told us, DCIS had attributed an interview to the wrong person. He also said exculpatory statements were left out of some of the summaries.⁸⁶ One of the Navy's Tailhook prosecutors complained that the DCIS agents could not produce sufficient agent notes to support their reports of interview summaries. He said this essentially "neutralized" the statements because even if counsel suspected the subject of an interview was changing his or her story or lying, the summary and the agent's notes could not be used to prove it. He attributed this to a lack of training and experience in the investigation of general crimes.⁸⁷ Several of the judge advocates we

to pursue.

⁸¹ Interview of Donald Mancuso, Assistant IG for Investigations (Oct. 12, 1994).

⁸² *Id.* The Navy appointed a convening authority on February 5, 1993, and the Assistant IG for Investigations met with Navy prosecutors the next day. *Id.*

⁸³ Telephone interview of Donald Mancuso, Assistant IG for Investigations (Nov. 10, 1994). In fact, Service prosecutors are not as able to provide this type of direction as are Assistant U.S. Attorneys in the civilian federal system. In the military, commanders make the decisions about what charges

⁸⁴ *Id.*

⁸⁵ E.g., Interview of Captain C.E. Ellis, Jr., Commanding Officer, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994).

⁸⁶ Interview of Lieutenant Commander Chip Meade, Senior Defense Counsel, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994).

⁸⁷ Interview of Lieutenant Commander Chris Morin,

interviewed asserted that if the agents had been advised by attorneys with prosecutorial experience, those attorneys could have reviewed the interview summaries and advised the agents of the need for follow-up questions.⁸⁸

There were also a number of criticisms regarding DCIS agents' lack of familiarity with the Uniform Code of Military Justice and their failure to provide proper rights advisement under Article 31 of the Code. Again, those Navy and Marine Corps judge advocates who were familiar with DCIS's investigation asserted that agents were not familiar with the requirement in Article 31

Senior Defense Counsel, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994).

⁸⁸ Captain William T. Vest, Jr., USN, the circuit military judge who ruled on the defense motion to dismiss in the cases of three Navy and Marine Corps officers facing court-martial charges in connection with Tailhook, also found problems with DCIS's reports of interviews. In his opinion in *United States v. Miller*, U.S. Navy, Navy Marine Corps Trial Judiciary, Tidewater Judicial Circuit (Feb. 8, 1994), Judge Vest criticized DCIS agents for relying on memoranda summarizing interviews rather than using written sworn statements. The Assistant IG for Investigations told us his agents took sworn statements from individuals when something of consequence was revealed and that DCIS audio taped some interviews. Moreover, over 1,000 of the approximately 3,700 interviews DCIS agents conducted were from people who the agents believed were involved only peripherally in the activities being investigated; in these cases, the witnesses were asked questions from a 15-question questionnaire and signed the questionnaire when it was complete. Interview of Donald Mancuso, Assistant IG for Investigations (Oct. 12, 1994). In fact, the reliance on reports of interviews rather than sworn statements is common in the civilian federal law enforcement community where prosecutors often obtain the equivalent of sworn statements through the use of the grand jury system. As we note elsewhere in this report, Assistant U.S. Attorneys often do not like sworn statements because witnesses are "locked in" to a statement. The use of sworn written statements is common, however, in the military justice system, and DCIS's failure to use written sworn statements for more witnesses, again, demonstrates its lack of familiarity with practices in the military justice system.

that a subject be informed of the "nature of the accusation" before being questioned. Others said even when the agents were aware of this requirement, they were not familiar enough with the Code to be able to inform the subjects of the offense they were suspected of committing. The judge advocates who criticized DCIS agents for their lack of knowledge of Article 31 and offenses under the Uniform Code of Military Justice said it evidenced both a lack of training and a lack of sufficient legal guidance. Several of the defense counsel we interviewed commented that if the agents had access to attorneys familiar with prosecuting cases under the Code, they could have received guidance on how and when to read rights and could have conferred with the attorneys to determine the offenses under the Code of which the subjects were suspected.⁸⁹

Several Navy and Marine Corps defense counsel, judge advocates, and commanding officers also complained of DCIS's heavy-handed interview techniques. One Marine Corps defense counsel commented that DCIS agents threatened interviewees by telling them they would "go public with the investigation" unless the subject cooperated with the investigators. He also said he was aware of one incident in which a DCIS agent threatened to throw a civilian defense counsel out of the room if he did not leave so the agent could interview the witness without counsel present.⁹⁰ A Navy defense counsel said a senior DCIS investigator told one subject "if you refuse to take that polygraph, I can call up the Secretary of the Navy and

⁸⁹ The Assistant IG for Investigations told us DCIS had some difficulty in determining the appropriate way to handle rights advisement. For approximately the first two weeks of the investigation, investigators advised every person interviewed of his or her Article 31 rights. They stopped this practice because of a concern that the rights advisement was "watered down" when they approached it in this manner. After that, the investigators were told to advise only witnesses they suspected of a crime.

⁹⁰ Interview of Lieutenant Colonel Robert W. Leas, USMC, Regional Defense Counsel, Eastern Region, Quantico, VA (Mar. 25, 1994).

end your career tomorrow."⁹¹ The Assistant IG for Investigations acknowledged that DCIS used "aggressive" interview methods, but said he believes those methods were appropriate. He said, for example, investigators sometimes would tell subjects that they planned to inform the Navy that the subjects were lying. He does not, however, consider their approach unduly threatening or aggressive and said the techniques DCIS agents used are used commonly in the civilian law enforcement community.⁹²

In short, our interviews with people familiar with DCIS's investigation of Tailhook, our review of the training DCIS agents receive,⁹³ and our reading of Judge Vest's opinion in *United States v. Miller* lead us to conclude that although many DCIS agents have experience in general crimes investigations, their experience is not current and, more importantly, they often are not experienced in investigation of offenses under the Uniform Code of Military Justice. All investigators should coordinate more closely with experienced legal counsel, but DCIS agents in particular must have access to and consult with judge advocates who have served as trial counsel when and if they are ever called upon to conduct investigations of violations of the Uniform Code of Military Justice.

b. MCIOs

(1) Quality

The investigation of general crimes is the "meat-and-potatoes" work of the MCIOs. Without belittling their other missions, it is fair to say that USACIDC, NCIS, and

⁹¹ Interview of Lieutenant Commander Chip Meade, Senior Defense Counsel, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994).

⁹² Interview of Donald Mancuso, Assistant IG for Investigations (Oct. 12, 1994).

⁹³ See, *infra*, §§VIII.A.2.a(3) and d(1), and Vol. II, Supplemental Reports, §§IV.B.1.a and 3.a, for discussion of DCIS training.

AFOSI do (and should) exist primarily to promote good order and discipline through the investigation of general crimes. The overall quality of the MCIOs' general crime investigations and the agents conducting them is quite good. We heard very few criticisms of the quality of MCIO agents and their investigations. Indeed, commanders, judge advocates, and Assistant U.S. Attorneys praised the professionalism, responsiveness, thoroughness, and independence of MCIO agents. The confidence expressed by the commanders and judge advocates applies to all MCIO agents, regardless of rank or whether the agents are civilian or military. Commanders and judge advocates also frequently mentioned the quality and effectiveness of their MCIO's relationship with local law enforcement as a factor that enables the MCIOs to be more effective in their investigations. Many of the Assistant U.S. Attorneys we interviewed compared the quality of MCIO agents and their investigations favorably to that of FBI agents. The former Service Secretaries we interviewed also generally were satisfied with the quality of the MCIO agents in the Services they had administered. Several of the Army commanders and judge advocates interviewed mentioned the high quality of USACIDC's murder investigations.

The success of the MCIOs perhaps can be seen most easily in some of their statistics. The Uniform Crime Report, for example, reports that in calendar year 1992 law enforcement agencies in the general population solved approximately 65 percent of all murder cases. In the Services, by contrast, the MCIOs solved approximately 95 percent of all murder cases.⁹⁴

Although most of the comments regarding the quality of the MCIO agents and their investigations were positive, we heard from judge advocates and commanders that

⁹⁴ Due to varying definitions of "solved," the rate of solved murders for the MCIOs may be inflated by a few percentage points. We also recognize that criminal investigations conducted in the military community may differ from those performed by civilian law enforcement.

MCIO agents sometimes focus too quickly on a specific subject. As a result, these critics said, the agents do not track down all relevant leads before interviewing subjects. Others expressed this same criticism by saying that MCIO agents often rely too heavily on confessions instead of pursuing all possible leads. A few judge advocates said some agents are more interested in writing a report and closing the case than developing and presenting a case that meets the prosecutor's needs. They perceive that agents are graded by the number of cases they close and not the quality or usefulness of the case they present to the command.

Some defense counsel and representatives of subjects' rights groups interviewed complained that MCIO agents are not trained thoroughly in how to protect a subject's rights. In particular, they said agents do not inform subjects adequately of the crimes for which they are being investigated as required by Article 31 of the Uniform Code of Military Justice. A few defense counsel and subjects' rights groups also criticized the MCIO agents for "coercing confessions," although they provided no specific examples of such behavior. The staff judge advocates interviewed largely disagreed; they do not think coerced confessions are common in MCIO investigations. Several Navy and Marine Corps commanders and staff judge advocates, however, criticized NCIS agents for having abusive interview techniques; that is, the agents insult, scream at, and berate interviewees.

One area of potentially great concern for the quality of USACIDC investigations is the enormous resources that the agency must devote to its protective services mission. USACIDC has a Protective Services Unit with 43 positions, 39 of whom are active duty special agents. An additional 13 USACIDC special agents throughout the agency are dedicated to the protective services mission. Although AFOSI and NCIS do have some protective services duties, the Army -- through USACIDC -- is responsible for the bulk of DoD protective services, including protection for the Secretary and Deputy Secretary of Defense, the Chairman and Vice-Chairman of the Joint Chiefs of

Staff, and visiting high-level foreign dignitaries.⁹⁵ The Army has never given USACIDC personnel resources for the missions of the Protective Services Unit. The Protective Services Unit was never intended to execute the entire protective services mission itself; it has always relied on support from subordinate USACIDC field elements. According to the Protective Services Unit special agent-in-charge, downsizing the Army has "wreaked havoc on the field's ability to meet support requirements."⁹⁶ While USACIDC as a whole has been downsizing, its protective services mission has not decreased. Thus, the adverse effect of this mission on USACIDC field investigative operations is increasing.

(2) Responsiveness

USACIDC and AFOSI are responsive to the needs of their Services and the commands they serve. Although many Navy and Marine Corps commanders said NCIS is responsive to their needs, NCIS needs to work at being more responsive and to place a greater emphasis on keeping commanders informed of its investigations.

Army and Air Force commanders and staff judge advocates generally had high praise for the responsiveness of USACIDC and AFOSI. Army commanders at all levels praised USACIDC's responsiveness. They said USACIDC is quick to respond to their requests for investigative support and keeps them informed of the status of ongoing cases. USACIDC's responsiveness is due in part to the fact that USACIDC Regulation 195-1 requires USACIDC field offices to provide a copy of an initial report of investigation to concerned commanders and USACIDC supervisors within three working days after the office has determined that "credible information exists that an offense has been committed that falls within USACIDC's

⁹⁵ See Vol. II, Supplemental Reports, §II.E, for additional discussion of protective services.

⁹⁶ Telephone interview of Special Agent-in-Charge Wayne T. Nordolillo, USACIDC (July 18, 1994).

investigative responsibility." Air Force wing commanders and staff judge advocates attribute the high level of responsiveness from AFOSI in part to the weekly or biweekly "status of discipline" meetings that the wing commander holds with the staff judge advocate, the AFOSI detachment commander, and the security police commander. The purpose of the meetings is to brief the wing commander on the status of all investigations being conducted on the installation and the prosecutive status of all criminal cases. Wing commanders said these meetings are an excellent tool for keeping informed of the status of ongoing cases, for fostering coordination between the lawyers and investigators, and for sharing criminal intelligence between AFOSI and the security police. In addition, AFOSI Regulation 124-22 states, "AFOSI field unit commanders must ensure that appropriate Air Force installation/wing commanders receive timely briefings on all allegations on which AFOSI initiates an investigation."

Although the NCIS Manual for Investigations requires NCIS agents to keep commanders and prosecutorial authorities apprised of the progress of investigations, NCIS agents do not always inform commanders of investigations they conduct within their command, nor do they always brief commanders periodically on the status of investigations being conducted within the command. This often results in commanders viewing NCIS as an outside agency that does not have a clear affiliation with the Service.⁹⁷ According to commanders and judge advocates we interviewed, NCIS agents often inform their higher headquarters of cases without informing the local commander, which can lead to an officer on the Navy staff becoming aware of an investigation before the local commander.

A number of times in our interviews with Navy and Marine Corps commanding officers and judge advocates we were told that NCIS is interested only in the "big,"

⁹⁷ Indeed, some of the NCIS agents we interviewed clearly do not consider themselves or their agency part of the Navy.

high-profile cases -- it tends to decline smaller felony cases. One reason NCIS may be more likely to decline smaller felony cases than the other MCIOs may have little to do with interest. It may be a result of the fact that NCIS has fewer agents dedicated to general crimes investigations than the other MCIOs. For example, NCIS has approximately one general crimes investigator for every 1,605 Navy and Marine Corps personnel; AFOSI, in contrast, has one general crimes investigator for every 540 Air Force personnel and the Army has one for every 1,141 Army personnel. Whatever the reason NCIS declines to investigate smaller felony cases, the declination results in the Navy using more commander-directed investigations or police investigations for cases that MCIO agents would investigate in the Army and the Air Force.⁹⁸

In addition to NCIS agents sometimes not informing commanders of investigations, several of the Marine Corps commanding officers and judge advocates attribute the perception that NCIS is too far removed from command, in part, to the fact that NCIS has very few military agents. It is apparent from the interviews we conducted with Navy and Marine Corps commanders and judge advocates that the civilian agents in NCIS are not viewed as an integral part of these organizations. One Marine Corps commander, although pleased with NCIS's responsiveness, commented that Marine Corps CID agents understand how the Marine Corps units operate and function, which allows them to investigate crime in the units better.⁹⁹ In contrast, many Army and Air Force commanders we interviewed attribute the effectiveness of USACIDC and AFOSI to the fact that their military agents understand the Service and its culture. Army and Air Force commanders also said they believe their Services' military MCIO agents

⁹⁸ In the Marine Corps, Marine Corps CID agents fill this gap. See, *infra*, §III.A.3, for discussion of Marine Corps CID.

⁹⁹ Interview of Lieutenant Colonel Richard T. Tryon, Commander, 2d Battalion, 8th Marines (Mar. 25, 1994).

are more likely to discover crime because they are a part of and have a close association with the Service.

Some Marine Corps commanding officers and judge advocates commented that because NCIS is not viewed as part of the Service, it is more difficult for NCIS agents to discover crime within the Service. Several commanders commented that because NCIS is "too far removed from command," it does not hear of crimes unless the crimes are reported to it. Several NCIS agents also complained that Navy commanders often are hesitant to report crime to NCIS. The lack of trust and the perception that NCIS is not part of the command affect NCIS's ability to discover crime and to focus clearly on the needs of the Navy. The perception that NCIS is not closely associated with the Navy has been exacerbated further by the recent reorganization of NCIS, which included the removal of virtually all military members from leadership or supervisory positions.

(3) Independence

A principal focus of the Board in its study of the investigative organizations in DoD was to evaluate the ability of investigators to investigate independently and without bias members of their own Service or organization. The ability to be self-critical is indispensable to any organization, and that requires the ability to investigate and discipline members of the organization. To be credible and effective, investigators must be sufficiently independent of the people and organizations they investigate to avoid improper command influence, whether overt or subtle. Overall, we found that the MCIOs have implemented extensive protections for the independence of their special agents, and those protections are effective.

(a) Organizational Structure

Although the MCIOs have somewhat different organizational structures, each is designed to provide the required investigative independence to its special agents.¹⁰⁰ All

field elements of each MCIO report within a "stovepipe" chain of command to a central headquarters. The head of USACIDC, the Commanding General, reports to the Secretary and Chief of Staff of the Army.¹⁰¹ The Director of NCIS reports to the Secretary of the Navy through the Navy General Counsel regarding investigative matters.¹⁰² AFOSI's Commander reports directly to the Air Force Inspector General; the Air Force Inspector General, in turn, reports to the Secretary of the Air Force.¹⁰³

All MCIO special agents and supervisory personnel have career paths exclusively within their organizations, with one exception. The commissioned officers assigned to USACIDC are military police (MP) officers; these officers do not remain with USACIDC for their entire military career, but rather rotate through the organization as staff, supervisors, or commanders. MP officer assignments to USACIDC generally are two to three years in duration. Some MP officers may have multiple tours in USACIDC, but the assignments rarely are consecutive. Upon completion of a USACIDC assignment, MP officers generally return to the MP corps.

USACIDC headquarters personnel and other MP officers explained why USACIDC has this rotation system for its commissioned officers. Between 1971 and 1974, USACIDC experimented with the concept of officer agents; it found, however, that the

and Vol. II, The Organizations, §II, for detailed descriptions of the MCIOs' organizational structures.

¹⁰¹ Army Reg. 10-87, ¶4-4(a), *Major Commands in the Continental United States*.

¹⁰² NCIS response to RFI CLOC-002 (Feb. 28, 1994). No Navy instruction or regulation requires the reporting relationship through the General Counsel. According to SECNAVINST 5520.3B, the Director reports directly to the Secretary. The current Secretary of the Navy directed the General Counsel to take on this responsibility.

¹⁰³ Air Force Reg. 23-18 ¶4(b)(2), *Organization and Mission -- Field*.

¹⁰⁰ See, *supra*, The DoD Investigative Structure, §II,

practice of having officers specialize in a technical field such as criminal investigations was incompatible with the Army's philosophy for developing officers. The Army wants its commissioned officers to be generalists; to be competitive for promotion in the Army, a commissioned officer must have two viable career fields. If MP officers became special agents, and therefore remained exclusively in USACIDC assignments, they would not be able to compete with other Army officers for promotion. Moreover, it is not possible to give these officers a separate career field, so that they are not required to compete against other officers. Because there are only 66 MP officer positions in USACIDC, it is too small to constitute a viable career field for Army officers.

The policy of rotating officers through USACIDC has at least the potential for compromising their independence. When in USACIDC assignments, these officers know that they will, before too long, be in another command, perhaps in the chain of command of someone USACIDC is investigating. From what we heard in many interviews, this does not affect the independence of the organization as a practical matter.¹⁰⁴ Very few commanders or MP officers recognize even the potential for the rotation system to affect independence. One senior MP officer, who had completed numerous USACIDC assignments, did acknowledge that this issue is a "concern" of his. He explained that he had been the object of attempts at what he termed "implied" command influence; that is, he had senior officers tell him, "I wish you wouldn't investigate, but we understand."¹⁰⁵ He said, however, that he countered this problem by explaining his obligations pursuant to the Army's and USACIDC's regulations. A former USACIDC commander also recognized the rotation of

MP officers as a potential problem, but said it is not a problem in practice.¹⁰⁶

(b) Policies for Withholding Investigative Information

Commanders are responsible for conducting their command's affairs properly and, as a general rule, should be kept informed of problems within the command, including possible criminal activity that is being investigated. There are some circumstances, however, in which it could interfere with an investigation to inform the commanders. Although the question of under what circumstances MCIOs should withhold investigative information from the immediate chain of command is very important, there currently is no DoD-wide guidance on the subject, except for provisions for delayed reporting and release of records in the context of procurement fraud investigations.¹⁰⁷ Of the Services, only the Army has established policy on the subject that is applicable to all criminal investigations.¹⁰⁸ The Air Force has addressed the issue for fraud

¹⁰⁴ See, *infra*, §VIII.A.3.b, for a discussion on MP officer rotation in USACIDC and supervision.

¹⁰⁵ Telephone interview of Colonel Thomas J. McHugh, USA, Inspector General, Arizona National Guard (Mar. 8, 1994).

¹⁰⁶ Interview of Major General Eugene R. Cromartie, USA (retired), Deputy Executive Director and Chief of Staff, International Association of Chiefs of Police (Feb. 4, 1994).

¹⁰⁷ See DoD Directive 7050.5, *Coordination of Remedies for Fraud and Corruption Related to Procurement Activities*.

¹⁰⁸ Army Reg. 195-2 provides that when a USACIDC element believes that premature release of investigative information outside of USACIDC channels may endanger the successful completion of an investigation, he or she is authorized to withhold or delay release of the information from commanders up to the level of major Army commanders with approval of USACIDC commanders.

investigations,¹⁰⁹ and the Navy has limited regulatory guidance on the matter.¹¹⁰

(c) Policies for Use of Informants

The use of informants is critical to any law enforcement agency. Every MCIO uses informants from the military community. Only NCIS, however, must obtain the concurrence of a military informant's commander before it may direct the informant's activity. According to Secretary of the Navy Instruction 5520.3B, paragraph i(5), this is necessary "due to the unique nature of the military chain of command." The NCIS Manual for Investigations (NIS-3) contains similar guidance and provides for recourse when the NCIS agent cannot obtain a commander's concurrence.¹¹¹

Although we recognize that communicating with commanders about the

recruitment of informants can, under some circumstances, be beneficial both to the investigator and the command, this policy has the potential to permit command interference with investigations. Indeed, in one interview, a NCIS special agent identified the Navy's policy of requiring commander concurrence on informants as the cause of improper command influence in an incident in which a Naval commander refused to allow a confidential source to work for NCIS. NCIS, however, is second only to USACIDC in the number of investigations initiated through the use of informants, so this policy does not appear to be affecting the productivity of the NCIS informant program.¹¹² Although we respect the unique nature of the military chain of command, the other Services have not identified a need for this restriction, and we question whether it is necessary in the Navy.

(d) Status of the MCIO Head

In our view, the leadership arrangements of each of the MCIOs provide the required independence. NCIS adopted civilian leadership in the wake of the Tailhook investigation, in part because of a concern about independence. As we discuss below, however, we have found in our inquiry no indication that command influence is any greater with military leaders than civilian leaders.¹¹³

There clearly is some benefit to military leadership of MCIOs. Many individuals told us that an organization with a military leader who has extensive military experience is more responsive to the needs of the Services and military leadership and has more credibility with the "uniformed community." We asked each DCIO whether the head of a Service investigative organization should be a

¹⁰⁹ See Air Force Reg. 123-2; AFOSI Reg. 124-5. There is some general instruction for investigations of other than fraud-related matters. AFOSI points out that its guidance on this matter can be interpreted from current Air Force and AFOSI regulations. AFOSI Reg. 124-22 §5.a reads, in part, "AFOSI field unit commanders will *normally* conduct prompt briefings of appropriate commanders in all instances when investigations are initiated based on information developed by AFOSI" (emphasis added). In addition, both AFOSI Reg. 124-22 and Air Force Reg. 124-4 direct that notifications and briefings be presented to "appropriate" action authorities and that care be taken to prevent release to unauthorized individuals.

¹¹⁰ SECNAVINST 5520.3B provides no specific guidance on the circumstances under which information may be withheld from commanders, or procedures for doing so. Paragraph i(2) of the instruction, however, reads as follows: "NCIS is authorized, exclusive of command request, to undertake investigative activities within the purview of this instruction and need not solicit authorization or requests to conduct any investigation; however, NCIS shall *normally* assure that the Immediate Senior In Command (ISIC) of the person being investigated is promptly apprised of the initiation of the investigation" (emphasis added).

¹¹¹ NCIS Manual for Investigations (NIS-3), ch. 8, §0805.

¹¹² See Vol. II, Supplemental Reports, §V.C, for a discussion of the DCIOs' use of informants.

¹¹³ We do not intend to suggest any disagreement with the Navy's decision to adopt civilian leadership for its MCIO.

military officer or civilian official,¹¹⁴ and all reported at least some advantage to MCIOs having military leadership.¹¹⁵ Civilian leaders, on the other hand, are likely to be in office longer, which provides continuity and enhanced experience in the position.

We would not recommend interfering with a Service's decision about how to run its criminal investigative organization unless there were good reason to believe the structure it has chosen does not protect independence. First, we note that the two MCIOs whose leaders are military have made those positions "terminal." That is, the leaders will not move on to any other

¹¹⁴ All DCIOs were given an opportunity to provide written comments on the 26 issues listed for possible review by this Advisory Board in the H.R. 5006 Conference Report, National Defense Authorization Action for Fiscal Year 1993.

¹¹⁵ Of some significance, both DCIS and NCIS, the two DCIOs with civilian leaders, recognized some advantage to military leadership of MCIOs. The DCIS response to this question reads:

Based on our experience, there might be a slight advantage to having a military commander rather than a civilian. Our only concern is that the "Director" or "Commander" report either to the service's Inspector General or to a senior civilian within the Department and not directly to the full military chain of command.

The NCIS response to this questions reads, in part:

Certainly having a civilian Director deflects the appearance of susceptibility to command influence from senior military officers, but the reality of the dynamic is that resistance to an attempted assertion of improper command influence comes from the integrity of the individual, whether he or she is a civilian or a military officer. . . . The proposition that having a military officer leading the organization will make it more receptive and responsive to its military customer -- because he or she understands the service, its mission, needs, and culture -- is valid, but not absolute.

positions in the Service. Second, we agree with the individuals who expressed the view to us that civilian leaders are also susceptible to improper command influence. As one senior military officer said, as long as a civilian leader's tenure is determined by an evaluation of his or her performance, he or she is as susceptible to command influence as a military officer. It is the integrity of the leader that is the ultimate factor in an individual's susceptibility to improper command influence.

(e) Status of Special Agents

We have found no difference in the investigative independence of civilian, officer, warrant officer, or enlisted special agents, other than what can be attributed to differences in experience level. During our numerous interviews on this subject, almost all individuals who were members of or affiliated with the Army, Air Force, and Marine Corps said they believe that there is no difference between the independence of military and civilian special agents. In addition, there was a consensus that a military agent's rank did not affect independence. The view of those we interviewed was that the stovepipe structure of the MCIOs and the fact that agents do not reveal their military rank protect military agents' independence. A USACIDC special agent commented that new enlisted agents may be more susceptible to command influence, but attributed this to a lack of experience, rather than rank.

Although several NCIS special agents who have worked with military agents told us the military agents are as independent as NCIS agents, some Naval personnel expressed the view that military special agents are not as independent because they defer to military commanders. The people who held this view did not have actual or, in one instance, recent experiences with military agents.

We do not see any antagonistic or mutually exclusive relationship between individuals being special agents and soldiers, sailors, or airmen. In fact, we view the military agent's continuing education in

military professional development and Service-specific military skills as significant assets. This not only provides for an investigative force that remains current in how intricate systems within a Service work, but also better ensures the insight necessary to understand and anticipate the actions of those it investigates. We believe that organizational structure and policies to ensure MCIO autonomy have a greater effect on the independence of special agents in the Services than whether they are military or civilian, enlisted or officer.

(f) Senior Official Investigations

Among the most important and difficult tasks for Service investigative organizations is investigating impartially senior officials in their own Service. In part because of a recognition of the sensitivity and importance of these investigations, the Secretary of Defense has established certain reporting requirements, by DoD Directive, dealing with senior official investigations. DoD Directive 5505.6, *Investigations of Allegations Against Senior Officials of the Department of Defense*, "establishes policy, assigns responsibilities, and prescribes procedures for reporting to the Inspector General of the Department of Defense allegations of serious misconduct against senior officials of the Department of Defense." This directive defines senior officials as "active duty, retired, Reserve, or National Guard military officers in grades O-7 and above, current and former civilians in the grade of GS or GM-16 or above, current or former members of the Senior Executive Service, and current and former DoD civilian Presidential appointees." A second directive, DoD Directive 5240.4, *Reporting of Counterintelligence and Criminal Violations*, contains additional reporting requirements regarding senior official investigations.

Each of the MCIOs has established regulatory procedures to comply with the reporting requirements set forth in DoD Directives 5505.6 and 5240.4. USACIDC Regulation 195-1 states that "whenever an allegation of criminality or impropriety against a senior person is received, the Director of Operations [at Headquarters,

USACIDC], will be notified immediately by telephone of the allegation." In addition to this reporting requirement, USACIDC Regulation 195-1 contains guidance that restricts the authority of USACIDC field agents to interview senior officials. The regulation also contains a provision that allows USACIDC field offices to request that an "outside" investigating team from another USACIDC element be assigned to conduct the investigation. This is permitted if the USACIDC field office believes another USACIDC office would be better suited to conduct the investigation.

AFOSI Regulation 124-17 requires that "any incident that involves either a Department of Air Force civilian in the grade GS/GM-15 or higher, an installation commander, or an officer (active duty or retired) in the grade of O-6 or higher as a subject, suspect, or where physical harm has resulted or been threatened to the individual as a victim of a criminal or infamous act" must be reported to Headquarters, AFOSI by priority message within 24 hours.

NCIS instructions do not contain any special reporting requirements for senior official investigations. The NCIS Manual for Administration (NIS-1), chapter 25, however, requires certain categories of cases to be reported to Headquarters, NCIS within one working day. Senior official investigations quite often fall into one of the categories requiring reporting within one day.

The majority of commanders and judge advocates with whom we spoke about the MCIOs' investigations of senior personnel praised the quality and impartiality of the investigations. One senior Army judge advocate said USACIDC investigations of senior personnel are more aggressive, and because more resources are dedicated to them, they are more thorough.¹¹⁶ One Air Force defense counsel, who has represented several senior officials in high-profile cases, echoed this assessment when he said, once a

¹¹⁶ Interview of Colonel Stephen D. Smith, Chief, Defense Appellate Division, U.S. Army Legal Services Agency (Feb. 17, 1994).

determination is made to investigate a senior official, AFOSI uses unlimited resources to conduct the investigation. He also commented that "there is a tendency to make an example of senior officials."¹¹⁷ A commander of one of the Naval Legal Services Offices commented that "NCIS is not at all reluctant to be aggressive when investigating senior officials."¹¹⁸

Although the majority of commanders and judge advocates interviewed said the quality of senior official investigations is good, several judge advocates and MCIO agents recommended that MCIO agents not conduct investigations of senior personnel on the installations they support. They gave several reasons for this recommendation. One senior Army judge advocate suggested that local USACIDC agents should not investigate senior officials because of "their normal deference to superiors."¹¹⁹ He suggested that a pool of agents be formed at USACIDC Headquarters to conduct all senior official investigations. Others suggested that because MCIO agents develop a close working relationship with commanders, allegations involving an installation commander should be investigated by "outside" agents. Those who hold this view said this would protect against any perception of partiality on the part of the MCIO. One judge advocate we interviewed said that although the MCIO is not actually part of the local command, in practice it becomes a part of the command because it works with local commanders on almost a daily basis.¹²⁰

¹¹⁷ Interview of Lieutenant Colonel Frank J. Spinner, Chief Appellate Counsel, Appellate Defense Division, Air Force Legal Services Agency (Feb. 14, 1994).

¹¹⁸ Interview of Captain C. E. Ellis, Jr., Commanding Officer, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994).

¹¹⁹ Interview of Brigadier General Thomas R. Cuthbert, USA, Assistant Judge Advocate General for Military Law and Operations (Feb. 16, 1994).

¹²⁰ Interview of Major James Pohl, Chief, Government Appellate Division, U.S. Army Legal Services Agency (Feb. 24, 1994).

Although we conclude that the procedures the MCIOs have established generally work well, because of the importance of investigating senior officials impartially and the difficulty of being impartial about senior officials, we believe additional protections are warranted. In particular, we agree that, whenever possible, local MCIO agents should not investigate senior officials -- and we define this term to include officers at the O-6 level or higher -- if they hold an influential position in a command that requires frequent contact with the local MCIO unit. MCIO special agents not assigned to the local unit should conduct these investigations. This additional protection is important to avoid both the fact and the appearance of bias in an investigation.

(g) Improper Command Influence

We do not believe that direct or overt improper command influence of MCIO investigations is a widespread problem in any of the Services. We have, however, heard of more subtle attempts at influence. For example, we have heard that commanders often will not report minor crimes to the police organizations, and sometimes -- particularly in the Navy -- will not inform the MCIO of a matter that is within its jurisdiction. We also were told of incidents of commanders urging their personnel not to cooperate with an investigation. Defense counsel and people from subjects' rights organizations have complained of a general desire on the part of investigators to protect their Service that sometimes results in flawed investigations and injustice to subjects.

Although we fear that these types of "influence" may be problems in some cases, we do not think the solution is to change the structure or personnel of the MCIOs. To do so likely would result in a loss of responsiveness of the organizations to commanders and might cause commanders to try to investigate even more cases on their own.¹²¹ We think the solution must be

¹²¹ See, *infra*, §V.A.3, and Vol. II, Supplemental Reports, §III.D, for a discussion of commander-directed investigations.

increased vigilance by the Service leadership and the Inspectors General.

(4) Protection for Subjects

In the main, we find that the Uniform Code of Military Justice provides adequate protections for the rights of individuals being investigated for violations of criminal law, with one notable exception -- the Defense Criminal Investigations Index. Actual protection of an individual's rights during an investigation hinges on the conduct of the agent pursuing the investigation and the successful suppression of any evidence, real or testimonial, gained in violation of those rights.

(a) Due Process in Conduct of Investigations

The judge advocates and commanders we interviewed were quick to note that Article 31, Uniform Code of Military Justice, provides military subjects of MCIO investigations greater protections than federal law provides to civilians. One senior Air Force judge advocate commented that Article 31 of the Uniform Code of Military Justice provides much more protection than civilian law.¹²² Article 31 requires that military members who are suspected of an offense under the Uniform Code of Military Justice be informed of their rights to remain silent and to have a lawyer present before being interviewed or questioned,¹²³ whereas the Fifth Amendment requires that civilians be informed of those same rights only if they are

being questioned in custody.¹²⁴ Access to legal counsel is also greater in the military justice system. Any accused servicemember is entitled to free legal representation by a military defense counsel through the entire appeal process; civilians may have free counsel only if they are indigent. Article 31 also requires that the subject of an interrogation must be informed of the nature of the accusation before questioning. There is no corresponding right in the federal civilian system.

The commanders, judge advocates, and majority of defense counsel we interviewed said that the MCIOs provide subjects of investigations the due process required by law.¹²⁵ Nevertheless, we did hear some complaints. Of greatest concern is the criticism we heard from Navy and Marine Corps commanders, judge advocates, and defense counsel that NCIS's interview techniques are abusive. A few of the defense counsel interviewed also expressed a more general concern that MCIO agents coerce confessions. None of the defense counsel, however, presented a specific case in which statements had been coerced, nor did they provide details as to how the coercion occurred. Some did say they had represented clients whose confessions they believed were coerced, even though they had not been able to prove it. Several of the defense counsel, including some who did not argue that MCIO agents are coercing confessions, would provide subjects additional protection against potential abuses by videotaping all interviews of subjects.¹²⁶

¹²² Interview of Colonel Jeffery T. Infelise, Chief Appellate Counsel, Government Trial and Appellate Division, Air Force Legal Services Agency (Feb. 14, 1994).

¹²³ By its own terms, Article 31 requires only those subject to the UCMJ -- i.e., only military personnel -- to warn subjects of their rights under that article. Nevertheless, each DCIO requires its agents, including civilian agents, to give Article 31 rights. See DCIS Agents Manual, ch. 5, ¶0505; USACIDC Reg. 195-1, ¶5-2b; NCIS Manual for Investigations (NIS-3), ch. 7, §703.1; and AFOSI Reg. 124-81.

¹²⁴ See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980).

¹²⁵ We did not study investigations of allegations of homosexual conduct under the "don't ask, don't tell, don't pursue" policy given the recent implementation of the policy. Therefore, this report does not discuss what protections are due a servicemember accused of homosexual conduct, nor whether the servicemembers actually are afforded the protections due to them.

¹²⁶ We recognize that the videotaping of all subject interviews is a topic of debate in the law enforcement community. Because we have found no widespread problem with abuse of subjects' rights by the

Several defense counsel and representatives of subjects' rights groups complained that MCIO agents do not always inform subjects adequately of the accusations against them as required by Article 31, Uniform Code of Military Justice. One defense counsel said this sometimes results in a subject confessing to crimes that he or she was not suspected of committing.

Finally, a number of defense counsel complained that the defense does not have ready access to defense investigators, but instead must apply to the convening authority to have an investigator appointed to assist the defense. The military defense counsel who lodged this complaint suggested that each of the Services create a pool of MCIO investigators to serve as defense investigators.¹²⁷

Although we did hear complaints from some defense counsel and subjects' rights groups of abuses by MCIO agents, the vast majority of staff judge advocates and the majority of defense counsel we interviewed said MCIO agents afford subjects the rights to which they are entitled under the law. Therefore, we conclude that the abuse of legal rights is not a widespread problem within the MCIOs.

We do note, however, that the servicemember's due process protections in an administrative setting are not as clearcut as in criminal proceedings. For example, there is no "double jeopardy" provision within Article 15, Uniform Code of Military Justice, the provision relating to non-judicial punishment. Thus, "imposition and

MCIOs, we do not agree this step is necessary in all cases, although it may be well advised under some circumstances.

¹²⁷ In *United States v. Garries*, 22 MJ 288 (CMA 1986), the court held that servicemembers are entitled to investigative services as a matter of military due process when they are needed to prepare adequately for trial. The burden is on the defense to demonstrate the necessity for investigative services, but there is no requirement that an accused first establish that he or she cannot afford to hire an investigator.

enforcement of disciplinary punishment under [Article 15] is not a bar to trial by court-martial" even if the punishment is detention.¹²⁸

(b) Defense Clearance and Investigations Index

The Defense Clearance and Investigations Index (DCII) is a computerized central index of investigations for many DoD investigation activities. Our study of the use of the DCII has convinced us that the policies for the entry of and access to personal identities in the system do not afford sufficient protection to those individuals named in the DCII. Moreover, there is inadequate oversight of the Services' use of the DCII.¹²⁹

The DCII database contains the personal identifying data of individuals or entities who appear as subjects, victims, or incidentals¹³⁰ in the investigative reports of DoD criminal, counterintelligence, fraud, and personnel security adjudicative activities. DoD Instruction 5505.7, *Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense*, states that identities of subjects of criminal investigations must be entered into the DCII at the initiation of the investigation. According to that instruction, the standard for determining when a person is a "subject" is "a determination that credible information exists that a person or entity may have committed a criminal offense or is otherwise made the object of a criminal investigation." The instruction defines credible information as

¹²⁸ See, *infra*, §§V.A.1.C, 2.C, and 3.a(4), for discussion of protections for subjects in the context of DoD IG, Service IG, and commander-directed investigations, respectively.

¹²⁹ See, *infra*, §III.A.2.f, and Vol. II, Supplemental Reports, §§II.G, for a discussion of the failure of police investigators in some Services to enter the subjects of criminal investigations in DCII.

¹³⁰ DoD Instruction 5505.7 defines "incidentals" as "[a]ny person or entity whose identity may be of subsequent value for law enforcement or security purposes."

Information disclosed or obtained by an investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to indicate criminal activity has occurred and would cause a reasonable investigator under similar circumstances to pursue further facts of the case to determine whether a criminal act occurred or may have occurred.

The names of subjects in a criminal investigation case can be removed from the DCII only in the case of mistaken identity.¹³¹

Twenty-seven agencies, with a total of 1,179 terminals, enter information into the DCII¹³² and have access to the information it contains. An additional 129 terminals, located at approximately 20 organizations within and outside of DoD, have "read only" access to the DCII. As an illustration of how frequently the system is used, during the week of April 4-8, 1994, DCII users made an average of 35,000 online inquiries per day of the DCII Personality File.¹³³

Concerns regarding the titling of subjects in criminal investigations and the subsequent indexing of their identities in the DCII first were brought to our attention by Army judge advocates and later by representatives from the Office of the Army Deputy Chief of Staff for Operations and Plans. One staff judge advocate pointed out that while there may be sufficient evidence for titling a subject in a case, there may not be adequate information to take action.¹³⁴ Another made the same

observation and questioned the fairness of titling someone if that person is not going to be prosecuted.¹³⁵ Yet another Army judge advocate complained that, once titled, a person's name stays in the DCII for 40 years and the person cannot get "untitled."¹³⁶ Army Deputy Chief of Staff for Operations and Plans representatives related that titling and subsequent indexing in the DCII can "virtually ruin someone."¹³⁷

We recognize the need for the DCIOs to identify and retrieve investigations of individuals who were under suspicion or about whom complaints were made, regardless of the outcome of the investigation. This information may prove extremely valuable during any investigation of subsequent allegations against the same individuals, in identifying and coordinating complaints that occur across agencies, and in documenting the actions taken by law enforcement to resolve complaints. A centralized index of DCIO investigations that records all investigative efforts is a necessary tool for effective law enforcement in DoD.

What makes the DCII different from the systems of other federal law enforcement agencies, however, is access to the indices. Although other federal law enforcement organizations, such as the FBI, may title and index under a credible information or even broader standard, they do not allow external organizations -- even other law enforcement organizations -- access to the databases. People from external organizations who seek data from these indices must ask the federal law enforcement agency to conduct a search. This provides for increased protection of

¹³¹ DoD Directive 5505.7.

¹³² The actual number of contributing organizations is greater than 27 because some DoD organizations input data for other DoD elements.

¹³³ The DCII Personality File is the file that contains the names and identifying data about individuals and entities.

¹³⁴ Interview of Colonel Stephen D. Smith, Chief, Defense Appellate Division, U.S. Army Legal Services Agency (Feb. 17, 1994).

¹³⁵ Interview of Major James Pohl, Chief, Government Appellate Division, U.S. Army Legal Services Agency (Feb. 24, 1994).

¹³⁶ Interview of Lieutenant Colonel Francis I. Moulin, Staff Judge Advocate, Total Army Personnel Command (Apr. 11, 1994).

¹³⁷ See, e.g., Interview of Colonel Howard E. O'Brien, Chief, Security Force Protection, and Law Enforcement Division, Office of Army Deputy Chief of Staff for Operations and Plans (Apr. 28, 1994).

sensitive information. By restricting access to the indices, the law enforcement organizations also can evaluate the requestor's "need to know" before the existence of the record is even identified. Indeed, there are sections of the FBI's index with special access requirements and procedures so that not even all FBI special agents may search them.

We find the current number of organizations, and thus individuals, with access to the DCII troubling, especially in light of the credible information standard for titling and indexing and the sheer number -- approximately 19 million -- of individuals whose identities appear in the system. We have learned that it is technically feasible to limit the users that have access to the criminal investigation indices in the DCII, while still making the other indices available. We believe this should be considered.

First, we think it is an unacceptable risk for non-DCIO personnel to have access to indices that identify ongoing criminal investigations. It is not an overstatement to say that in some circumstances, if the subject of a criminal investigation became aware prematurely of the initiation of an investigation, victims or witnesses could be placed in jeopardy. This is in addition to actions subjects could take to conceal evidence or otherwise impede the DCIO's investigation.

Second, access to closed criminal investigation indices by other than DCIO personnel may create an unacceptable risk for individuals listed as subjects in the system. DoD Instruction 5505.7 contains the restriction that "[j]udicial or adverse administrative actions shall not be taken solely on the basis of the fact that a person has been titled in an investigation." Although this provision acknowledges the potential for misuse of the DCII and attempts to prevent certain decisions from being made exclusively on the existence of titling information in a criminal investigation index, we are concerned that regulatory requirements may not provide sufficient protection.

A hypothetical illustrates the concern. A DCIO receives what is perceived at first to be credible information that an individual has committed an offense and thus titles and indexes the subject in the DCII. This information later is deemed not credible, but the individual remains titled and in the DCII. Thus, five years later when an agency with access to the DCII conducts a search of the system on two candidates for the same critical position, the one individual is identified as the subject of a criminal investigation and the other not. Now, at this point, the agency should request the case file from the relevant DCIO and read that no credible information ultimately was developed. As a practical matter, however, the agency is pressed for time and makes a decision to employ the individual without the DCII criminal investigation record.

We recognize that command security personnel need to be notified of criminal investigations that may affect the security clearance standing of a member of the command. We do not believe, however, that access to the criminal investigation indices of DCIOs, including open and closed investigations, is necessary to meet this need. If appropriate security personnel are not receiving notice of DCIO investigations, giving commands unrestricted access to the criminal investigation indices is not the answer to the problem.¹³⁸ We also understand that individuals responsible for adjudicating security clearances may need to identify and review certain investigations of individuals holding or applying for a clearance. Currently, however, several organizations with online access to the DCII have only a limited law enforcement mission, if any, and do not adjudicate security clearances.

We also note that when law enforcement organizations make a titling decision based on the credible information standard, it is one made by an investigator interpreting a very broad and subjective standard, with no

¹³⁸ See, *supra*, §III.A.1.b(2), for a discussion of MCIO responsiveness to commanders.

second party review of the determination.¹³⁹ This type of standard for the titling and indexing of subjects may be necessary to ensure that the DCIOs can identify and retrieve all investigations of significance to them. We are troubled, however, that the criminal investigative information about individuals so titled may be released for administrative determinations, such as employment in sensitive positions or flag or general officer promotions. For example, the Services search all available indices for "adverse information" on individuals under consideration for flag or general officer promotion.¹⁴⁰ We believe that people using criminal investigative information for administrative determinations should have access only to information about subjects for whom it was determined that a preponderance of the evidence¹⁴¹ exists that the subject committed an offense.

Finally, the absence of a mechanism for subjects to request removal of their name from the DCII is unfair.¹⁴² There are

¹³⁹ In law enforcement, most "probable cause" determinations are made by a judge or grand jury.

¹⁴⁰ Interview of Lieutenant Colonel Maryanne Dillon, USA, Deputy for Flag and General Officer Matters, Office of Undersecretary of Defense, Personnel and Readiness (May 18, 1994). This requirement was instituted in 1988 at the request of the Senate Armed Services Committee after the Senate confirmed the retirement of an Army general without knowing he was under criminal investigation.

¹⁴¹ "Preponderance of the evidence" is the standard of proof that petit juries use in civil trials and generally connotes a balance of evidence of at least 51 percent in favor of the prevailing party.

¹⁴² We acknowledge that subjects may petition the Services' Boards for Correction of Military Records for relief from an improper titling. We have no way of knowing, of course, how well known (especially for nonmilitary subjects) or meaningful a mechanism for relief this may be. A May 1991 DoD IG Report, *Review of Titling and Indexing Procedures Used by the Defense Criminal Investigative Organizations*, reported that while the Army's Board for Correction of Military Records had directed the deletion of subject names from investigative files neither the Navy nor

circumstances in which a titling decision could be viewed as arbitrary, capricious, or an abuse of discretion. It is not enough to allow a change to the system only in the event of a mistaken identity. Criminal investigative organizations, and subjects, should have the ability to address and correct mistakes.¹⁴³

2. Police Investigators

The police investigators in the Services -- that is, military police investigators in the Army, security police investigators in the Air Force, and the masters-at-arms (MAA) and civilian police investigators in the Navy¹⁴⁴ -- unlike the MCIO agents are not members of stovepipe organizations and operationally are highly decentralized. In most instances, police investigators are members of military law enforcement units or occupational specialties and function under the direction of installation security officers or military commanders. "Police investigator" is not a military career field, and many military personnel will spend only a small portion of their careers conducting these types of investigations.

Although the majority of police investigator effort is directed toward misdemeanor crime, the potential affect of these investigations on DoD is significant. For example, in 1993, police investigators conducted 116,473 investigations in DoD.¹⁴⁵ Furthermore, most of the crimes police investigators investigate have a direct impact

Air Force Board had ever done so.

¹⁴³ See Vol. II, Supplemental Reports, §II.D, for additional discussion of the DCII.

¹⁴⁴ The other Services also have some civilian personnel in police investigator positions; however, the Navy employs far more civilian police investigators than the other Services. See Vol. II, The Organizations, §III.C.2, for additional information on civilian police investigators.

¹⁴⁵ This total includes all police investigations conducted in the Army, Air Force, and Navy. It does not include those conducted by Marine Corps CID.

on the good order, morale, and discipline of military organizations.

a. Quality

Across the Services we frequently heard concerns regarding the quality of police investigations. Many people expressed apprehension about the ability of police investigators and the thoroughness of their investigative effort. We also learned that when police investigators receive adequate training and have a close relationship with their MCIO, the quality of the investigative product improves.

Several individuals we interviewed noted that many of the categories of investigation that police investigators conduct do not require significant investigative skill, and, therefore, police investigators do not need to be as good as MCIO special agents. Although this is true, we are concerned that if commanders do not believe their police investigators can conduct quality investigations, they will be less inclined to call on them. Each Service has dedicated training funds and personnel to establish a police investigator capability, and each Service should use those funds. The number of investigations these personnel conduct alone supports the need for this action. In addition, if commanders do not have the confidence in their police investigator force, they may be more inclined to initiate commander-directed investigations with completely untrained personnel. This has the potential to create even greater difficulties than using police investigators because commander-directed investigations are very informal and more subject to abuse.¹⁴⁶

The failure of commanding officers to use police investigators when appropriate is of particular concern in the Navy. It was one senior NCIS agent's view that commanders are not interested in installation security departments -- they "rank at the bottom" of

matters with which they are concerned. One Navy commander informed us he does not believe that there is a need for "a full time policeman" aboard ship and that he does not use his MAAs to conduct investigations. Several NCIS personnel interviewed, including a senior member of the organization, believe that it is a general view in the Navy that "we do not need police on Navy ships" and that ship commanders feel strongly that discipline, including law and order, is their exclusive responsibility. Although this sentiment is not universal among Navy commanders -- some with whom we spoke expressed confidence in and supported the use of MAAs for investigations -- many commanders do not view police investigators as an important tool to ensure good order and discipline, as they should, but rather see them as in conflict with the responsibilities of command.

During our field interviews we also noted a sometimes surprising lack of knowledge about the duties and functions of the Navy's civilian police investigators. The Navy's civilian police investigators provide investigative support to the security departments on naval installations; the MAA investigators primarily provide investigative support to the security departments on ships. One Naval judge advocate officer believed that MAAs conducted criminal investigations in his installation's security department, when in reality there were eight civilian police investigators who conducted over 1,400 investigations per year. Another senior Naval judge advocate officer did not know what types of offenses the security department's civilian police investigated and was aware only that they provided courtroom security for significant trials.

b. Selection and Training

The first and perhaps most important step to increasing quality among police investigators is to ensure that all investigators receive adequate training. At least one senior representative from each of the Services¹⁴⁷

¹⁴⁶ See, *infra*, §V.A.3, and Vol. II, Supplemental Reports, §III.D, for a discussion of commander-directed investigations.

¹⁴⁷ Interview of Colonel Michael L. Sullivan,

Findings and Recommendations

reported difficulties in obtaining training slots at the Army's MPI course.¹⁴⁸ Even personnel in the Army have had these problems. In theory at least, police investigators -- whether military or civilian -- from any Service should have access to the Army's MPI course. From what we have learned, it is clear that the MPI course at Fort McClellan provides quality instruction to police investigators. Interviews with police investigators who have attended the MPI course and their supervisors indicate a high degree of satisfaction with the instruction.¹⁴⁹

In the Army's case, we were informed that the difficulty obtaining training slots is due to a policy of the Specialized Training Branch, U.S. Army Personnel Command. This policy prohibits soldiers from attending the MPI course if they have less than 6 or more than 18 months on station. We were told that it sometimes may take over a year to evaluate an individual's military police performance and the person then has only a six-month window in which he or she can be trained.¹⁵⁰ The Specialized Training Branch, however, reports no such official policy

Commander and Provost Marshal, 16th MP Brigade, Ft. Bragg, NC (Mar. 22, 1994); Interview of Senior Chief George A. Willis, Assistant Master-at-Arms Program Manager, Headquarters, NCIS (Apr. 25, 1994); Interview of Lieutenant Colonel John S. Heumann, Chief of Security Police, March Air Force Base, CA (Apr. 15, 1994).

¹⁴⁸ The Army trains its military police investigators at the MPI course at the U.S. Army Military Police School (USAMPS) at Fort McClellan, Alabama. The Air Force and the Navy also send their police investigators to the Army's MPI course.

¹⁴⁹ The MPI course is eight weeks in duration and, according to the course outline, provides instruction in "criminal law, crime scene processing, testimonial evidence, investigations of crimes against persons and property, physical evidence, drug investigations, investigative reports, special investigative techniques and protective services."

¹⁵⁰ Interview of Colonel Michael L. Sullivan, Commander and Provost Marshal, 16th MP Brigade, Fort Bragg, NC (Mar. 22, 1994).

exists.¹⁵¹ In any event, it is clear that the policy has been applied unofficially in some circumstances and has caused difficulty.

We do not know why the other Services have had difficulties with obtaining training slots. We learned from Department of the Army and USAMPS personnel that the MPI course has been operating below capacity. Because the training capacity of USAMPS is not a factor, it appears that the difficulty obtaining training allocations in the MPI course may be the result of organizational training budget constraints or other administrative obstacles.

Each of the Services has requirements for selection and training of police investigators. We found, however, in each Service that it is possible to become a police investigator without receiving formal investigative training. According to the Office of the Army Deputy Chief of Staff for Personnel,¹⁵² the Army MPI course, in fiscal years 1990 through 1993, had 712 graduates from the Army, 139 from the Navy, and 277 from the Air Force.¹⁵³ What this reveals is that in the past four years the Army has graduated more active duty personnel from the MPI course than it currently reports as credentialed MPI investigators (582). This is consistent with the temporary nature of MPI assignments and indicates an effort by the Army to maintain an adequate number of trained MPI investigators. The Navy and Air Force both

¹⁵¹ Telephone interview of Robert Bartel, Military Personnel Management Specialist Supervisor, Specialized Training Branch, U.S. Army Personnel Command (Sept. 14, 1994).

¹⁵² Telephone interview of Allan M. Craig, Training Program Specialist, Training Requirements Division, Deputy Chief of Staff for Personnel (June 17, 1994).

¹⁵³ There were also 80 graduates from the Marine Corps. Marine Corps military police trained in the MPI course are used essentially as uniformed patrol investigators to conduct extremely brief investigations of nominal incidents such as domestic disturbances. Marine Corps CID investigators are trained at the Army Apprentice Special Agents course. See, *infra*, §III.A.3.b.

have graduated fewer active duty personnel from the MPI course than they report as investigators (191 and 334 respectively). In both of these Services, it is possible that a number of police investigators identified were trained prior to 1990; however, we also may infer that there is a proportionally smaller pool of trained personnel available for assignment to police investigative duties. Of course, there is no guarantee that in the Army, Navy, or Air Force the people with training are the only ones conducting police investigations. Indeed, we have heard that this often is not the case.

Finally, we note two areas of particular concern related to the Navy. First, there is no formal investigative training course or requirement to obtain formal investigative training for the Navy's GS-083¹⁵⁴ civilian police investigators. The Chief of the Defense Protective Service, an OSD organization, informed us that he often receives complaints from Navy GS-083 series personnel about the lack of training and other work-related issues.¹⁵⁵ Second, because some ships may not have immediate access to NCIS investigative support,¹⁵⁶ rated MAAs¹⁵⁷ assigned to these vessels

¹⁵⁴ See Vol. II, The Organizations, §§III.C.2, for discussion of GS-083 civilians.

¹⁵⁵ Interview of John H. Jester, Chief, Defense Protective Service (Aug. 1, 1994). We are as concerned that these civilian investigators believe mistakenly that the Chief of Defense Protective Service is in their chain of command when in fact there exists no organizational relationship. Mr. Jester also advised us that when he tried to forward the complaints to the Secretary of the Navy's office, a more appropriate forum, it refused to accept them because the correspondence was addressed to "DoD." He subsequently forwarded the letters to NCIS.

¹⁵⁶ If a ship is not part of a carrier task force, it does not have access to the special agents afloat that NCIS has on each aircraft carrier. Therefore, it is difficult for the ship to receive investigative support from NCIS while afloat.

¹⁵⁷ As discussed in Vol. II, The Organizations, §III.C.1, there essentially are three categories of MAAs who conduct investigations: (1) non-rated MAAs, individuals temporarily detailed to the MAA

should have the maximum amount of investigative training available. We have discovered that this is not always the case.

c. Supervision and Retention

The other principal cause of the quality problems that we have found is a lack of experienced supervision of police investigators. This has happened because, in each Service, the more senior active duty police personnel do not conduct or supervise investigations. Most active duty police investigators are members of a law enforcement career field in their Service, but police investigation is not a military career field in any of the Services. For several reasons, individuals may conduct police investigations in one assignment and perform a different law enforcement function or other duties in the next.

In the Army, as with commissioned officers, non-commissioned officers need a variety of assignments to be competitive for promotion. The Army is considering removing the MPI skill identifier from an individual's personnel record after he or she reaches a certain grade, as it implies specialization, which is thought to harm promotion potential. Air Force personnel argue that there are too few SPI investigators for a career field with adequate promotion opportunities. All of the Services' active duty police organizations have responsibilities that are satisfied, at least in part, by employing police investigators in duties and functions other than criminal investigations. Finally, people quite simply may not want to make a career out of conducting investigations of petty crimes.

The absence of a career field appears to have its greatest effect on police investigations in the limitations it places on

force; (2) rated MAAs, individuals who have trained and qualified for the basic MAA enlisted personnel classification; and (3) rated MAA military investigators, individuals who have qualified for the basic MAA personnel classification and the military investigator classification of MA-2002.

investigator experience and supervision. Regardless of the quality of basic investigative training or an individual's aptitude, many investigative skills and functions can be perfected only with application and knowledgeable guidance from experienced supervisors. Police investigators, however, tend to move on to other duties before they fully develop the skills and knowledge they need.

The Navy is the only Service in which experienced MCIO special agents play a role in developing policy for police investigators. Although NCIS does not have operational control of the police investigators, it is responsible for Navy security and law enforcement policy.¹⁵⁸ An experienced security officer in the Navy, however, told us that, in his opinion, NCIS appears to pursue police policy issues less aggressively than it has in the past. If this perception is accurate, it is extremely unfortunate. We noted a lack of knowledge on the part of NCIS personnel about GS-083 civilian personnel conducting police investigations in the Navy. This tends to support a lack of attention to its policy making role.

When police investigator personnel are collocated with or otherwise increase their interaction with MCIO special agents, it generally has a positive effect on the quality of police investigations. We learned of two Army installations where USACIDC special agents provide investigative guidance to MPI investigators and supervise ongoing MPI investigations. In both instances, Army personnel expressed satisfaction with the operations. Several people from the Army whom we interviewed, including senior officers from the MP corps, expressed their view that increased interaction between USACIDC and the MPI would be beneficial. Indeed, more than one MP officer suggested some form of consolidation of the two organizations. There is some precedent for interaction between the MCIOs and police investigators in the Army, Navy, and Air Force. In the Army and the Air Force, MPI

and SPI personnel frequently are detailed to drug suppression teams with USACIDC and AFOSI special agents. In the Navy, MAA personnel also work with NCIS narcotic squads.

d. Responsiveness

Police investigators are viewed as very responsive to the needs of the local command. This responsiveness can be attributed to the lines of authority under which police investigators operate. In most instances, police investigators are members of the command they support. Many of the crimes police investigators investigate have a direct effect on the morale, good order, and discipline of military units. The responsiveness of police investigators to military commanders is, therefore, viewed as a critical element of their support role. In addition, unlike with the MCIOs, installation and ship commanders are able to establish the priorities of their police investigator force directly. This provides commanders the ability to respond quickly to situations that affect their commands adversely.

Furthermore, commanders can employ active duty police investigators in other significant support roles, such as when MPI and SPI investigators perform warfighting functions during deployments. MAA investigators have important additional duties aboard ship when ordered to "Battle Stations." These abilities provide flexibility and a significant measure of responsiveness to commanders.

e. Independence

The other side of the police investigators' close relationship with supported commands is that they are less independent than the stovepipe MCIOs. People we interviewed frequently noted that because of the organizational structure of police investigations, there is a potential for improper command influence. They did not believe, however, that improper command influence of investigations occurs. The explanation for this that we heard most often

¹⁵⁸ NCIS response to RFI CLOC-003 (Feb. 25, 1994).

is that police investigators generally investigate petty crimes; it simply is not worth the risk to interfere with these investigations.

We recognize that without the stovepipe structure of the MCIOs, police investigators are more susceptible to improper influence. We believe, however, that to fulfill their responsibilities, commanders must have an investigative force that is directly responsive to their needs. Given the nature of the crimes investigated by police investigators, we view this as an acceptable trade-off.

f. Reporting

The reporting and coordination of the Services' police and police investigation data has several important effects on the investigative capability of DoD. Service-wide crime trends based on police crime data provide commanders with the status of discipline and order within the Services and can be used in decisions about how to direct all investigative assets of the Services. The ability to analyze the nature and quantity of Service-wide police investigator workload is necessary to ensure resources are allocated properly. The identity of subjects of police investigator reports, if entered into the DCII,¹⁵⁹ can be of significant value to future investigations. The sharing of criminal intelligence between the police investigators and the MCIOs is of significant importance to the criminal investigative capability of the Services.

Both the Army and Air Force currently have working systems that provide for the collection and analysis of Service-wide police

crime data. The Navy has a system for the collection and analysis of Service-wide police data; however, it is not functioning. Only the Army has a working system in place that routinely enters police investigator subjects into the DCII. Neither the Army, Navy, nor Air Force can ascertain readily the Service-wide workload data of police investigators. Finally, the Services have no reliable systems for the sharing of information between the police investigators and the MCIOs.

None of the Services has a centralized repository for the storage of all police investigator reports or systems that can correlate police investigation data. As a result, no one is able easily to collect Service-wide data about police investigations. When we requested that the police organizations provide information about the categories of crime they investigate, each had to acquire the data from individual field elements.

The sharing of criminal information and intelligence between the MCIOs and police investigator elements varies. The degree and value of the exchange frequently depends on the nature of the relationship between the two local offices and on the personalities involved. In the Army, Navy, and Air Force, the local MCIO offices generally receive copies of the police blotter or the police agency's equivalent report. The chief of security police and AFOSI detachment commanders participate routinely in "status of discipline meetings" at Air Force installations. During these meetings, the organizations and concerned installation staff share SPI and AFOSI investigative information. At some Army installations, USACIDC and MPI have established joint criminal intelligence centers.¹⁶⁰

3. Marine Corps CID

The Marine Corps Criminal Investigation Division (Marine Corps CID) is unique

¹⁵⁹ DoD Instruction 5505.7, *Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense*, requires that the subjects of all criminal investigations be entered into the DCII. See, *supra*, §III.A.1.b(4)(b), and Vol. II, Supplemental Reports, §II.D, for further details on the DCII, and Vol. II, Supplemental Reports, §II.G, for a further discussion of the failure of some police organizations to enter the subjects of criminal investigations into the DCII.

¹⁶⁰ Criminal intelligence centers are organized by USACIDC field elements for the collection, correlation, analysis, and dissemination of local crime data and intelligence.

among DoD criminal investigative organizations. Marine Corps CID agents receive the same training and by most accounts are as capable as MCIO agents, but its organizational structure is similar to some Services' police investigator elements. Its jurisdiction is somewhere in between the two types of organizations.

a. Quality

It was almost the universal opinion of those we interviewed that Marine Corps CID investigators are very proficient criminal investigators. We heard this not only from Marine Corps commanders and staff judge advocates, but from a number of NCIS special agents and from local civilian police. Marine Corps CID investigators often were described as very competent, mature, and equal to NCIS agents. Those familiar with Marine Corps CID told us that Marine Corps CID investigators are capable of conducting more complex investigations than their peacetime jurisdiction allows.

Presumably, much of the reason that Marine Corps CID maintains high standards of quality for its investigators is that Marine Corps CID's investigative jurisdiction expands significantly during combat and deployed contingency operations. In these situations, Marine Corps CID assumes investigative jurisdiction over all criminal offenses within the Marine Corps' area of responsibility. Thus, Marine Corps CID investigators must have the capability to perform the same types of investigations as MCIO agents.

Marine Corps CID does, however, have some limitations on its investigative ability. Although Marine Corps CID investigators develop and recruit criminal informants, they typically refer those informants to NCIS for registration and use. Marine Corps CID does not have a criminal informant program or the funds required for some confidential investigative operations.¹⁶¹ NCIS performs

all nonconsensual interception of wire or oral communications. Marine Corps CID does, however, have a polygraph examination capability, and uses the Army and NCIS forensic laboratories routinely.

b. Selection and Training

The Marine Corps CID requires an enlisted person to attain the rank of sergeant before he or she may become a Marine Corps CID investigator. The requirement is more rigorous than in USACIDC or AFOSI, the two MCIOs with military agents. This may be, in part, responsible for the favorable comments we heard about the maturity of Marine Corps CID investigators. In addition, several people told us that the military police or "street cop" experience of Marine Corps CID investigators adds to their abilities as investigators. They acquire this experience from the time they spend in the Marine Corps military police before being permitted to move to Marine Corps CID. Moreover, applicants to be Marine Corps CID investigators must complete a six-month apprenticeship at Marine Corps CID before they may apply to the Army's Special Agent course. This apprenticeship period also provides the provost marshal an opportunity to evaluate applicants' abilities and helps to ensure that quality people enter the Marine Corps CID career field. The formal training that Marine Corps CID investigators receive is at the Army's course for USACIDC agents at Fort McClellan, Alabama.

Many individuals interviewed expressed the opinion that the Marine Corps CID investigators are well trained. In fact, two NCIS agents told us that the investigative training Marine Corps CID investigators receive at the Army's Special Agent course is better than that provided to NCIS agents at the Federal Law Enforcement Training Center. They mentioned crime scene processing specifically as one of the strong points of the training. One senior Marine Corps staff judge advocate who had experience with both AFOSI and NCIS

¹⁶¹ This category includes undercover operations.

special agents believed that Marine Corps CID investigators were better trained.¹⁶²

c. Supervision and Retention

Marine Corps CID investigator is a career field. The career field status of Marine Corps CID investigators provides for the retention and development of experienced investigators and supervisors. Over 60 percent of the Marine Corps CID investigators assigned to Marine Corps CID are in the grade of staff sergeant or higher.

In addition, pursuant to a Memorandum of Understanding with NCIS, dated May 8, 1987, Marine Corps CID assigns 30 high-ranking investigators (22 enlisted investigators in the grade of staff sergeant or higher and 8 warrant officers) to NCIS as special agents "for the purpose of maintaining a cadre of personnel trained in investigation of major offenses for use in support of Marine Corps forces during combat operations." Thus, there is always a high percentage of experienced investigators to supervise more junior investigators.

One individual said that he believes Marine Corps CID is experiencing a high turnover of investigators. He attributed this, in part, to a morale problem because Marine Corps CID investigators are not allowed to investigate major felony crime. Although we do not know that there is, in fact, a problem with turnover, Marine Corps CID personnel and many other individuals expressed frustration that Marine Corps CID investigators are trained to do and capable of doing much more than their peacetime jurisdiction allows. Dissatisfaction with the responsibilities given the investigators must have some affect on their career decisions.

d. Responsiveness

It was the opinion of those interviewed that Marine Corps CID is very responsive to the investigative needs of Marine Corps commanders. Some said Marine Corps CID is more responsive than NCIS. Many believe this is because Marine Corps CID investigators are marines with a "stake in the organization." Marine Corps CID is willing to investigate aggressively less serious criminal incidents that are of concern to commanders. We were told, for example, that Marine Corps CID mobilized immediately and dedicated resources to the investigation of a hazing incident that did not involve significant injury. To some law enforcement personnel this might not have appeared significant, but hazing is very important to Marine Corps commanders because it is harmful to the image of the Marine Corps. Thus, some crimes, although not major criminal events, can have a significant effect on the good order and discipline of the Marine Corps and can be of extreme importance to commanders.

e. Independence

The organizational structure of Marine Corps CID, which places it in the direct chain of command of the local commander, limits its investigative independence. Marine Corps CID potentially is more susceptible to improper command influence than organizations that have stovepipe chains of command. We were told by a number of people we interviewed, however, that improper command influence is not a problem with the Marine Corps CID. One Marine Corps officer noted that commanders are no longer isolated from outside scrutiny from organizations such as the DoD IG or Congress; he said they know if they try to exercise influence over investigations they are "only a phone call away from a lot of trouble." Several people pointed out that because provost marshals work for the installation commanders, the ability of other local commanders to influence investigations improperly is restricted. They based this opinion on the ability of the provost marshal

¹⁶² Interview of Colonel Elijah D. Clark, Circuit Military Judge, Camp Pendleton, CA (Apr. 11, 1994).

to report improper command influence directly to the installation commander.

B. Recommendations

1. DCIOs

a. Do Not Consolidate the General Crimes Missions of the DCIOs

One possible organizational change that the Advisory Board considered was the total consolidation of the four DCIOs. We have concluded that the DCIOs should not be consolidated into one defense criminal investigative agency. We believe complete consolidation would be unwise, primarily because it would sacrifice investigative quality and responsiveness for no substantial financial benefits. We note that the DoD IG, the Services, and the Department of Justice all agree with this conclusion.

Complete consolidation is contrary to the trend toward decentralization of government agencies and away from large bureaucracies that become unresponsive to those they are supposed to serve. Only the FBI would be larger than a consolidated defense investigative agency. In numerous interviews with commanders, prosecutors, FBI agents, local law enforcement, and defense attorneys, we have heard the concern that a mega-investigative unit would become a rigid and unresponsive bureaucracy of the type the Government should avoid. John Magaw, the Director of the Bureau of Alcohol, Tobacco, and Firearms, with 30 years of law enforcement experience and a veteran of other law enforcement consolidation proposals, described the suggested consolidation of DoD law enforcement agencies as a "huge error."¹⁶³ His view is that consolidation creates problems because a large bureaucracy

develops a different agenda from that of its customers.

The differences in the missions and functions of the DCIOs, for the most part, reflect the different needs of their respective primary customers. Overall, commanders throughout the military have expressed satisfaction with the responsiveness of their own MCIO. These same commanders fear that a consolidated DoD-wide investigative unit would not be responsive to the degree that the MCIOs are at present nor to the degree the commanders believe is necessary to support their warfighting mission.

DOJ, which in many ways is the primary customer of DCIS's investigative product, has expressed similar misgivings concerning total consolidation. DOJ's concern is that in a completely consolidated organization, the specialized procurement fraud investigators will not receive the resources or other headquarters attention they currently receive and fraud investigations will suffer as a result.¹⁶⁴

In addition to being large and unwieldy, a consolidated DoD-wide criminal investigation agency would, in effect, require an all-civilian force so long as there are separate Services. Military agents who spend any more than two or three years at a time serving in a DoD agency, outside their specific Services, lose their competitiveness for promotion within their Service. Thus, the consolidated agency could have military agents only if those agents were serving a limited, joint tour of duty similar to other Pentagon tours of duty. But in order to provide an experienced pool of agents to rotate in and out of the consolidated agency, each Service would need to maintain an investigative agency of its own. Redundant parallel career tracks in each Service for the military personnel assigned periodically to the consolidated investigative agency would negate any savings that might be realized from consolidation. In addition, rotating

¹⁶³ Interview of John W. Magaw, Director, Bureau of Alcohol, Tobacco, and Firearms, Department of Treasury (Mar. 15, 1994).

¹⁶⁴ Letter from DOJ, Office of Legislative Affairs, to the Honorable Sam Nunn, Chairman, Senate Armed Services Committee (July 23, 1992).

personnel would eliminate any efficiencies that experience and length of service produce. A consolidated, all-civilian force would be plagued by the difficulties of alienation from the Services it would be investigating, as well as the difficulties of having only civilians investigate military personnel.

Integration into the process and culture of the particular Service often is essential for the successful investigation of at least general crimes. To investigate general crimes, agents need the ability to develop investigative leads, and the most effective and efficient method of developing investigative leads is to be part of the Service the agents are investigating. To develop informants and other sources, agents must be located on base. Furthermore, they must know the process and culture of the particular Service, and other servicemembers must perceive them as being in that Service.

Moreover, a civilian investigative force could not support the Services adequately in operational environments. USACIDC, AFOSI, and Marine Corps CID all have significant operational responsibilities in addition to their crime-fighting role. For example, each is engaged in "force protection" activities relating to its respective Service. This force protection role can include forward base physical security, protective service details for high ranking officers, and anti-terrorism actions on the battlefield. Furthermore, they always have had a substantial crime-fighting role during wartime. Special agents in all three Services have served most recently in Saudi Arabia, Somalia, Bosnia, and Haiti.

In each case, their functions are largely Service-specific and require trained military personnel because they occur in hostile situations. For example, USACIDC conducted numerous death investigations in Somalia in support of Operation Restore Hope. These investigations included those -- conducted at the request of the United Nations -- of mass murder committed by warlords, deaths of Somalis that occurred because of alleged violations of the rules of engagement, suicides, and claims against the Joint Military Task force for deaths during convoy mishaps. USACIDC, with some

support from Marine Corps CID agents, had to conduct these investigations in an arena with no front line and potentially hostile personnel surrounding them.

The USACIDC agents were able to conduct these investigations because, in addition to their investigative training, they receive regular training in the "soldier skills" that allow them to defend themselves in a battle environment. Civilian agents, not trained in similar skills, would require soldiers to escort and protect them during the investigation.

Although the Navy uses civilian agents, the role of NCIS agents in a combat environment is limited. NCIS agents are assigned predominantly to warships that stand off the coast. Marine Corps CID agents are on the front lines with the Marine Corps and call in NCIS agents only for specific cases. As one marine put it, "There is no place on the battlefield for a civilian." DCIS, which also uses civilian agents, is not subject to the problems associated with civilian agents in the MCIOs because its agents investigate primarily procurement fraud and have no operational role.¹⁶⁵

The investigative quality and responsiveness that would be lost in the event of consolidation might be justifiable if the resulting savings were sufficiently large, but the Board has determined that they would not be. Approximately four years ago, the DoD Comptroller's Office estimated that complete consolidation would save the Department approximately \$110 million over five years. We question the assumptions on which that estimate is based, but, in any event, the MCIOs have reduced significantly their overhead and personnel expenses since 1990, largely by eliminating most of their middle managers. Therefore, even if the estimate once was valid, it is no longer. The DoD Comptroller's Office has revised its calculations using 1994 figures at our request, and it now estimates that complete

¹⁶⁵ See Vol. II, Supplemental Reports, §II.A, for additional discussion of investigations in operational environments.

consolidation would save only \$65.8 million over five years.¹⁶⁶ Although no savings are insignificant in these times of budget reductions, we believe that whatever savings would occur are insufficient to warrant the reduction in quality and responsiveness that would accompany consolidation.¹⁶⁷

b. MCIOs Should Investigate Service-Related General Crimes

DCIS is primarily a fraud investigative agency. Its agents are trained and their current experience is in fraud investigations; they should not ordinarily be called upon to conduct general crimes investigations, particularly investigations of persons crimes. If the DoD IG requires agents to conduct another investigation such as Tailhook, the DoD IG should request the MCIOs from the unaffected Services to detail agents for the duration of the investigation.

If the DoD IG does use DCIS agents to conduct investigations involving offenses under the Uniform Code of Military Justice, DCIS agents should receive additional or refresher training in the investigation of offenses punishable under the Code and the protections provided to subjects of investigations. Moreover, DCIS must have legal advice from experienced judge advocates, preferably but not necessarily the lawyers who will prosecute the matter being investigated.

¹⁶⁶ See Testimony of Kenneth Schreier, Analyst, DoD Comptroller's Office, before the Advisory Board 28 (July 8, 1994).

¹⁶⁷ The same difficulties discussed in connection with calculating savings from consolidation of procurement fraud investigations, see, *supra*, note 62, apply to the \$65.8 million figure for total consolidation.

c. Department of Defense Must Provide Resources for USACIDC's Protective Services Mission

The Army is providing excellent service in its conduct of the protective services mission, and it should retain responsibility for that mission as it relates to the Office of Secretary of Defense and the Joint Chiefs of Staff. Because of the decrease in USACIDC's overall agent force, however, the amount of staffing that USACIDC must provide to the protective services mission has the potential to affect adversely USACIDC's criminal investigative mission. The Department of Defense must offer USACIDC some relief from drawdown requirements to compensate for its disproportionate responsibility for protective services.

d. NCIS Should Adopt Measures to Increase Responsiveness

(1) Establish Guidance for Informing Commanders of Investigations

NCIS should establish procedures similar to those used by the Army and Air Force for informing commanders of investigations. That is, it should establish regulatory guidance requiring NCIS agents to inform commanders shortly after they initiate an investigation or establish procedures to ensure commanders are briefed on a weekly or bi-weekly basis concerning investigations taking place within their commands.

(2) Increase the Number of Military Special Agents

NCIS should increase the number of military agents in its ranks rather than reduce them, as it is doing. This should be accomplished by the Navy creating a military special agent career field in NCIS. An increased military presence may lead to a closer association with and greater respect for the Navy and Marine Corps on the part of the agents and for the agents on the part of the servicemembers. This, in turn, may lead to

greater responsiveness and enhanced crime solving ability for NCIS.

Although the Navy has a limited pool of active duty personnel with law enforcement experience from which to recruit and develop military NCIS special agents, it does have a number of Intelligence Officers, Limited Duty Officer Security Officers, Security Warrant Officer Technicians, and enlisted MAAs. As with the other MCIOs, NCIS should look to these experienced military personnel as a potential source for officer and enlisted career special agents.

We recognize that with the current constraints imposed by downsizing in DoD increasing the presence of active duty military career special agents in NCIS may be difficult. In the case of NCIS support to the Marine Corps, however, our recommendation at section III.B.3 for integration of Marine Corps CID and NCIS field elements would meet this goal without requiring additional personnel.

(3) Increase Focus on General Crimes

The Navy and NCIS should increase their focus on general crimes investigations in the Navy, and they should begin by increasing the number of agents dedicated to that mission.

e. Develop Guidance for Delayed Reporting to Commanders

The Secretary's Board on Investigations should see to it that there is DoD-wide guidance, applicable to all types of criminal investigations, on the circumstances and procedures for withholding criminal investigative information from the immediate concerned commander. We believe such guidance is necessary to ensure the MCIOs and their special agents have the necessary independence and that any decision to withhold or delay reporting to a commander is implemented equitably and uniformly.

f. The Navy Should Examine the Need for Restrictions on Use of Informants

The Navy and the Secretary's Board on Investigations should examine the need for the restrictions that exist currently on NCIS's use of informants, particularly in light of the fact that neither the Army nor the Air Force finds this type of restriction necessary. We understand the importance of keeping commanders informed of the activities of members of their command and that, on occasion, it may even be necessary to solicit the cooperation of a commander to direct the activity of an informant. A requirement that special agents obtain a commander's permission to direct informant activities, however, may increase the potential for improper command influence.

g. Adopt Added Protections for Independence in Criminal Investigations of Senior Officials

Many of the commanders and MCIO agents we interviewed commented on the close working relationship that exists between the command and the MCIO field office. In light of this close working relationship, an investigation by the local field office of an MCIO into misconduct by senior personnel in the local command it serves could lead to at least a perception of partiality. Therefore, each MCIO should adopt procedures whereby MCIO agents from outside the local installation to which a senior command official is assigned, investigate that senior official.

h. Take Disciplinary Action Against Agents who Infringe Subjects' Rights

The DCIOs should be vigilant to ensure that agents are sensitive to the protection of subjects' rights by taking appropriate disciplinary action against agents who deny subjects their rights.

i. Examine the Use of Defense Investigators

The Services, through the Secretary's Board on Investigations, should examine current Service policies regarding assignment of MCIO investigators to assist defense counsel. Reasonable access to investigative resources is an accepted part of the defense of criminal cases. We did not explore this in detail, but recommend that attention be paid to the matter in consultation with the senior defense counsel of each Service and the Judge Advocates General.

j. Change the DCII System

Recognizing that any change to the DCII system must balance adequate protection for individuals indexed in the system with criminal investigative and national security interest needs, we recommend that DoD implement the following proposals for the DCII.

(1) Establish Procedures for Information Related to Open Investigations

Special procedures should be established for the entry of, and access to, open criminal investigation entries in the DCII when such entry and access may result in the compromise of an investigation or constitute an unacceptable risk of physical harm to those associated with the investigation. These may include notifying only designated security clearance adjudicative authorities about ongoing investigations, blocking some organizations from access to information about ongoing investigations, and delaying entry about ongoing matters into the system.

(2) Establish Prompt, Effective Procedures for Individuals to Appeal Titling and Indexing Decisions

Procedures should be established to allow individuals titled as the subjects of criminal investigation reports, and subsequently indexed in the DCII, to appeal such decisions to the concerned investigative organization.

If the investigative organization determines there was an error in judgment in applying the titling standard, or other circumstances exist that could be considered arbitrary, capricious or an abuse of discretion, the individual's record should be changed. The procedures that the Army used to amend titling decisions before DoD Instruction 5505.7 and still uses to resolve requests for amendment of investigative records provides a uniform, and to the extent possible, equitable means of addressing such petitions.¹⁶⁸

(3) Limit Online Access to Criminal Investigation Indices

The justification for the number of organizations or activities that currently have online access to DCII's criminal investigation indices must be reviewed. Only those organizations or activities with a substantial law enforcement function, those with national security interests, such as security clearance adjudicative authority, and the Defense Investigative Service should have access to criminal investigation indices. All other users should be blocked from access to the criminal investigations indices. This recommendation is imperative. If it cannot be accomplished, then the standard for indexing criminal investigations in the DCII should be preponderance of evidence.

(4) Establish a Preponderance of the Evidence Standard for Other than Law Enforcement or National Security Purposes

We are concerned about the widespread access to a vast criminal investigation index based on a credible information standard, and the release of the investigative reports on which the indexed information is based to other than law enforcement agencies and those with a national security interest. Even if online access to the criminal indices is limited, the DCIOs still will receive requests for information on individuals and investigations for purposes other than law

¹⁶⁸ See Vol. II, Supplemental Reports, §II.D.2, for discussion of the Army's procedures.

enforcement and national security. The release of investigative records in response to these requests should occur only when the information in the record satisfies a preponderance of evidence standard.

Titling of subjects and indexing in the DCII still would be based on a credible information standard, which is purely an investigative determination. The determination of whether an investigation meets a preponderance of evidence standard, on the other hand, should be made only after both an investigative review and an independent legal review. The results of each review should be listed prominently in the report of investigation. We recognize that this may result, to some extent, in an appearance that the record reflects a conclusion about the subject's guilt or innocence, which has a potential for unfairness to a subject. We believe, however, that on balance the procedures we recommend would protect far more individuals than it will harm. Because of the broad use of investigative reports in DoD, we believe it is necessary to have a higher standard for releasing potentially harmful information.

2. Police Investigators

a. Train All Police Investigators

All police investigators must receive formal investigative training. No one without formal investigative training should be conducting police investigations. Especially in light of the haphazard nature of police investigator supervision, on-the-job training should not be permitted to take the place of formal training. The Navy in particular must increase the number of MAAs and civilian police investigators who receive investigative training.

b. Train at Army's MPI Course

The Army's MPI course is of high quality and, as a practical matter, police investigators from every Service currently train there. The

Army school should be the DoD location for police investigator training. The Army and the other Services should resolve whatever is causing the difficulty in obtaining slots at the MPI course. The Secretary's Board on Investigations should monitor progress in this area.

c. Improve Supervision

Given the complexity of organizational relationships, physical restraints of existing facilities, and differences in missions, size, and composition of personnel in the Services' police investigator elements, we have no single recommendation for how the Army, Navy, and Air Force should improve supervision, but each Service should adopt one or more of the following recommendations.

(1) Collocation

Police investigators could collocate with MCIO units at locations where both elements exist. Collocation includes physically situating police investigators and MCIO agents in the same facility or as close as possible. MCIOs would provide guidance on investigative activity, but not necessarily exercise operational control. Operational control, such as establishing priorities of investigative effort, should remain with the police investigators' chain of command. Their rating chain also should remain within the police organization.

The benefits of this option are that police investigators would receive supervision from experienced MCIO special agents. It would provide opportunities for consolidation of investigative support functions, such as evidence repositories, and would enhance the sharing of criminal intelligence. The installation security official, however, would not lose the responsiveness of his or her police investigators because they would remain under his or her operational control and chain of command.

The principal downside if the Services adopt this option is that the MCIOs may require increased staffing to compensate for

increased supervisory responsibilities. There could be some confusion over to whom the police investigators are responsible. Police investigators working under the supervision of the MCIO's would, in effect, be working for two supervisors -- the installation security official and the MCIO representative. There also could be some concern that sensitive MCIO criminal information, such as informant identities, may become known to personnel from outside of the MCIO, but we assume the MCIOs can develop systems to avoid this problem.

(2) Civilian Investigator Supervisors

The Services could increase the use of civil service personnel to supervise active duty police investigators. Such individuals should be required to possess substantial training and experience in criminal investigations.

The use of civil service employees as police investigators supervisors could provide a core of experienced personnel to improve the quality of investigative effort. This also could establish a continuity in investigative efforts, with civil service employees compensating for the rotating military force. There will be no loss of responsiveness to the installation security officials, as all police investigators would still be under their direct control.

The use of civilian personnel could require conversion of some police investigator supervisory positions from active duty to civil service. This would reduce the number of personnel available for the other functions of police investigators, such as their duties during wartime. The civil service police investigator supervisory positions will have little, if any, career progression in a predominately active duty military organization. It may be difficult to recruit and retain experienced personnel for the supervision primarily of misdemeanor investigations.

(3) Rotation of MCIO Special Agents as Supervisors

MCIO special agents could serve tours of duty as police investigator supervisors. This would be accomplished by assigning MCIO special agents to installation security officials for a specified period of time, after which they would return to their MCIO.

Using experienced MCIO special agents as police investigator supervisors could improve the quality of police investigation. It would provide MCIO special agents with increased opportunities for supervisory experience and could help reduce confusion over investigative jurisdictions. It also would improve cooperation and sharing of information between police investigator elements and the MCIOs. The installation security official is assured of responsiveness, as all police investigators would remain under his or her chain of command.

Again, the possible downside is that this option could require increased staffing of the MCIOs to compensate for the loss of personnel. It is also possible that MCIO special agents would be placed in difficult positions by working temporarily for the installation security official, without the benefit of a stovepipe structure.

d. The Navy Should Adopt Additional Measures

The problems with training and supervision of police investigators are particularly acute in the Navy. The Navy must increase substantially its focus on this level of law enforcement by mandating a police investigator organizational structure and training requirements. This inevitably will require additional funding. In addition to the recommendations already made for increased training and supervision of police investigators, the Navy should:

(1) Establish and adhere to a regulatory requirement that all independent duty

MAAs¹⁶⁹ attend the Army MPI course and be rated MA-2002s.¹⁷⁰

(2) Establish and adhere to a regulatory requirement that a significant portion of rated MAAs in each command attend the Army MPI course and be rated MA-2002s.

(3) On shore, either provide investigative training to a cadre of civilian police and allow only those investigators to conduct police investigations, or have trained MA-2002 investigators conduct all police investigations.

(4) Establish and require a uniform structure for the investigative elements in all security departments. This includes developing a system to determine staffing levels of investigative elements and requiring the use only of personnel who have received investigative training.

(5) Increase the emphasis and role of NCIS's oversight of police investigator policy and consider expanding it to operational inspections, even if increased NCIS staffing is required.

e. Increase Coordination with MCIOs

To ensure that all available criminal intelligence and information is available to police investigators and the MCIOs, the Services should look for avenues to combine activities of the organizations, such as consolidation of local criminal intelligence collection and analysis efforts.

¹⁶⁹ The smallest rated MAA force consists of one individual called an independent duty MAA. These personnel generally are assigned to ships with a crew of 350 or fewer.

¹⁷⁰ See, *supra*, note 157 for a description of the categories of MAAs.

f. Improve Records Maintenance

All investigations conducted by police investigators should be retained in a centralized records repository of the Service. Services should be able to correlate and analyze data contained in these reports. The Services should consider standardizing existing reporting systems of the Services' police investigators and MCIOs.

g. Develop and Implement Policy for DCII Entry

The requirements DoD-wide for how and when subjects of police investigations will be indexed in the DCII, including DoD Instruction 5505.7, and how Services' police investigators are complying with those requirements need serious review. Standard procedures should be created and implemented.

h. Study Other Possible Organizational Structures

During the course of our investigation, we heard other proposals for changes to the structure of police investigator organizations. We were not able to study these proposals in detail, but recommend that the Secretary's Board on Investigations do so.

(1) Consolidation with MCIOs

The Secretary's Board on Investigations should study whether the MCIO and police investigators in each Service should be consolidated. Complete consolidation of the criminal investigative organizations and missions within each Service could improve the quality of police level investigations. Consolidation also could lead to an improved collection and correlation of criminal information and intelligence. Lower-level investigations would provide a good training ground for the development and maturation of junior MCIO special agents. Any confusion over investigative jurisdiction would be eliminated. Perceptions of potential improper command influence, based on organizational structure, would be eliminated.

Finally, there may be savings through more efficient support and supervisory functions.

Complete consolidation would, however, leave installation law enforcement officials and commanders without their own criminal investigation capability to fulfill their responsibility to maintain good order and discipline. Commanders would not be able to set priorities or direct criminal investigations because the MCIOs are organizationally autonomous from local commanders. There is the potential that the increased investigative responsibility could degrade the MCIOs' ability to focus on serious felony investigations. It is also possible that the MCIOs' emphasis on felony crime could cause the less serious crimes to be neglected. Finally, in wartime and deployment, many police investigators perform other military duties in support of operations. Loss of these resources could affect adversely the ability of the police organizations to provide the support required in these operations.

(2) Collocation with MCIOs' Having Operational Control

Another organizational option that the Secretary's Board should consider is situating police investigators and MCIO units in the same location and providing for operational control by the MCIOs.¹⁷¹ This could provide many of the benefits of consolidation of the police investigator and MCIO mission. Police investigators, however, would remain the assets of the local commanders, who would retain administrative control. Thus police investigators still would be available for deployment and other duties at the direction of the local commander.¹⁷²

¹⁷¹ This organizational structure would be somewhat similar to the structure that would result if the recommendations in §III.B.2.c(1) and c(3) both were implemented. The primary difference is that here the supervising MCIO agents remain members of their stovepipe organization. Recommendation III.B.2.c(3) contemplates the MCIO agents temporarily becoming members of the police investigator organizations.

¹⁷² We recommend a very similar structure for

Collocation with operational control could create some of the same problems the total consolidation of missions would cause. In addition, there could be confusion between the authority of the police investigators' chain of command and the MCIO. Police investigators would be placed in a position of having to respond to two supervisors.

i. Establish DoD Standards for Selection and Training of GS- 083 Series Civil Service Employees

Although we limited our review to GS-083 series personnel in investigative or "detective" positions, we heard repeatedly of a lack of training and standard selection requirements in DoD for all GS-083 series positions. One notable exception to this problem is the Defense Protective Service.¹⁷³ These are significant concerns; the Secretary's Board on Investigations should address them. The practices of the Defense Protective Service may serve as a useful model.

3. Marine Corps CID -- Increase Investigative Responsibilities

We believe the current restriction of Marine Corps CID's jurisdiction makes no sense and is an unacceptable misuse of a quality resource. We recommend that the Marine Corps' investigative responsibilities be expanded by consolidating the investigative missions and resources of

Marine Corps CID and NCIS. Here we recommend study of the structure rather than implementation. We are comfortable that the new structure would work for Marine Corps CID because the roles, missions, and training of NCIS agents and Marine Corps CID investigators are quite similar and investigations is a career for both. Police investigators and MCIO agents are not as similar, and we do not feel we have examined the difference in enough detail to recommend this new structure without further study.

¹⁷³ See Vol. II, The Organizations, §III.E, for discussion of the Defense Protective Service.

Marine Corps CID and NCIS. Pursuant to this recommendation, all Marine Corps CID investigators would be assigned to NCIS offices and the investigative jurisdictions of the two organizations on Marine Corps installations would be combined. Case assignments would be based on an individual's capability, not his or her status as a Marine Corps CID investigator or NCIS special agent. The assistant special agent-in-charge of the NCIS office would be the senior Marine Corps CID investigator. Marine Corps CID investigators would be under the operational control of NCIS, but in the provost marshal's rating chain. The Marine Corps CID investigators would deploy in training exercises and missions. Marine Corps CID investigators would be rated by the assistant special agent-in-charge, who is rated by the base Marine Corps provost marshal.

This consolidation would provide for better use of the training and skills of Marine Corps CID investigators. It would eliminate confusion over investigative jurisdiction and provide for a greater military presence in NCIS offices on Marine Corps installations. It also would recognize the need for the provost marshal to have investigators responsive to his or her investigative requirements by keeping the provost marshal in Marine Corps CID investigators' rating chain. There may be some efficiencies realized in support and supervisory functions, in addition to an increase in the sharing of criminal intelligence. We recognize some downsides to this structure. Most significant, with this structure the Marine Corps CID agents would not operate under the same stovepipe structure as the NCIS agents. We believe, however, that these agents would be protected sufficiently from influence by the fact that they work in a stovepiped NCIS office. Most importantly, this proposed structure -- although perhaps not perfect -- is far superior to the current arrangement.

IV. Counterintelligence

In response to a request from the House Permanent Select Committee on Intelligence,¹⁷⁴ the Acting Assistant Secretary of Defense (Command, Control, Communications, and Intelligence) (C3I) asked the Advisory Board to examine the feasibility of separating the counterintelligence mission from the criminal investigations mission within the DoD organizations responsible for counterintelligence activities.¹⁷⁵ This examination entailed studying the current nature of the counterintelligence mission within DoD, and developing findings on the merits of the status quo.

A. DoD Counterintelligence Organization and Mission

Executive Order 12333, *United States Intelligence Activities*, December 4, 1981, directs DoD to conduct counterintelligence activities. It defines counterintelligence as:

Information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document, or communications security programs.

Implementing Executive Order 12333, DoD Directive 5240.2, *DoD Counter-*

intelligence, charges DoD component counterintelligence organizations as follows:

To conduct counterintelligence investigations and operations; to collect, analyze, evaluate, and disseminate counterintelligence information; and to prepare studies and analyses of the threat to DoD from foreign intelligence services and international terrorism.

The Foreign Counterintelligence Program (FCIP)¹⁷⁶ funds DoD counterintelligence activities. The FCIP is one of six DoD programs included in the National Foreign Intelligence Program, which is overseen by the Director of Central Intelligence and the Deputy Secretary of Defense.

DoD counterintelligence program management is the responsibility of the Assistant Secretary of Defense (C3I). The Director for Counterintelligence and Security Programs serves as the DoD program manager for the FCIP. The FCIP funds Army, Navy, Air Force, Defense Intelligence Agency, and the On-Site Inspection Agency¹⁷⁷ counterintelligence activities. The Director for Counterintelligence and Security Programs coordinates Service counterintelligence programs and pursues program initiatives that cut across Service responsibilities.¹⁷⁸

¹⁷⁴ Classified Annex of the FY 1992 Intelligence Authorization Act at 70, prepared by the House Permanent Select Committee on Intelligence, H.R. Rep. No. 527, 102nd Cong., 1st Sess. (1991).

¹⁷⁵ See Letter from Charles A. Hawkins, Jr., Acting Assistant Secretary of Defense (C3I) to Representative Dan Glickman, Chairman, House Permanent Select Committee on Intelligence (Apr. 27, 1993).

¹⁷⁶ The Foreign Counterintelligence Program is the name given to the consolidated DoD counterintelligence program and budget managed by the Assistant Secretary of Defense (C3I) through the Director for Counterintelligence and Security Programs. The program includes the individual programs that Army MI, NCIS, and AFOSI execute. Marine Corps counterintelligence activities and some Army MI activities are funded or supplemented separately under the Tactical Intelligence and Related Activities (TIARA) and other accounts within the Defense budget.

¹⁷⁷ The On-Site Inspection Agency coordinates counterintelligence support of international arms control treaties.

¹⁷⁸ For example, last year the Assistant Secretary of Defense (C3I) sponsored an effort to identify ways the

The Director for Counterintelligence and Security Programs is assisted by the Defense Intelligence Agency Intelligence Program Support Group (IPSG). The IPSG performs the program staff function for the FCIP Program Manager and compiles the DoD counterintelligence Congressional Budget Justification Book (CJB), under supervision of the program manager, for DoD and Congress.¹⁷⁹

DoD counterintelligence personnel are stationed in 22 countries and represent U.S. national security interests in another 50 countries around the world. DoD counterintelligence elements deploy with U.S. combatant or assistance forces, including naval battle groups and Marine Expeditionary Units. Counterintelligence personnel participate in military training exercises conducted in foreign countries, assist Defense agencies, and support military contingency plans.

DoD counterintelligence organizations support military commanders and DoD program managers and decision makers. They provide: (1) force protection during all types and phases of military operations; (2) detection, and neutralization of espionage; (3) anti-terrorism services; (4) threat assessment support; (5) counter-proliferation support; (6) means to counter illegal technology transfer; (7) acquisitions systems protection; (8)

Services could integrate their counterintelligence programs to enhance the effectiveness of the overall DoD counterintelligence effort. DoD assembled a two-year, full-time Corporate Information Management (CIM) working group composed of representatives from Army MI, NCIS, AFOSI, and Defense Intelligence Agency to develop a common DoD counterintelligence information database system. OSD also is examining ways to consolidate counterintelligence training.

¹⁷⁹ The Congressional Budget Justification Book, or "CJB," is an annual report to Congress providing a consolidated summary of ongoing DoD and Service counterintelligence programs, accomplishments, and budget requirements. The CJB is produced with the assistance of counterintelligence representatives of Army MI, NCIS, and AFOSI, and program analysts from the IPSG of the Defense Intelligence Agency.

support to other intelligence disciplines; (9) information systems protection; and (10) treaty support. These organizations also complement the counterintelligence activities of the FBI and the CIA.¹⁸⁰

Although OSD is the focal point for management of counterintelligence, the Services actually operate the counterintelligence programs. The exact amount allocated to each Service for counterintelligence activities is classified;¹⁸¹ however, it can be noted that the counterintelligence activities of Army MI, NCIS, and AFOSI constitute a significant mission responsibility and funding for counterintelligence makes up a sizable proportion of their overall budgets. The organizational structure of each Service's counterintelligence programs varies significantly. In the Army, counterintelligence is part of the intelligence mission and the Army Deputy Chief of Staff for Intelligence is responsible for the Army counterintelligence mission. The Navy and Air Force categorize counterintelligence as criminal in nature and authorize their criminal investigative organizations (NCIS and AFOSI) to conduct counterintelligence activities.

Service counterintelligence organizations support the Office of the Joint Chiefs of Staff, the Unified and Specified Commands, and various Defense agencies.¹⁸² Counterintelligence Support Officers are assigned to all U.S. Combatant Commands. These officers are experienced Army MI, NCIS, and AFOSI counterintelligence officers who advise commanders-in-chief and their component commanders on

¹⁸⁰ DoD provides a large portion of counterintelligence investigative and operational support to CIA and the FBI counterintelligence operations. Exact figures are classified.

¹⁸¹ See *Fiscal Year 1995 Congressional Budget Justification Book (Secret)* for budget numbers.

¹⁸² These include the Defense Investigative Service, National Security Agency, Defense Intelligence Agency, and On-Site Inspection Agency.

counterintelligence matters and coordinate all significant counterintelligence activities of forces subordinate to these commanders.

DoD counterintelligence activities can be grouped into the following four broad categories: (1) investigations; (2) operations; (3) collection; and (4) analysis and production. These four broad categories of activities are interrelated -- operations often spawn espionage investigations; espionage investigations support collection and analysis activities; and collection and analysis activities are essential to successful development of counterintelligence operations.

Counterintelligence investigations seek to identify spies and others who commit national security crimes against the United States. Army MI, NCIS, and AFOSI investigators gather evidence used to support prosecution in military, federal, and foreign courts. Often, DoD investigators work closely with special agents of the FBI, foreign security officials, state and local law enforcement personnel, and intelligence officers in DoD and other federal organizations. Investigators provide military commanders and policy makers with information used to identify and eliminate security vulnerabilities, assess damage to national security, and improve DoD security programs.

Counterintelligence operations include actions taken against foreign intelligence services to counter espionage and other clandestine intelligence activities damaging to the national security.

Counterintelligence collection, analysis, and production activities obtain, analyze, and disseminate information to military commanders, the DoD leadership, and national command authorities concerning espionage, sabotage, terrorism, intelligence activities, and related threats to national security and U.S. military forces. This information is used to formulate security policy, plans, and procedures, and to assist in human intelligence (HUMINT) collection operations and counterintelligence investigations and operations.

B. Findings

Unlike our analysis of consolidation issues regarding procurement fraud and training within the DCIOs, examination of the consolidation of the DoD counterintelligence organizations was not within our charter. That issue is more global in nature and should be addressed by the President's Foreign Intelligence Advisory Board in its study of the role of the intelligence community in the post-Cold War world. We recognize Service HUMINT programs are being consolidated in a new Defense HUMINT Service (DHS) under the Defense Intelligence Agency. But we did not examine the HUMINT consolidation in any depth -- in part because the consolidation commenced in April 1994 and is scheduled to be completed in October 1996 -- and because, once again, the consolidation issue was not within our charter.

The focus of our study was whether the counterintelligence mission of the Services should be included with their criminal investigative organizations (e.g., NCIS and AFOSI), or with the intelligence organization (e.g., Army MI). During the course of our study we divided the DoD counterintelligence mission into two categories, strategic and tactical. We define tactical counterintelligence as that conducted "on the ground" at the direction of operational commanders in contingency situations to ensure protection of friendly forces. Strategic counterintelligence is not normally conducted during contingency operations. Strategic counterintelligence is centrally directed from a national level with the goal of preventing foreign intelligence services from gathering intelligence against the United States. Army MI, NCIS, and AFOSI conduct tactical and strategic counterintelligence activities on behalf of their respective Services. U.S. Marine Corps Counterintelligence Teams provide only tactical, combat counterintelligence support to deployed Marine Corps forces. NCIS provides all other counterintelligence support to the Marine Corps.

1. Structure of DoD Counterintelligence

In examining whether the counterintelligence functions should be restructured, we looked first at how well that function currently is performed. Counterintelligence is a demanding specialty, and, in the main, we found that DoD counterintelligence organizations work well as currently structured and tailor support to the Service customer. Customers, particularly operational commanders, seem satisfied with existing counterintelligence programs. We also consulted the commanders of the Service intelligence agencies and counterintelligence experts regarding the current Service counterintelligence structure. None were in favor of changing the current structure.¹⁸³ A senior Army MI counterintelligence officer explained that the placement of the Army and Marine Corps counterintelligence organizations as subdisciplines within intelligence is due to of the Army and Marine Corps structure and wartime mission. Both are force projection services composed of tactical ground units that directly engage enemy forces on land. The Army and Marine Corps counterintelligence organizations reflect a critical need to support the tactical and operational commanders with their own counterintelligence personnel embedded in tactical units under their operational control.¹⁸⁴

¹⁸³ See Interview of Ray W. Pollari, Director of Counterintelligence, Office of the Assistant Secretary of Defense (C3I) (Jan. 21, 1994); Interview of Colonel Nicholas J. Ciccarello, Director of Counterintelligence and Security Countermeasures, Deputy Chief of Staff for Intelligence, Department of the Army (Feb. 1, 1994); Interview of John T. Elliff, Director of Counterintelligence and Security Programs, Office of the Assistant Secretary of Defense (C3I) (May 6, 1994); Interview of Rear Admiral Edward D. Scheafer, Jr., Director of Naval Intelligence (May 4, 1994); Letter from Major General Kenneth A. Minihan, Commander, Air Intelligence Agency, to the Advisory Board (Aug. 16, 1994).

¹⁸⁴ Interview of Colonel Nicholas J. Ciccarello, Director of Counterintelligence and Security Countermeasures, Deputy Chief of Staff for

The Navy and Air Force have adopted the FBI model of combining their counterintelligence organizations with their criminal investigations organizations. A senior AFOSI official opined that the reason the Army made the decision to include the counterintelligence function within the Army Intelligence structure was because Army resources are more tactically oriented and forward deployed during combat. The Navy and the Air Force, in contrast, are more strategically positioned during wartime. He added that historically each Service tailored the structure of its counterintelligence function to best serve its customer.¹⁸⁵ Additionally, both NCIS and AFOSI officials argued that NCIS and AFOSI agents stationed in foreign countries develop close and cooperative links with local police during the course of routine criminal investigations. Due to this law enforcement "collegiality," agents occasionally obtain information of a counterintelligence nature from the local police that otherwise might not come to the attention of the U.S. intelligence community.¹⁸⁶

Effective enforcement of U.S. espionage statutes and Articles 104 and 106 of the Uniform Code of Military Justice¹⁸⁷ is essential to national security. Given the seriousness of the offense of espionage, its potential consequences, and the penalties that can be imposed for violations of espionage statutes, allegations of these offenses must be investigated competently. Senior officials within NCIS and AFOSI argue that investigations of espionage are simply a category of criminal investigation requiring basic criminal investigations skills and

Intelligence, Department of the Army (Feb. 1, 1994).

¹⁸⁵ Interview of Timothy F. Deerr, Chief of Investigative Programs Division, Headquarters AFOSI (Feb. 18, 1994).

¹⁸⁶ *Id.*; Interview of David L. Brant, Assistant Director for Counterintelligence, Headquarters, NCIS (Mar. 1, 1994).

¹⁸⁷ UCMJ Article 104 prohibits aiding the enemy; UCMJ Article 106 prohibits spying.

experience that each of their agents possesses.¹⁸⁸ As we point out below, one criticism we have of the Army MI counterintelligence program is that Army MI investigators, shorn of a structural tie to the Army's criminal investigations mission, lack sufficient on-the-job experience investigating cases for prosecution. Separating the counterintelligence mission from the criminal investigations mission and infrastructures in NCIS and AFOSI could, we believe, lead to a degradation in the counterintelligence investigative capability of the Navy and Air Force and DoD as a whole.

On the other hand, we do not believe the Army's counterintelligence mission and resources should be transferred to USACIDC. Army MI should focus more on the law enforcement aspects of counterintelligence investigations, but the responsive tactical counterintelligence support to operational commanders that Army MI provides is a key DoD priority. Lieutenant General Charles E. Dominy, Director of the Army Staff, expressed his conviction that the Services and their commanders need homegrown counterintelligence assets that can respond immediately to often evolving and unpredictable requirements encountered in operational environments.¹⁸⁹ For many of the same reasons that we cited in the general crimes section of this report, we found that warfighters need immediate access to counterintelligence resources, particularly in a tactical environment. In a tactical environment, to be most effective, counterintelligence units supporting an operational command must have an intimate understanding of the command, its mission, its capabilities, and its counterintelligence requirements. Often, operational commands

are deployed on short notice with minimal opportunity to coordinate with other organizations. As currently configured, Army MI and Marine Corps counterintelligence personnel are embedded in their units and deploy with the operational commands they are supporting. Therefore, these agents are acquainted with their supported command, the mission, and the command's capabilities and counterintelligence requirements.¹⁹⁰

The value of embedded tactical counterintelligence support was illustrated during Operation Restore Hope in Somalia. In a situation report from Somalia, Lieutenant General (Select) Charles E. Wilhelm, Commander of U.S. Marine Forces Somalia, praised the Marine Corps counterintelligence teams during that operation. General Wilhelm said the success of these teams accounted, in part, for the low casualty rate experienced to that point in the operation. He added:

[T]he architects of our counterintelligence structure can take justifiable pride in the capability that has been built. The counterintelligence teams and sub-teams are populated by the right kinds of Marines . . . gutsy and intensely mission-oriented, but also mature and responsible. Our HUMINT collectors have again proven their worth.

With a high probability of [an] increasing number of missions on the left side of the operational continuum, this is an element of our structure that we should protect.¹⁹¹

In examining the merits of separating the Navy and Air Force counterintelligence mission from NCIS and AFOSI and placing it with the intelligence function, or placing the

¹⁸⁸ Testimony of Charles Torpy, Executive Associate, Headquarters, AFOSI, before the Advisory Board 8 (Feb. 12, 1994); Testimony of David L. Brant, Assistant Director of Counterintelligence, Headquarters, NCIS, before the Advisory Board 16 (Feb. 12, 1994).

¹⁸⁹ See Letter from Lieutenant General Charles E. Dominy, Director of the Army Staff, to the Advisory Board (June 6, 1994).

¹⁹⁰ NCIS and AFOSI counterintelligence agents also deploy with the commands they support, but because their support is more strategic than tactical, they need not be embedded in those commands.

¹⁹¹ Situation Report No. 55 (Jan. 24, 1993).

Army counterintelligence mission in USACIDC, we also looked at the potential impact on resources. DoD officials we interviewed argued persuasively that such reorientations of the counterintelligence mission would cost more than the current DoD counterintelligence program structure. The counterintelligence missions of the Army, Navy, and Air Force currently are supported administratively and logistically by Army Intelligence, NCIS, and AFOSI, respectively. Separating these missions from their current agencies would increase costs for office space, vehicles, equipment, communications, personnel, and administration systems -- in short, an entirely new infrastructure and bureaucracy would be required. As a senior DoD counterintelligence official stated, the DoD counterintelligence budgets "piggyback" on the existing infrastructures, giving DoD much more "bang for its CI bucks."¹⁹²

Although some of the infrastructure could be transferred from existing counterintelligence organizations, much of the infrastructure now used by DoD counterintelligence agents and analysts is provided by and shared with criminal investigators or the Service intelligence organizations. During our interview of the Director of DHS, he acknowledged that the new consolidated HUMINT organization is experiencing "growing pains," and consolidation savings will not be as great as originally estimated because of unforeseen infrastructure costs.¹⁹³ In addition, representatives of NCIS and AFOSI have argued that agents who normally conduct criminal investigations can provide additional counterintelligence resources during times of particular need. In the same vein, Army MI counterintelligence officials argue that resources devoted to other Army intelligence disciplines can augment counterintelligence activities when required.

¹⁹² Interview of Ray W. Pollari, Director of Counterintelligence, Office of the Assistant Secretary of Defense (C3I) (Jan. 21, 1994).

¹⁹³ Interview of Major General John A. Leide, USA, Director, Defense HUMINT Service (Aug. 11, 1994).

2. Nature of Service Counterintelligence Doctrine

While studying whether the DoD counterintelligence mission should be segregated from the law enforcement and intelligence missions, we examined the nature of the counterintelligence mission and doctrine in the Services.¹⁹⁴ Currently, the Services have different approaches to counterintelligence due to their unique missions. Representatives of Army MI, NCIS, and AFOSI addressed the Board, and we interviewed officials and agents of these organizations regarding their counterintelligence doctrines and training programs. During these meetings and interviews, we learned that NCIS and AFOSI counterintelligence doctrine holds that counterintelligence primarily is a law enforcement mission. Army MI counterintelligence officers, on the other hand, conveyed that under Army counterintelligence doctrine, counterintelligence is, first and foremost, an intelligence mission.

Lines of jurisdiction between many traditional law enforcement activities, criminal intelligence activities, counterintelligence activities, and "positive" intelligence collection¹⁹⁵ activities are, and should be, by nature blurred. Attempting to demarcate the disciplines of law enforcement, counterintelligence, and intelligence artificially is difficult and not in the best interests of the Department of Defense.

¹⁹⁴ Because Marine Corps counterintelligence has only a tactical counterintelligence role, not law enforcement, it is not included in this discussion of Service counterintelligence doctrine.

¹⁹⁵ Within the intelligence community a distinction often is drawn between "defensive" intelligence operations -- counterintelligence -- and "positive" intelligence operations. Positive intelligence operations are those operations designed to gather intelligence aggressively on an adversary. Counterintelligence operations generally are designed to detect and neutralize the positive intelligence collection of an adversary.

The differing approaches to the counterintelligence mission arise in large part due to the different missions of the Army, Navy, and Air Force. DoD warfighting doctrine, however, is changing. More and more, the Services are fighting jointly. Distinctions between Service mission areas and counterintelligence support to those missions are dissolving as combat doctrine and the nature of United States military commitments evolve. In an era of declining defense resources, joint and combined operations likely will increase. We believe a reorientation of respective Service counterintelligence doctrines, training, and ADP integration would achieve efficiencies and enhanced support to the counterintelligence customer that cannot be achieved through either reorganization or maintenance of status quo.

Counterintelligence is not strictly a law enforcement matter. NCIS and AFOSI also have provided tactical intelligence that has saved lives and contributed to the success of recent U.S. military operations.¹⁹⁶ Some NCIS and AFOSI counterintelligence agents and analysts have used counterintelligence activities to exploit sources and geographical advantages to satisfy intelligence requirements of operational commanders and to thwart terrorist operations targeting the sailors, Marines, and airmen of the Navy, Marine Corps, and Air Force.¹⁹⁷ To ignore the contributions of these organizations in the intelligence arena, or to allow those capabilities to atrophy under a self-limiting doctrine that defines counterintelligence as only law enforcement, not intelligence, is a

mistake. During this time of declining resources and rapidly evolving national security interests, DoD's counterintelligence agencies must do more with less.

Nevertheless, counterintelligence is not strictly intelligence. As evidenced by the many successful investigations and prosecutions of espionage suspects within the military during the past decade, counterintelligence is very much a law enforcement matter. There needs to be greater cooperation among DoD law enforcement, counterintelligence, and intelligence agencies. A recent review of U.S. counterintelligence effectiveness by the Joint Task Force on Intelligence Community/Law Enforcement Relations¹⁹⁸ highlighted the need for increased cooperation and coordination among U.S. counterintelligence activities. The task force noted that the intelligence and the law enforcement communities need to improve their understanding of their respective needs and operating practices and cooperate earlier, more closely, and more consistently on matters in which they have separate but parallel interests.

Considerable intersection exists between law enforcement, counterintelligence, and intelligence in the areas of espionage, terrorism, and low-intensity conflict. This relationship is particularly pronounced in situations involving military involvement in civil and political disturbances, peacekeeping, and nation building. Greater sensitivity to the intersection between law enforcement, counterintelligence, and intelligence is

¹⁹⁶ Interview of Ray W. Pollari, Director of Counterintelligence, Office of the Assistant Secretary of Defense (C3I) (Jan 21, 1994).

¹⁹⁷ *Id.*; Interview of Colonel Nicholas J. Ciccarello, Director, Counterintelligence and Security Countermeasures, Deputy Chief of Staff for Intelligence, Department of the Army (Feb. 1, 1994); Interview of Timothy F. Deerr, Chief, Investigative Programs Division, Headquarters, AFOSI (Feb. 18, 1994); Interview of David L. Brant, Assistant Director for Counterintelligence, Headquarters, NCIS (Mar 1, 1994).

¹⁹⁸ The Attorney General and the Director of Central Intelligence formed this joint task force after the "BNL" scandal. In the early 1990s, the former manager of the Atlanta branch of the Italian Banca Nazionale Del Lavoro was tried and convicted of lending money to Iraq for its nuclear, chemical, and ballistic missile program. Investigation disclosed that U.S. intelligence agencies had been aware of these transactions but did not inform U.S. law enforcement agencies. The task force is composed of attorneys from intelligence and law enforcement agencies. Its goal is to promote a closer working relationship between the two communities.

necessary in the DoD counterintelligence program.

3. Service Counterintelligence Training

Our examination of counterintelligence training provided to DoD counterintelligence agents included review of curricula, interviews with training staff, and anonymous telephone interviews of agents in the field.¹⁹⁹ Although DoD counterintelligence agencies are sensitive to opportunities to train jointly in advanced counterintelligence mission areas, we find that NCIS and AFOSI agents do not receive sufficient training on the intelligence mission, organization, reporting mechanisms, and requirements of their respective Services. We find further that Army MI counterintelligence investigators do not receive sufficient training in the requirements of law enforcement.

The NCIS basic agent course at the Federal Law Enforcement Training Center, Glynco, Georgia, provides no training regarding the intelligence discipline. Our surveys of NCIS agents determined that many NCIS agents do not know how to write an Intelligence Information Report²⁰⁰ and would not know how to introduce important information into the intelligence system, and

¹⁹⁹ We telephoned field offices of the DCIOs and Army MI and spoke anonymously with new agents, experienced agents, and supervisors. The sample of agents with whom we spoke is small compared to their overall number, and we do not attempt to draw any scientifically valid conclusions. The survey was useful, however, for identifying themes, and was used in various areas throughout this report.

²⁰⁰ The Intelligence Information Report is a DoD standard mechanism for reporting intelligence information. The report is formatted and computer-readable. The information is entered automatically into the Defense Intelligence Agency intelligence database, and reports are disseminated automatically to appropriate consumers and analysts. Defense Intelligence Agency and Service counterintelligence agencies evaluate the reports for accuracy and reliability.

the hands of consumers, quickly. NCIS is increasing on-the-job counterintelligence training for all agents by using Mobile Training Teams. This training, however, must include intelligence training.

AFOSI agents also receive only limited training in the intelligence discipline at the Air Force Special Investigations Academy. Surveys of AFOSI agents found that many AFOSI agents do not receive training in the proper evaluation and reporting of intelligence information. Many AFOSI agents do not know how to write an Intelligence Information Report. Anecdotal evidence suggests that too many NCIS and AFOSI agents overseas, living and working in lucrative collection environments, and interacting routinely with foreign counterparts in the law enforcement, intelligence, and military communities, do not know the intelligence collection requirements of their Services and the U.S. national command authority. Although some counterintelligence agents within both Services seem to be well-versed in intelligence requirements and reporting mechanisms, many are not. Some agents do not even know the name of their Service intelligence agencies.

Notwithstanding the significant counterintelligence and intelligence successes NCIS and AFOSI have enjoyed in recent years, we are forced to wonder how many opportunities are missed to detect and neutralize adversary intelligence organizations because NCIS and AFOSI agents are not trained uniformly to a minimum standard in the disciplines of counterintelligence and intelligence.

Army MI has the opposite problem. Our review of the Army MI curricula indicates that Army MI provides a great deal of intelligence training to Army MI counterintelligence agents, but relatively little investigations training.²⁰¹ It is essential that Army MI personnel conducting counterintelligence investigations be trained

²⁰¹ See Vol. II, Supplemental Reports, §IV.B, for a detailed discussion of Army MI counterintelligence training.

competently to a minimum standard in investigative techniques, search and seizure law, rules of evidence, and rights advisement. They also must receive continuing training in these subjects throughout their careers. We heard consistently that Army MI counterintelligence investigators lack investigative training and experience. By placing undue emphasis on the intelligence side of counterintelligence, and too little emphasis on the law enforcement side, Army MI invites criticism that it does not know how to investigate security problems competently.

Without doubt, Army MI counterintelligence investigators have contributed to the roster of successful DoD espionage investigations and prosecutions in recent years with the prosecutions of former Army Sergeant Roderick J. Ramsay, Army Staff Sergeants Jeffrey Rondeau and Jeff E. Gregory, and Army Specialist Albert T. Sombolay.²⁰² Nevertheless, evidence we uncovered suggests strongly that Army MI counterintelligence investigators need better investigative training.

A recently retired DoD Director for Counterintelligence and Security Programs explained that Army MI investigators did not acquit themselves well during investigations of violations of Articles 104 and 106 of the Uniform Code of Military Justice and federal espionage statutes. Without offering specific examples, he stated it was his opinion Army counterintelligence investigators were simply not trained in the investigative process as well as their counterparts in the Navy and Air Force.²⁰³ Army counterintelligence agents

do not have a law enforcement mindset, and NCIS and AFOSI agents are more sensitive to such things as evidence chain-of-custody, search and seizure, discovery, and other issues bearing on the potential to prosecute a suspect at court-martial successfully. He also stated the Department of the Army has a significantly greater tendency to discharge disloyal soldiers quietly rather than court-martial them.²⁰⁴

A senior Department of Justice prosecutor who specializes in espionage prosecutions, corroborated the assessment that Army MI counterintelligence investigators are weakest among DoD investigative agencies.²⁰⁵ We also heard from an FBI special agent with experience working with Army MI counterintelligence investigators that Army MI counterintelligence investigators needed more investigative training and they themselves recognize the need for more training in how to conduct an investigation.²⁰⁶ Interviews of Army MI investigators in DoD corroborated further the general assessment that Army MI investigators need more training in how to conduct a criminal espionage investigation.

An experienced USACIDC investigator who worked with Army MI counterintelligence investigators in Panama told us that an Army MI investigator participated in a crime scene search after a terrorist bombing that killed one U.S. soldier and wounded several others. He found a large fragment of the grenade used in the attack. The Army MI investigator, we were told, apparently not recognizing the evidentiary significance of the grenade fragment, or not sensitive to chain of custody

²⁰² Sergeant Ramsay was convicted of espionage on August 28, 1992, and sentenced to 36 years confinement. Sergeant Rondeau pleaded guilty to espionage in 1994 and was sentenced to 18 years confinement. Sergeant Gregory also pleaded guilty to espionage in 1994 and was sentenced to 18 years confinement. Specialist Sombolay was convicted of aiding and abetting the enemy on July 17, 1991, and was sentenced to 34 years confinement (actually 19 years in accordance with a pre-trial agreement).

²⁰³ Interview of Ray W. Pollari, Director of Counterintelligence, Office of the Assistant Secretary

of Defense (C3I) (Jan. 21, 1994).

²⁰⁴ *Id.* The Army may wish to explore this statement and, if true, determine whether this is a desirable policy.

²⁰⁵ Interview of John Dion, Chief, Espionage Unit, Internal Security Section, DOJ (Apr. 5, 1994).

²⁰⁶ Interview of Special Agent Jane Hein, National Security Section, FBI (Apr. 21, 1994).

requirements, took the fragment home with him as a "souvenir."²⁰⁷

Surveys of DCIO and Army MI agents revealed that Army MI investigators testify only rarely in court, in contrast to the testimony experience of USACIDC, NCIS, and AFOSI agents. No Army MI agents interviewed by telephone, including experienced agents and supervisors, had ever testified in either a court-martial or federal court proceeding while working for Army MI. By contrast, all experienced DCIO agents related that they had testified in courts-martial or federal court proceedings. One Army MI agent, who was scheduled to testify at the court-martial of a soldier she had investigated for national security crimes, said she learned a lot while preparing for court. She related that it was the first time that she had worked closely with prosecutors, and she came to understand how evidence is used in court and why prosecutors are concerned that the evidence be obtained properly so that it is admissible at trial.

4. Counterintelligence Automated Data Processing

The Counterintelligence Corporate Information Management Working Group (Working Group), which has completed 12 months of a management study of DoD counterintelligence organizations,²⁰⁸ has

²⁰⁷ Interview of Special Agent Gerald R. Marker, USACIDC, Ft. Irwin, CA (Apr. 15, 1994). We reviewed the case file and confirmed that a grenade fragment was removed from the scene during the search and turned over to USACIDC by an Army MI captain 12 hours after other evidence recovered at the scene had been entered into the evidence custody system.

²⁰⁸ The Working Group has examined systematically the common "functional processes" of the agencies performing the counterintelligence mission to identify opportunities for improvement. Functional processes in this context means the investigative steps agents take when investigating or collecting counterintelligence information, e.g., interviewing witnesses, conducting surveillances, and writing and transmitting reports. The Working Group has published a series of preliminary reports that identify

determined that the Army, Navy, and Air Force use different automated data processing (ADP) hardware, software, and report writing systems to do the same job. The Army, Navy, and Air Force use different terminology to describe the same activities. According to the Working Group, significant efficiencies and potential improvements in counterintelligence capabilities could be realized within DoD simply by requiring the Army, Navy, and Air Force to:

- (1) use the same counterintelligence vocabulary;
- (2) use the same report writing system;
- (3) buy compatible computer hardware;
- (4) develop compatible software cooperatively;
- (5) use a common database manager; and
- (6) train the same.

These recommendations make sense. At a time when U.S. military operations are becoming more "joint," it makes little sense for the Army, Navy, and Air Force to use different vocabularies, different report writing regimens, and different equipment to perform similar counterintelligence functions.²⁰⁹ Although certain Service-unique counterintelligence functions might require unique equipment and reporting regimens, much of what Army, Navy, and Air Force counterintelligence personnel do is very similar. Incompatible vocabulary, equipment, software, and databases now frustrate greater cooperation and consolidation of training.²¹⁰ While

several significant findings and recommendations regarding DoD counterintelligence capabilities.

²⁰⁹ The U.S. Army has taken the lead in developing systems for providing secure counterintelligence reporting support anywhere in the world. The system is known as the "Theater Rapid Response Intelligence Package" (TRRIP), and its main components are a notebook computer, a portable printer, a digital camera, and a hand scanner. Agents in the field can rapidly transmit critical intelligence via the laptop to field commanders and intelligence organizations, such as the Defense Intelligence Agency, and vice versa.

²¹⁰ Joint Chiefs of Staff draft publication, *Joint Doctrine, Tactics, Techniques, and Procedures for*

recognizing that any recommendation to procure compatible equipment and develop compatible software carries a price tag, we also recognize that costs of prudent automation and consolidation can be offset by appropriate personnel reductions over time.²¹¹

5. Army MI Program Management

Army MI appears to lack a management system to account for execution of its counterintelligence budget. We frequently were frustrated in our attempts to obtain answers from Army intelligence officials regarding Army counterintelligence programs. We found Army answers regarding budget execution for counterintelligence investigations to be elliptical and unreliable and we attribute this to its management system. Our conversations with congressional staff corroborated our suspicion that Army MI's inability to provide answers regarding its counterintelligence program spawns skepticism in Congress as to the information the Army provides. We find that this inability to manage and account for its

Counterintelligence Support to Operations, Joint Pub. 2-01.2 (Proposed Publication) (U) (Dec. 22, 1993), states: "Using electronic mail or similar automation capabilities to transfer data easily among Services and production elements is not a current option in most cases. With the exception of CT (counterterrorism) elements, DoD counterintelligence automated systems are configured for independent support of various Service counterintelligence organizations and are generally not interoperable. Consequently, counterintelligence field elements supporting joint forces usually do not have automated connectivity." DoD-wide development and introduction of compatible database systems like TRRIP will help remedy this shortcoming.

²¹¹ One Army general, while commenting on the merits of consolidation, told us that one way for DoD to save money and downsize was with computer technology and not with consolidation. Interview of Lieutenant General Leo J. Pigaty, Deputy Commanding General, Army Materiel Command (May 10, 1994).

resources jeopardizes the credibility of Army counterintelligence program managers.²¹²

Although we were impressed with much of what we learned about Army counterintelligence support to Army commanders, particularly Army MI's strong emphasis on multi-disciplinary counterintelligence support, Army management's apparent inability to answer simple questions about counterintelligence force structure, on-the-job training, and counterintelligence investigations is troubling. We attribute this in large part to the complex, decentralized, and embedded nature²¹³ of the Army counterintelligence program.

C. Recommendations

1. Do Not Reorganize DoD Counterintelligence Organizations

The counterintelligence capabilities of the Army, Navy, Air Force, and Marine Corps should not be reorganized. During our examination of Army MI, we explored whether the Army's counterintelligence mission and resources should be transferred to USACIDC to improve investigative capability in the counterintelligence area. We do not believe such a restructuring is called for at this time. Army MI does an outstanding job providing support to

²¹² The DoD IG also criticized Army MI's management system in its January 25, 1994 audit of DoD counterintelligence activities. In particular, the audit report stated that there is no existing system to track annual work years of Army personnel supporting the FCIP. *DoD Counterintelligence Activities, Audit Report No. 94-030*, Office of the Inspector General, Department of Defense, classified SECRET/NOFORN/WNINTEL (Jan. 25, 1994).

²¹³ Many Army MI counterintelligence personnel are embedded within operational commands and under the control of the commanding officer. They are not part of a stovepipe Army counterintelligence chain of command.

commanders in the intelligence realm of counterintelligence. Army MI doctrine regarding multidisciplinary counterintelligence support to warfighters and Army MI tactical counterintelligence capabilities are valuable and would suffer if counterintelligence agents were not embedded in Army commands.

We also examined whether the Navy and Air Force counterintelligence missions and resources should be transferred from NCIS and AFOSI to the Office of Naval Intelligence and the Air Intelligence Agency. As a result of our study, we do not believe such a reorganization is necessary to improve support to their customers. The NCIS and AFOSI doctrine of combining their counterintelligence and criminal investigative organizations has been very successful in providing high quality investigations and resulting prosecutions of Navy and Air Force spies. In addition, the criminal investigative training and experience of agents assigned to NCIS and AFOSI enable these organizations to provide comprehensive counterintelligence support for Navy and Air Force commanders during contingency operations.

2. Reorient Counterintelligence Doctrine

Rather than major reorganization of DoD counterintelligence programs, what is necessary is a reorientation of DoD counterintelligence doctrine and training to exploit better the intersection between law enforcement, counterintelligence, and intelligence. Leadership from the DoD Director of Counterintelligence and Security Programs is necessary to reconcile the tension between the counterintelligence goals of prosecution and intelligence exploitation. A coherent DoD counterintelligence strategy and closer cooperation between investigators, prosecutors, intelligence officials, military commanders, and DoD policy makers is needed. The law enforcement, counterintelligence, and intelligence collection disciplines must complement one another.

3. Reorient Counterintelligence Training

Essential to any reorientation is training. We recommend that the DoD Director for Counterintelligence and Security Programs coordinate reorientation of DoD counterintelligence training. In so doing, the Director should coordinate DoD's actions with national level counterintelligence organizations. We recommend that NCIS and AFOSI train all agents regarding the intelligence mission, cycle, community, requirements, consumers, DoD intelligence agency counterparts, and intelligence reporting mechanisms. All agents assigned overseas should receive training in the intelligence requirements and reporting policies and procedures relevant to the assignment. Agents assigned overseas should be evaluated on the quality of their support to the counterintelligence and intelligence missions, as well as on the quality of their support to the criminal investigations mission.

The DoD Director of Counterintelligence and Security Programs should monitor Army MI's progress in providing more investigative training to counterintelligence personnel credentialed to conduct investigations. Investigators' credentials should not be conferred on any Army personnel, regardless of military occupational specialty, who do not meet minimum investigative training standards. At a minimum, Army MI investigators must have a working knowledge of evidence chain-of-custody procedures, search and seizure law, and suspects' rights. Army MI investigators should be required to complete a structured, on-the-job investigative training regimen or probationary program similar to that of USACIDC.²¹⁴

Although we did not conduct a detailed examination of the Reserve components, by extension, our recommendations regarding reorienting counterintelligence training require that Reserve component augmenters be trained similarly. Reserve personnel, during annual training periods and drills, should receive

²¹⁴ See Vol. II, Supplemental Reports, §IV.B, for discussion of USACIDC on-the-job training and probationary programs.

meaningful on-the-job training in actual counterintelligence investigations, operations, collections, and analysis. If the Reserve components genuinely are needed to augment our active duty forces in time of crisis, they must be ready to step in and do the job to the standards expected of the full-time counterintelligence forces.

4. Standardize Counterintelligence Automated Data Processing Systems and Report Writing

We recommend the DoD counterintelligence community continue to implement a modernization plan to develop compatible database systems, use a common DoD report writing system, and consolidate and integrate counterintelligence training, where practicable. We recommend the DoD Director of Counterintelligence and Security Programs act as the proponent for these actions.

5. Coordinate Early with National Security Crimes Prosecutors

As with other major investigations that DoD investigative organizations conduct, coordination with competent legal authority sometimes is not accomplished early enough in potentially serious counterintelligence investigations. Counterintelligence investigations likely to result in prosecution at courts-martial should be coordinated early with a judge advocate, preferably one experienced in the prosecution of national security crimes. Prosecutions involving civilians or military members in federal court should be coordinated at an early stage with the FBI and the Department of Justice Internal Security Section.²¹⁵

6. Implement a Better Management System to Account for and Justify Army MI Counterintelligence Budget Execution

Army MI appears to lack a management system sufficient to allow it to account for execution of its counterintelligence budget. Army MI's inability to answer fully our questions about force structure, on-the-job training, and investigations is problematic. Although it has taken steps to improve its management system since the DoD IG audit and this Board's Review, it is too soon to determine the value of these changes. The Army must continue to implement a more responsive management system. The DoD Director for Counterintelligence and Security Programs should oversee this process.

²¹⁵ The Internal Security Section oversees the enforcement of 88 national security criminal statutes covering violations ranging from espionage to illegal arms exports to atomic energy violations. This office lends assistance to the MCIOs and Army MI in prosecuting violations in the federal court system.

V. Non-Criminal Investigations

Many investigations conducted within DoD are designed primarily to find facts, determine misconduct that is not criminal, and analyze systemic problems. The line between criminal and non-criminal investigations, however, is sometimes extremely fuzzy. This is particularly true in the military because behavior that is not criminal in the civilian environment can be a violation of the Uniform Code of Military Justice and, therefore, criminal for servicemembers. In general though, investigations by the Departmental Inquiries Division at DoD IG and Service Inspector General investigations are non-criminal investigations. The largest and most amorphous category of investigations in the Services -- the commander-directed investigations -- also principally are non-criminal, although they often are designed to ferret out misconduct.

A. Findings

1. Departmental Inquiries

The function of the Departmental Inquiries Division of DoD IG is to receive and investigate allegations of non-criminal wrongdoing throughout DoD. Two of its three operating elements -- Special Inquiries and Program Integrity -- conduct investigations and prepare reports of those investigations.²¹⁶ The primary focus of Special Inquiries is to investigate allegations of whistleblower reprisals, but it also investigates other allegations and systemic issues. The Program Integrity Directorate, pursuant to DoD Directive 5505.6, receives all allegations of misconduct against civilian and military senior officials in DoD, refers all of the criminal allegations to a criminal investigative organization, and either

investigates or refers the non-criminal allegations.²¹⁷

a. Training

Departmental Inquiries has a general requirement that all new investigators attend the Army IG course at Fort Belvoir, Virginia. As soon after being hired as possible, they attend either the two or three week course, subject to whichever course has the earliest available space. The Department may waive the training requirement if an investigator already possesses formal investigative training.

Newly hired Departmental Inquiries investigators are assigned to work initially with an experienced investigator to learn the unit's report writing and computer systems. Because Departmental Inquiries hires investigators at the GS-13 level, and new personnel already should possess investigative skills, they must learn only the "narrowly focused" types of investigations that the unit conducts.²¹⁸ Once new investigators have proven their ability to conduct investigations, they are given more autonomy.

Departmental Inquiries has no formal in-service training program, but rather an informal system of "peer learning" by

²¹⁶ The third element, the DoD Hotline Directorate, serves as an intake office for DoD Hotline complaints.

²¹⁷ In light of comments the DoD IG made in response to our draft of this section, we thought it important to clarify our methodology. Our investigations of Departmental Inquiries procedures included interviews of a very large number of individuals familiar with the organization, review of documents, including directives, manuals, and RFI responses, review of written reports in 9 of the 31 senior official investigations for which Departmental Inquiries found allegations were substantiated, and review of investigative case files for 3 of those investigations and 2 other case files for Service senior official investigations that Departmental Inquiries reviewed. This is consistent with the methodology we employed for all other areas of this report.

²¹⁸ Telephone interview of Michael Suessmann, Assistant IG for Departmental Inquiries (July 6, 1994).

working closely with other, more experienced investigators.²¹⁹ It does send its investigators to special courses on topics such as interviewing, report writing, and dealing with difficult people. These courses are commercial, contractor-provided training paid for either by Departmental Inquiries or the DoD IG Training Office. Departmental Inquiries does not use the Federal Law Enforcement Training Center's IG Institute because the Institute is geared towards GS-1811 criminal investigators, and Departmental Inquiries civilian investigators are GS-1801 general investigators.²²⁰

b. Independence

The Office of the DoD IG, like all Inspectors General created pursuant to the Inspector General Act of 1978, was established to be independent of its Department. The DoD IG reports only to the Secretary of Defense and to Congress. The purpose of this structure is to maintain independence from the people the IG inspects, audits, and investigates, and we have found that to be true of Departmental Inquiries. The representatives from victims' and subjects' advocacy organizations with whom we spoke generally praised Departmental Inquiries for its independence from the Services and stated that they are more comfortable bringing complaints to Departmental Inquiries than to any of the Service IGs. This perception of independence from those investigated is an important asset for Departmental Inquiries and DoD because it gives the conclusions that Departmental Inquiries reaches -- particularly

if they exonerate a subject -- credibility sometimes not enjoyed by the Services.

The dual reporting responsibility -- to the Secretary of Defense and to Congress -- can, however, cause difficulties for the DoD IG. As several people have told us, the DoD IG "straddles a barbed wire fence," referring to the tension between its relationship to Congress and to DoD. Though one former Secretary of Defense praised the DoD IG,²²¹ another expressed concerns about DoD IG's failure to report matters to him as quickly as he would have liked and complained that members of Congress sometimes use the DoD IG as a vehicle to find material with which to "bash the administration publicly."²²²

This tension can be of particular concern with Departmental Inquiries because it is vital to that office's mission -- which includes investigating senior officials and systemic problems -- that it be, and be perceived as, fair and independent. Several individuals whom we interviewed criticized Departmental Inquiries in particular and the DoD IG in general for being too solicitous of Congress and acting, in effect, as Congress's investigative arm at DoD. There is no doubt that Departmental Inquiries is responsive to Congress's concerns. Indeed, the Assistant IG for Departmental Inquiries told us "you can't please everyone, but if you ask who we are really writing for, it is the people on the SASC [Senate Armed Services Committee] staff."²²³ This attentiveness to Congress has caused the perception that Departmental Inquiries is unduly concerned with pleasing Congress when it investigates. Without commenting on the reality underlying this

²¹⁹ *Id.*

²²⁰ GS-1801 series is for "General Inspection, Investigation, and Compliance." It includes positions "not more appropriately classifiable in another series," the primary duties of which are to "administer, coordinate, supervise or perform inspectional, investigative, analytical, or advisory work to assure understanding of and compliance with federal laws, regulations, or other mandatory guidelines."

²²¹ Interview of Casper Weinberger, former Secretary of Defense (May 4, 1994).

²²² Interview of Frank Carlucci, former Secretary of Defense (Mar. 21, 1994). Secretary Weinberger and Carlucci were referring to the DoD IG in general, not specifically to Departmental Inquiries.

²²³ Interview of Michael Suessmann, Assistant IG for Departmental Inquiries (Apr. 1, 1994).

perception, the perception itself is a problem.²²⁴

c. Protection for Subjects

People from many backgrounds and perspectives expressed concerns about the failure of Departmental Inquiries to treat subjects of its investigations fairly. Regardless of whether these concerns rise to the level of a deprivation of due process, as one former DoD General Counsel said, they must be remedied because "it is important for the Government to play fair."²²⁵

Most of the criticisms concern Departmental Inquiries' conduct of investigations involving senior officials. The criticism is not universal. Indeed, the Senior Executives Association (SEA), an organization comprising senior managers in governmental organizations, praised Departmental Inquiries' procedures for conducting senior official investigations. The SEA, in a letter to Senator John Glenn, Chairman of the Senate Governmental Affairs Committee, commended the DoD IG's practice of determining early on whether an allegation against a senior official could result in prosecution and, if it decides it could not, of referring it for an administrative rather than criminal investigation. We agree with the SEA that this practice avoids significant unfairness to officials who otherwise would become subjects of criminal investigations -- with the stigma that carries -- when the allegations are not criminal in nature. Although the SEA also was impressed with Departmental Inquiries' procedures for conducting senior official investigations, we have found that, in several important

²²⁴ We have not addressed the issue of Departmental Inquiries' responsiveness to DoD elements and complainants. During our investigation we heard some comments -- both positive and negative -- about the responsiveness of Departmental Inquiries, but we do not believe we were able to collect enough information to draw any conclusions.

²²⁵ Interview of Kathleen Buck, former DoD General Counsel (Mar. 2, 1994).

respects, those procedures either are inadequate or are not followed.

(1) Notice to Subjects

The first respect in which the Departmental Inquiries practices result in unfairness to subjects is the failure in many cases to provide subjects adequate notice of and opportunity to respond to the criticisms that will be made of them. The draft Departmental Inquiries Policies and Procedures manual²²⁶ states that, for senior official investigations, the Program Integrity Directorate must notify "the heads of DoD components or their Designated Officials (normally the Inspector General) of . . . receipt of adverse information against a senior official within their component and the [DoD IG's] intent to retain investigative jurisdiction and conduct an inquiry." Departmental Inquiries does not notify the subject of a senior official investigation about an investigation; that notification "is normally left to be accomplished by the subject's chain of command or the Component Inspector General."²²⁷ Finally, the Departmental Inquiries policy is to provide subjects notice that an investigation has been completed, what it concluded, and how they may obtain additional information pursuant to the Freedom of Information Act.²²⁸

The draft manual instructs investigators that "[t]he subjects in formal inquiries will always be interviewed." It also tells

²²⁶ The policies and procedures for Departmental Inquiries investigations are not currently set forth in one place. There is a Special Inquiries Investigative Policies and Procedures manual, dated July 1989, but there is also a draft Departmental Inquiries Investigative Policies and Procedures manual, dated March 1994, which in several respects is inconsistent with the earlier manual.

²²⁷ The draft manual states that notification may be withheld "if determined to be in the best interest of the investigation."

²²⁸ The policies set forth in the draft manual for the Special Inquiries Directorate are the same in all relevant respects.

investigators to "[a]fford the subject the opportunity to admit, deny, explain and evaluate the facts discovered" and, if the subject rebuts the facts with specific leads, to "follow-up on those new leads to determine their relevance and credibility." It states that the purpose of the subject interview "is to confront the subject with the allegations that have been made against him/her, to obtain their knowledge and impressions of the events and conduct at issue, and to afford them the opportunity to either admit or deny culpability in the matter." The Assistant IG for Departmental Inquiries and the Deputy IG both conceded that, in practice, this policy is not always followed.²²⁹ Moreover, when followed, it is not always adequate. First, it is not clear that Departmental Inquiries conducts even a first interview with subjects in every case -- although the Assistant IG for Departmental Inquiries told us the investigators will interview the subject in almost all cases.²³⁰ We were not made aware of any cases in which a person criticized was not interviewed at least once.

If a first interview is conducted early in the investigation, Departmental Inquiries generally tries to conduct a second interview of a subject toward the end of the investigation to allow the subject to hear and respond to the criticisms that have surfaced during the investigation.²³¹ Both the Assistant IG for Departmental Inquiries and the Deputy DoD IG told us, however, that investigators do not always conduct these second interviews.²³²

²²⁹ Interview of Michael Suessmann, Assistant IG for Departmental Inquiries (Apr. 1, 1994); Testimony of Derek J. Vander Schaaf, Deputy DoD IG, before the Advisory Board 90 (Apr. 8 1994).

²³⁰ Interview of Michael Suessmann, Assistant IG for Departmental Inquiries (Apr. 1, 1994).

²³¹ *Id.*

²³² *Id.*; Testimony of Derek J. Vander Schaaf, Deputy DoD IG, before the Advisory Board 90 (Apr. 8, 1994).

When the investigators do ask questions either in first or second interviews about the facts underlying allegations or possible criticisms,²³³ the Departmental Inquiries policy is not to provide notice of tentative conclusions and allow subjects an opportunity to respond to those conclusions. In the context of the types of reports Departmental Inquiries prepares, this can be an important distinction. The investigations often do not involve simple questions of whether or not a person engaged in some clearly proscribed activity. Thus, when a person is asked what he or she did, the questions alone do not always provide notice of -- and certainly not an opportunity to respond to -- the conclusions contained ultimately in the DoD IG's report. We believe it is important for subjects to have this opportunity. For example, the *Tailhook I* report²³⁴ criticized The Judge Advocate General of the Navy, Rear Admiral John A. Gordon, for his actions with regard to the Navy's Tailhook investigation. In so doing, the report described two courses of action, either one of which, according to the report, Admiral Gordon should have pursued. Although Departmental Inquiries investigators asked Admiral Gordon during his interview what actions he took and why, they did not tell him what the DoD IG had concluded he should have done. Admiral Gordon, therefore, did not have the opportunity to explain why, in his view, the courses of action the DoD IG proposed

²³³ The interviews do not always seek information about all allegations or possible criticisms. For example, Rear Admiral Duvall M. Williams was criticized in the DoD IG report on the Navy's investigation of the events at the Tailhook convention, the *Tailhook I* report, for making several statements that the DoD IG said evidenced a poor "attitude toward women in the military services"; Admiral Williams was not asked specifically whether he made at least two of the comments attributed to him. Transcript, interview of Rear Admiral Duvall M. Williams, USN (retired), by DoD IG Departmental Inquiries (June 15, 1992; Aug. 13, 1992).

²³⁴ See, *supra*, note 79, for a description of the Tailhook investigations.

would have been inconsistent with his role as The Judge Advocate General.²³⁵

Because of the high-profile nature of many of the DoD IG's investigations, it simply is not adequate to provide subjects or people criticized in reports information about conclusions only after the report is final. In many cases the people criticized will have sufficient opportunity to rebut the report's conclusions to decision makers before any adverse action is taken against them. In some cases, however, the damage is done to a person's reputation or career as soon as the report is final. We heard a number of times from those we interviewed that the practice of not allowing subjects to respond to criticisms before a report is final is unfair.²³⁶ Again, to use the *Tailhook I* report as an example, the DoD IG's report was leaked to the press as soon as it was final.²³⁷ The individuals criticized in that report were given virtually no notice of the criticisms and no opportunity to respond before they literally were on the front page of newspapers around the country. In that circumstance, and in others less visible, personnel actions that irreparably affect the careers and reputations of individuals criticized, but are not disciplinary proceedings, occur before there has been an opportunity to respond to allegations.

The Office of the DoD IG, in its comments to our draft report, argued that allowing subjects an opportunity to comment on Departmental Inquiries conclusions is solely a management responsibility. We disagree and believe this demonstrates too narrow a view of the DoD IG's own responsibilities in non-criminal

investigations. If an investigation is non-criminal, the judgment already has been made that whatever actions are being investigated are not violations of criminal law (or are not violations serious enough to prosecute). Thus, the need to "catch" a wrongdoer, although important, should be only part of the purpose of these investigations. The broader purpose should be to identify and propose remedies for systemic problems. The more information the DoD IG has to accomplish this broader objective, the better. If, for example, Departmental Inquiries learned from a subject's comments that a conclusion it had reached about the subject's actions or judgment was incorrect because Service policy encouraged the type of action the subject took, Departmental Inquiries then could do additional investigation and perhaps make constructive recommendations about that policy. This should be as much Departmental Inquiries' goal as identifying improper conduct.

Moreover, even if ferreting out wrongdoing were the DoD IG's only goal, it should see obtaining responses from subjects as part of its responsibility. Subjects of Departmental Inquiries investigations have an obvious interest in being permitted to respond to conclusions before a report is final. The DoD IG, however, also would benefit from such a practice. The credibility of the Office of the DoD IG is harmed, as is public confidence in the investigative system, every time facts or conclusions in its final report can be called seriously into question. That office has a strong interest in getting it right the first time. Allowing subjects to respond to a report before it is final, and perhaps modifying some findings or conclusions of the report as a result, would cause the DoD IG to be less susceptible to criticisms that the office is result-oriented or rushes to judgment.

In offering these observations we must stress that it is not our intention to draw any conclusions about the correctness of the ultimate results of the investigations mentioned. We have not re-investigated exhaustively the facts of these matters, nor do we believe that was our role. For example, we do not comment on the merits of the DoD

²³⁵ Transcript, interview of Rear Admiral John A. Gordon, USN (retired), by DoD IG Departmental Inquiries (June 29, 1991; Aug. 12, 1992).

²³⁶ See, e.g., Interview of William J. Haynes II, former Army General Counsel (Feb. 23, 1994); Interview of Major General William K. Suter, USA (retired), Clerk of the Supreme Court of the United States (Mar. 16, 1994).

²³⁷ We do not know, nor have we attempted to determine, who leaked the report to the press.

IG's conclusions about the Navy's conduct of the Tailhook investigations, and do not intend support for or criticism of those conclusions. Our comments on the *Tailhook I* report and all other reports concern procedural matters.

(2) Availability of Underlying Materials

It is critical to the credibility of an IG organization that witnesses feel able to speak honestly to the IG without fear of retaliation. Thus, it is very important for an IG to protect the confidentiality of witnesses, particularly complainants, to the greatest degree possible. Departmental Inquiries recognizes this obligation and is very careful to protect its sources. There is a tension, however, between confidentiality to witnesses and fairness to subjects. Subjects, or people criticized in a report, often will disagree with a report's factual conclusions. To respond fully to the conclusions, they must have access to the materials that underlie those conclusions.

According to the Assistant IG for Departmental Inquiries, Departmental Inquiries will not provide underlying documentation unless the subject disputes a factual issue in the context of some disciplinary action.²³⁸ In that case, it will provide the documentation to the accused's superiors. In practice, this policy sometimes results in significant unfairness to subjects, particularly in high-profile cases for which actions are taken against the individuals criticized often by asking for resignation or failing to promote, or by the release of the report to the press.

An example of the problems that can result from Departmental Inquiries' current policy is, again, the *Tailhook I* report. The *Tailhook I* report recommended that the Navy consider "whether the Under Secretary, the Judge Advocate General, the Naval Inspector General, and the Commander of the Naval Investigative Service should continue in their

current leadership roles" and that it "consider appropriate disciplinary action with respect to" Rear Admirals Williams and Gordon. Almost immediately after issuance of that report, Admiral Williams was asked to resign.²³⁹ Later, the Secretary of the Navy gave Admirals Williams and Gordon an opportunity to respond to the report's conclusions in connection with his consideration of disciplinary action, but the DoD IG did not permit either of them access to materials underlying these conclusions. When Admiral Williams requested underlying materials to aid him in responding, the Office of the DoD IG denied his request.²⁴⁰ The Deputy DoD IG suggested to us that these materials would have been released to the Secretary of the Navy if he had requested them.²⁴¹ Admiral Williams, however, was not informed of that possibility; the letters responding to Admiral Williams's request stated simply that he was not entitled to the materials.

Here again, the Departmental Inquiries policy results in unfairness because it does not recognize the realities of the effects of its reports. Departmental Inquiries policy should not be based on technical interpretation of its rules, but should strive for fairness in its dealings with subjects. Fairness requires that a person criticized in a report should have an opportunity to review

²³⁹ Admiral Gordon already had submitted his resignation because The Judge Advocate General by "gentleman's agreement" traditionally serves only two years in that position, and he had completed his two years. The Naval IG was changed to a three-star admiral position, so the admiral holding that position was reassigned. The Secretary took no action with respect to the Under Secretary of the Navy.

²⁴⁰ The Office of the DoD IG in its letter to Admiral Williams said he could obtain information through a Freedom of Information Act request. This is not adequate under these circumstances because a request would not provide the information in time for it to be useful and because information received in response to a FOIA request is not likely to be complete.

²³⁸ Interview of Michael Suessmann, Assistant IG for Departmental Inquiries (Apr. 1, 1994).

²⁴¹ Interview of Derek J. Vander Schaaf, Deputy DoD IG (May 6, 1994).

and rebut the materials that underlie its disputed factual conclusion when in danger of suffering adverse action, including an adverse promotion or retirement decision or significant damage to his or her reputation. If Departmental Inquiries will not release the materials to a subject directly, but will release them to his or her superiors, the subject should be told this policy. If senior officers could be treated as were Admirals Williams and Gordon, it is a certainty that lower-ranking servicemembers would be treated no better.

(3) Article 31 Warnings

The third respect in which Departmental Inquiries' procedures do not protect subjects adequately is the policy, articulated in the draft Departmental Inquiries Policies and Procedures manual, that civilian investigators need not inform subjects of their rights pursuant to Article 31 of the Uniform Code of Military Justice. Pursuant to Article 31, Miranda-type warnings must be provided before a servicemember suspected of a violation of the Uniform Code of Military Justice is questioned. It is not necessary for the servicemember to be in custody. This additional protection for servicemembers stems from their ingrained respect for the chain of command and superior authority. Accordingly, any situation in which a servicemember is being questioned is potentially coercive in the same way a custodial setting is for a civilian.

The requirement to provide Article 31 rights warnings applies only if the interrogator is himself or herself in the military. We have found, however, that each Service requires its civilian investigators to provide Article 31 warnings, and DCIS, the criminal investigative arm of the DoD IG, requires its civilian investigators to provide these warnings. Departmental Inquiries on the other hand, does not require its civilian investigators to provide these warnings.²⁴²

²⁴² The draft manual states that "IG investigators who are active duty military members must administer Article 31b warnings" but civilian investigators "are not subject to the UCMJ and have

When we asked the Assistant IG for Departmental Inquiries why his office had established this policy, he said the justification for providing Article 31 warnings is not present when the civilian investigators are part of a civilian, not a military, chain of command. He also noted that investigations that his office conducts rarely, if ever, result in courts-martial.²⁴³ We disagree strongly with this rationale and with Departmental Inquiries' practice. As a practical matter, a situation in which military members are being questioned by investigators who work for the Secretary of Defense has even more potential to be coercive than when they are being questioned by investigators from their Service, because the Secretary of Defense is a higher authority in their chain of command. The fact that few Departmental Inquiries investigations result in courts-martial is irrelevant. If a civilian investigator is in a situation in which an investigator subject to the Uniform Code of Military Justice would be required to provide Article 31 warnings, the civilian should be required to provide them as well.

d. Quality of Reports

During our investigation we heard some praise for Departmental Inquiries and the work it performs. For example, the Defense

no obligation to advise a military witness of his or her Article 31b rights." This policy is relatively new. In the 1989 Special Inquiries Policies and Procedures manual, investigators were told:

Article 31 warnings to military witnesses have much broader application during administrative investigations [as compared to Miranda warnings to civilians]. Potential for punishment for those subject to the UCMJ is greater than potential for punishment through the civilian court system; therefore, military personnel who are the subject or suspect in an investigation will always be advised of their rights under Article 31.

²⁴³ Interview of Michael Suessmann, Assistant IG for Departmental Inquiries (Apr. 1, 1994).

Finance and Accounting Services (DFAS), for which Departmental Inquiries conducts some non-criminal investigations, expressed satisfaction with the work of that office.²⁴⁴ Service IG personnel generally stated that they work well with Departmental Inquiries, and some representatives from subjects' advocacy organizations praised its independence. We heard many criticisms, however, of the quality of Departmental Inquiries reports, particularly in the more high-profile senior official investigations. Departmental Inquiries' investigations and reports are important to DoD, and we believe improving the quality of the reports would make them even more useful.

(1) Articulating Criteria and Standards

When criticizing the actions of senior officials, Departmental Inquiries reports sometimes fail to articulate clearly the criteria considered and the standards breached. In the vast majority of matters that Departmental Inquiries investigators review, there are standards of behavior -- in laws, regulations, instructions, or written or knowable standards of practice or ethics -- that guide or should guide the subjects. Too often, Departmental Inquiries reports fail to analyze or even mention the standards pursuant to which the subjects were supposed to operate and whether they satisfied those standards. In cases in which standards do not exist or are incomplete, Departmental Inquiries reports do not articulate the criteria they applied and why. Instead, the reports simply criticize the behavior and offer conclusions about what the subject should have done. Whatever the investigators or other authors of the report actually relied upon to reach their conclusions, the appearance from the report is that they simply are providing their own opinion -- substituting their own judgment for that of the subject.

In the context of senior official investigations, this is a dangerous practice. Such officials operate within a highly

regulated environment, but, within the confines of those regulations, they are expected to exercise their independent judgment on issues of the greatest importance. A responsible analysis of their actions must be conducted in the context of the standards by which they are required to operate. Not every misstep by a senior official can be related to some prescribed criterion. Sometimes, such officials must take responsibility (or be held accountable) for miscalculations in areas that essentially are uncharted. Still, fair play requires that every effort be made to relate criticisms to standards or guidelines that were known or knowable in advance.

One example of the practice we are criticizing can be found in the *Tailhook I* report. That report criticized The Navy Judge Advocate General, Rear Admiral Gordon, for "demonstrat[ing] poor professional judgment in his failure to eliminate a significant conflict of interest" on the part of an officer in the Navy Judge Advocate General Corps. The report also criticized the Commander of the Naval Investigative Service, Rear Admiral Williams, for failing to correct this "conflict of interest." The report explains that the two admirals resolved with the Under Secretary that actions would be taken to separate the judge advocate from certain meetings. The report concedes the DoD IG "found no evidence" that the conflict "caused actual damage to the investigation," but concludes that the need for complete recusal of the officer from the investigation was "so basic, so fundamental, in law enforcement and legal practice that we believe [Admirals Gordon's and Williams's] failure to so advise the Under Secretary raises serious questions about their professional judgment." The report goes on to say that Admiral Gordon, as the Navy JAG, must "bear the primary responsibility for failing to remedy the obvious and serious conflict of interest."²⁴⁵

Yet, at no point in its discussion of this "conflict of interest" does the report refer to or analyze any standards or definitions of

²⁴⁴ DFAS response to RFI OG-004 (May 13, 1994).

²⁴⁵ *Tailhook I* at 23.

conflicts of interest or discuss whether those standards exist. If, indeed, the conflict was "basic," "fundamental," "obvious," and "serious," then it would be a fairly simple matter to find and discuss the applicable standards. Nor does the report discuss why the remedy Admirals Gordon and Williams adopted was not acceptable. By failing to do so, the report appears to be simply stating the opinion of its authors. If, in fact, the existing conflict of interest standards do not proscribe the resolution that Admirals Gordon and Williams chose or require the resolution that the report advocates, then the report's conclusions are misleading and unfair.

There are examples of this problem in other reports. One Departmental Inquiries report criticizes a senior civilian official of one of the Services for abusing authority by taking an official trip primarily for personal reasons. The report describes the official's actions on the trip and concludes that the official business "appeared to have been of minimal importance" and personal reasons predominant. The report does not discuss whether guidelines exist for official travel or, if they do not, how officials have been directed in the past to make determinations about what legitimately is "official" travel. In short, the report gives no explanation of the criteria it used to get from the facts to its conclusion that the travel was personal. Another report criticizes a senior military commander for initiating a commander-directed investigation while a criminal investigation was pending.²⁴⁶ The report does not discuss the rules that existed at the time governing the initiation of commander-directed investigations or the practices of that Service. If the rules, regulations, and standards of practice precluded the initiation of the investigation, then the report would have benefited greatly by citing and discussing them. If the standards permitted, or even encouraged, the use of commander-directed investigations under these circumstances, then the report should have

criticized the rules and recommended changes, but criticism of the officer was inappropriate.

The draft Departmental Inquiries Policies and Procedures manual instructs investigators to be familiar with applicable "laws, regulations or standards that apply to the alleged misconduct" to aid in their investigation. It does not, however, instruct the investigators to refer to this body of law and policy in their reports. The failure to test the subject's conduct against applicable standards, and the appearance that criticisms are based on the opinion of the reports' authors, can force senior officials to ask themselves not what the correct behavior is in their own judgment, but what the DoD IG would have them do under these circumstances.

(2) Presentation of Reports

It is important that Departmental Inquiries reports be accurate, neutral, and not provocative. The draft Departmental Inquiries Policies and Procedures manual provides some guidance to investigators about how to use and present facts in a report and how to draw factual conclusions. It cautions investigators to "approach the task of report writing with the same concern and exactness exercised in the investigative process" and states "there must be no errors in identifying people, places, events, dates, documents, and other tangible matters." The manual states "the [report] should be convincing, not provocative." In discussing the "Findings and Analysis" section of reports, it tells investigators "[r]emember, we are dealing with the 'preponderance of the evidence.'"

We found, however, that Departmental Inquiries reports are sometimes, particularly in high-profile cases, overly provocative in tone, and do not contain a neutral presentation of the facts. One former DoD IG said the Office of the DoD IG currently is not doing an adequate job of oversight in the administrative area and cited the *Tailhook I* report as an example of a report filled with "innuendo" and personality issues rather than

²⁴⁶ It also criticizes the manner in which the investigation was conducted, again without referring to the regulations that govern the conduct of those investigations in the Service.

substantive, analytical fact-finding.²⁴⁷ A former Service Secretary said that same report "read like a dime-store novel" and was far too "theatrical" in its language.²⁴⁸ Another individual said Departmental Inquiries reports in general "read like a Woodward and Bernstein" book.²⁴⁹ Writing style choices can make a good investigation look like one that is not impartial.

On some high-profile investigations the Assistant IG for Departmental Inquiries will conduct portions of the actual investigation himself. Although we recognize the benefit of having the most experienced individual in the division conduct sensitive or difficult investigations, we believe this may result in the Assistant IG -- who should remain neutral to the greatest extent possible -- becoming too close to the investigation.

Of even more concern than the tone of the reports is the criticism that Departmental Inquiries is not sufficiently careful about the factual accuracy of its reports. We heard of and saw a number of examples of factual mistakes. Individuals criticized in the *Tailhook I* report, and in an earlier report that criticized several senior Army officials, provided their Service leadership responses to the reports that contain many examples of quotes taken out of context and misleading or inaccurate reporting of facts. The *Tailhook I* report criticized Rear Admiral Gordon for failing to "review the NIS and the Naval IG investigative reports for legal sufficiency to provide the Under Secretary with an assessment of their overall adequacy prior to their release on April 29, 1992."²⁵⁰ The report fails to mention that Admiral Gordon was out of the country on an inspection trip

that began on April 19, 1992, and the Under Secretary released the reports to the press without notice and prior to the expected date of release. Thus, whether or not Admiral Gordon should have reviewed the reports had he been there, he could not have done so under the circumstances.

The impression that Departmental Inquiries reports lack sufficient respect for sober factual analysis is, again, one that the DoD IG can ill afford. Investigators and others who author these reports, and the reviewers, must be extremely vigilant about checking factual accuracy and avoiding provocative language.

(3) Recommendations for Discipline

Often Departmental Inquiries reports contain recommendations for consideration of disciplinary action against the individuals criticized in them. Departmental Inquiries personnel often follow up with the subjects' superiors to see whether they have acted upon the recommendations, and are sometimes critical about the failure to do so. In at least one case, the DoD IG's office wrote to a Service expressing dissatisfaction with the failure to discipline an individual whom the DoD IG criticized in a report and reiterating its view that the individual's actions were improper. It is inappropriate for the DoD IG to advocate disciplinary action in any individual case. The DoD IG must not take any action -- overt or subtle -- that interferes with the decision making process of the adjudicator based on the evidence before him or her.

(4) Usefulness for Disciplinary Proceedings

We have heard from several individuals that Departmental Inquiries reports are not useful as a basis for disciplinary action. One senior Army judge advocate said Departmental Inquiries reports can be used only as allegations and the Service must reinvestigate the matter itself, which often is a

²⁴⁷ Interview of Honorable Susan J. Crawford, U.S. Court of Military Appeals (Feb. 24, 1994).

²⁴⁸ Interview of Sean O'Keefe, former Secretary of the Navy (June 21, 1994).

²⁴⁹ Interview of Major General William K. Suter, USA (retired), Clerk of the Supreme Court of the United States (Mar. 16, 1994).

²⁵⁰ *Tailhook I* at 20.

very long process.²⁵¹ Another senior judge advocate stated that the DoD IG puts the Services in a difficult position because it raises expectations of successful prosecutions in cases with limited evidence.²⁵² If a Departmental Inquiries report recommends consideration of discipline, the investigation must be sufficient for management to rely upon. The matter should not have to be reinvestigated. Moreover, Departmental Inquiries must be willing to make its investigative materials available to management, including its lawyers.

e. Role in Senior Official Investigations

The Secretary of Defense, in DoD Directive 5505.6, has asked the DoD IG to play a role in all investigations of DoD senior officials, including senior officials in the Services. We agree that Departmental Inquiries serves an important function with respect to those investigations. The Services currently conduct the vast majority -- 90 percent -- of the investigations of senior officials within the Services, but Departmental Inquiries is there as a check. The Services have an added incentive to conduct a thorough and impartial investigation because they know the DoD IG is reviewing the investigation. Moreover, we agree with the Assistant IG for Departmental Inquiries that there will be a small percentage of senior official investigations that Departmental Inquiries should conduct because the Service IGs will not be perceived as impartial with respect to the subjects of those investigations.

Some have recommended that Departmental Inquiries' increase its role in senior official investigations. The House of Representatives Report that accompanied the

National Defense Authorization Act for Fiscal Year 1994 recommended increased funding for the DoD IG so that it can increase the percentage of senior official cases that it conducts.²⁵³ The Assistant IG for Departmental Inquiries told this Board that his office plans to increase the staff of the Program Integrity Directorate so that it can increase its role in the investigation of senior official cases.²⁵⁴ We do not believe, however, that such an increase would be wise.

The responsibility for investigating senior officials in the Services should remain -- in the great majority of cases -- with the Services. It simply is best, whenever possible, that investigation of an organization's members be conducted within that organization. If conducted correctly, an investigation by peers that finds fault is more likely to be accepted as fair and less likely to be attributed to an "outsider" who does not know the circumstances under which the actions took place. The lessons from investigations are more likely to be accepted, understood, and incorporated into the behavior of other officials when the organization investigates itself. Again, we recognize that there are times when investigation by Departmental Inquiries is appropriate. For this reason we believe the current balance of workload in senior official investigations between Departmental Inquiries and the Services -- that is 90 percent with the Services and 10 percent with Departmental Inquiries -- is satisfactory.

2. Service Inspectors General

A significant part of the responsibility for non-criminal investigations in the Services rests with the military Inspector General

²⁵¹ Interview of Brigadier General Thomas R. Cuthbert, USA, Assistant Judge Advocate General for Military Law and Operations (Feb. 16, 1994).

²⁵² Interview of Colonel John D. Altenburg, USA, Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, NC (Mar. 22, 1994).

²⁵³ H.R. Rep. No. 200, 103rd Cong., 1st Sess. (1993).

²⁵⁴ Testimony of Michael Suessmann, Assistant IG for Departmental Inquiries, before the Advisory Board 13 (Mar. 17, 1994). Mr. Suessmann told the Board that his office plans to investigate as many as 30 percent of senior official cases itself, *id.* at 3.

system in each Service. The roles and functions of the military IGs are different from those of DoD IG and other IGs that Congress created with the IG Act of 1978. The role of the military IG is to act as the eyes and ears of the commander. Military IGs report directly to the commander, they act on the commander's behalf, and they derive their authority from the commander. The Army describes the mission of its IGs as being "to inquire into and periodically report on the discipline, efficiency, economy, morale, training, and readiness" of the Service. With some differences in emphasis, this is the role of all of the military IGs. Each Service has an IG who reports to the Service Secretary on some matters and to the Service's military leader on others. Below that level, the Services all have IGs who report to lower-level commanders. The military IGs carry out their functions in three ways: they inspect, assist, and investigate. It is the IGs' investigative role that concerns this Board.

The basic view of the IG's investigative function is the same in each of the four Services. IGs are to investigate allegations of impropriety or misconduct that the criminal investigative organizations normally would not investigate. The primary purpose of the IG investigative function is to correct the system and remedy wrongs, although subjects of IG investigations may be disciplined for the misconduct IGs investigate. The role of the military IGs is to keep their Service's system healthy, and their investigative function is designed to further this role.

The military IGs carry out their investigative functions differently in each Service; in some cases, they do so differently at different levels within the same Service. In our view, some of these discrepancies in approach have developed because of the legitimate needs of distinct Service cultures, while others have not. Although we recommend some changes, our discussion of the investigative function of the military IGs has as its basis a strong view that the military IG systems serve an extraordinarily important function in the Service and that the basic IG structure -- a decentralized system with the

IG reporting directly to the commander -- is crucial to that role.

a. IG Investigative System

Although the investigative function is only part of what the military IGs do, it is an extremely important and visible part, and its importance is increasing. The IG complaint and investigative system is a critical part of how the military corrects its mistakes. When the military cannot correct its mistakes -- or the public believes it cannot -- it can damage recruiting, morale, and ultimately readiness.

There is no better example of these problems than Tailhook. At least as destructive to the public's view of the Navy as the Tailhook Convention events themselves was the perception that the Navy was unwilling or unable to get to the bottom of the problem and hold people accountable. The problems with the Tailhook investigation clearly cannot all be placed at the feet of the Navy's IG system, but the heart of the problem with Tailhook was non-criminal and systemic; this is the type of problem military IGs investigate. What is clear is that everything that can be done to avoid the next Tailhook -- in every Service -- should be done. The military IG systems are where these problems will come, and the systems must be able to handle them.

The military IG investigative systems must function well if servicemembers and the public are to believe that the military is fair. If injustices have occurred because normal chain of command channels mishandled an incident or otherwise failed, the IG system must be seen as a legitimate way to correct those injustices. If IG personnel, because of a desire to "protect" their command or Service, or simply because of a lack of skill, fail to substantiate valid allegations, servicemembers will not trust the IG system. If servicemembers lose faith in the channels the system provides them, they will go outside their Services, to the DoD IG, Congress, or the press, with their complaints, which further erodes the Services' ability to police themselves. Moreover, and in some ways even more

damaging to the Services, if the IG systems fail to substantiate valid complaints, they will not be believed when they find invalid allegations are unsubstantiated.

(1) Independence

To maintain faith in the IG systems, IG complaints must be investigated by people who both are and appear to be impartial. We heard during our investigation several claims that military IGs conducted a "whitewash" in investigating certain complaints. In one example, a junior Navy doctor was assigned to investigate an IG complaint against a senior doctor to whom he reported. He found the allegations were not substantiated. We also heard that field-level IG personnel in the Army, when investigating an allegation of abuses by a fairly senior member of a local command, failed to interview the complainant or any witnesses to the abuses before finding the claim was not substantiated. We have not reviewed these investigations and, therefore, cannot say that they were flawed in fact. The circumstances of each of these matters, however, create at least an appearance of a biased investigation.

We draw two conclusions from these examples. First, the policy of appointing investigators on an ad hoc basis that is in effect, at least at the lower levels, in every Service except the Army is dangerous. At the lower echelons of the Navy, and below the Inspector General of the Marine Corps (IGMC) headquarters in the Marine Corps, it is common for IG investigations to be conducted by an officer or senior non-commissioned officer, chosen on an ad-hoc basis by the IG or commander. In the Air Force this is always the practice at all levels. To the extent this policy continues, the IG systems must take care to choose investigators who are and appear to be impartial. Because these IG investigations are more like commander-directed investigations, we discuss this in more detail in our section on commander-directed investigations. The arguments supporting the need for distance and neutrality are, if anything, stronger when it is an IG investigation.

Second, IGs must recognize those occasions when no investigator at their level should handle a matter. There are certain kinds of claims that, although a very small part of what IGs face, cannot be handled credibly at the level they are raised -- for example, claims for which it would be difficult for an IG to be impartial because of loyalties or concern for repercussions or, more commonly, claims for which it may appear that the IG is not impartial. Each Service has a mechanism to see that claims like this can be sent up the IG chain for resolution.²⁵⁵ What is most important is that IG personnel at all levels are instructed to and do use these mechanisms.

(2) IG Personnel

The IG system cannot perform its important investigative function adequately if it does not have IG personnel throughout the Service. Moreover, the IGs must be of sufficient rank to have the necessary independence and to command respect. We find that the lower echelons²⁵⁶ in the Navy have inadequate IG support. Many have no IG; when they have one, he or she often has several other duties and sometimes is at the O-4 or O-5 level. IGs in the Navy also often have inadequate staff. At one Echelon III

²⁵⁵ The Army recently has adopted Army Reg. 20-1 ¶7-3g, which requires IGs to analyze complaints to determine "potential for embarrassment or adverse impact" on their command, and send those complaints to the next IG level. The Navy and Marine Corps IG personnel similarly are instructed in SECNAVINST 5430.57F ¶7.m, to "refer [a] matter to the next highest office within the IG chain" if they determine that due to "conflict of interest, bias, prejudice, or other circumstances that may place the independence or impartiality of the inquiry in doubt" it is inappropriate for resolution at their level. Air Force Inst. 90-301 is not as explicit as the Army's or Navy's regulations, but that instruction does tell IG personnel to "[e]levate the case" if it would involve "self-investigation" and to "[r]efer cases to the next higher command level when you're not sure whether the command level being considered is appropriate for resolving an issue."

²⁵⁶ See Vol. II, note 91, for an explanation of echelons in the Navy.

command, for example, the IG is a commander (O-5) who is also the assistant chief of staff for personnel; he has a staff of one. It is not uncommon for this IG to have to direct investigations of matters involving officers at his level or senior to him. This opens the IG and the Navy up to criticism if his handling of an investigation involving a more senior officer is questioned. In another example, at one very large Naval base we visited, there is no actual base IG. The staff judge advocate, a commander (O-5), acts as de facto IG, but has no staff, no training, and no manual.

In the Marines, the staff of the Inspector General of the Marine Corps is stretched far too thin. Currently, the office at the IGMC that handles all assistance, investigation, and oversight matters has only nine people on staff. At least one of the existing staff positions is an "overstaff" and could be eliminated at any time. Even though the Marine Corps is traditionally more austere than the other Services, its headquarters IG needs more people to carry out the very important assistance and investigative functions of that office. The Marine Corps command inspectors²⁵⁷ also rotate too often to be as effective as they should be. Their rotations are 12 to 18 months. Just as they are becoming experienced at their IG duties, they are moved out.

b. Misuse of IG System

We have heard many times during our investigation of the increasing tendency of servicemembers to call a hotline, call Congress, or call the press with a simple problem that could and should be resolved at the lowest levels of the chain of command. This results inevitably in involvement of IG personnel at all levels in matters that should not be taking their time. An example that one IG headquarters official described to us as typical was a young servicemember who filed a complaint with the headquarters IG because

his pay had decreased by \$20 a month. The headquarters reviewed the complaint, and passed it down to the field-level IG personnel, who passed it to the servicemember's commander. The commander investigated and determined that the servicemember's housing allowance had decreased when he moved. The commander then had to report to the field IG, who had to report up the chain to the headquarters IG office, which had to review the report. This clearly is a matter that should have involved only the chain of command channels. Similarly, we heard from all of the military IGs that it is not unusual for a complainant to seek redress from many different systems at once, before exhausting the chain of command channels. Thus, a person may write to several members of Congress, the DoD IG, the Service IG, the Service Secretary, the White House, and even the press with the same complaint. Apart from the press, each of these systems must respond, even if it is only to send the complaint on to where it should be, and must be told how the matter is resolved. One senior IG official lamented that "sometimes I want to call a hotline and report fraud, waste, and abuse in the IG system" because of all the time they spend chasing down complaints that are frivolous or do not belong in the system.

We recognize this problem and support the efforts of IGs in all Services to have minimal involvement with matters that belong in the chain of command. The corollary, of course, is that IG personnel must not turn away claims that belong in the IG system. These include those that are non-frivolous but that the chain of command is unable or unwilling to address fairly. We are persuaded that this increased tendency to sidetrack command channels results in part from the publicity of Tailhook and other perceived failures of the systems for redress. In the long run, a strong IG system at the headquarters and the lower levels, that investigates effectively those matters that deserve attention, will be the best answer to this problem.

²⁵⁷ In the Marine Corps IG system, the personnel that carry out the IG function below the IGMC level are called command inspectors.

c. Protection for Subjects

As we discussed in the section on the DoD IG's Departmental Inquiries Division,²⁵⁸ it is critical that an IG system be fair to the subjects of its investigations. In general, we have heard few complaints about the military IGs in this regard. We have seen one example, however, of an IG report based on the opinions of IG personnel, rather than on a rigorous analysis of laws, regulations, and standards of behavior.

A Naval IG report involving allegations against an admiral was criticized by the DoD Office of General Counsel for failing "to describe and analyze the impact of law and regulation upon the decision process implicated by the allegations." In that report, the DoD General Counsel's Office found, and we agree, that the Naval IG failed to analyze the applicable standards. One example of this failure is in the report's conclusion that the relationship between the admiral's family and an enlisted person was "unduly familiar" and "exceeded the norm established by custom and tradition in the naval service." The IG report provides facts about the relationship, but does not analyze those facts in light of the duties of the enlisted person nor does it explain which aspects of the relationship violated the custom and tradition of the naval service. The report also concludes that the enlisted person's relationship with the admiral's family gave the "appearance of fraternization" and potentially was "prejudicial to good order and discipline," but fails to analyze the Navy's fraternization policy and the admiral's actions in light of it, or to state which behaviors might have prejudiced good order and discipline and how.

Since this investigation, the Naval IG has issued an Interim Investigations Manual. In writing the manual, Naval IG personnel appear to have been sensitive to the need to analyze allegations in terms of established standards of behavior and have included instruction to investigators about articulating

standards in writing reports. The Army IG's Assistance and Investigations Manual provides excellent direction to IG personnel on this issue. We are concerned, however, about the lack of any attention to this important subject in the Air Force's regulations and other guidance to investigators. The Marine Corps IG system has no manual or guidance of its own. We were told that Marine Corps IG personnel rely on the Army IG's Assistance and Investigations Guide; to the extent this is true, they have more than adequate direction on this issue. The guidance should, however, come from the Marine Corps in its own manual.

d. Training

There can be no question that people conducting IG investigations should receive training. IG investigations often can be complex and involve sensitive matters; a person who has no training, no matter how competent and ethical, probably will get something wrong. We heard over and over during our investigation about the need for trained IG personnel. People in headquarters²⁵⁹ and at the field level, people inside the IG system and those outside the system who see its results, all told us that training is essential. Only the Army trains all IG personnel and has only trained IG personnel conducting investigations. The Army has a three-week Army IG course about which we have heard many good things.²⁶⁰ The Navy's IG system has some

²⁵⁹ The only people who, as a group, did not agree that training is important for IG investigators were personnel in the Air Force IG headquarters.

²⁶⁰ The Army has a two-week course that it makes available to non-Army IG personnel. The course does not contain some of the Army-specific instruction that personnel from other Services do not need. We heard some concerns that this two-week course is not sufficiently rigorous, in part because it does not require its students to take and pass tests as does the regular Army IG course. In addition, a representative from one subjects' rights organization, which has lodged many complaints with the Army's IG system, particularly about conditions at the military prisons,

²⁵⁸ See, *supra*, §V.A.1.c.

trained investigators, particularly at the Naval IG and Echelon II levels; at the lower levels there are few trained investigators conducting IG investigations. The Marine Corps now sends its headquarters investigative personnel, many of its command inspectors, and some other IG personnel at the field level to the Army's IG course. The Air Force does not use trained IG personnel to conduct investigations. IG personnel who have attended the Army's IG course praise that training and say they do not know what they would do without it. IG personnel who have not received training told us that they find it difficult to be effective or proactive. People we interviewed used phrases like "laughable," "like the blind leading the blind," and "people bumping around in the night" to describe the quality of the Air Force and Navy field-level investigations by investigators with no training.²⁶¹

e. Manuals

The overwhelming number of people conducting IG investigations, other than in the Army, are doing them with few or no written reference materials. In the Navy, although there is an Interim Manual, most IG personnel at the lower levels do not have it. The Marine Corps does not have a manual. The Air Force provides guidance in its regulations, but they are not sufficiently detailed. Again, because IG investigations can be difficult and sensitive, all IG personnel and everyone conducting an IG investigation should have access to a detailed, easy-to-read IG investigations manual. The

observed that she does not believe even Army IG personnel are sufficiently trained or experienced to carry out their investigative responsibilities adequately. Testimony of Carolyn Dock, Director, Members Opposed to Maltreatment of Service Members, before the Advisory Board 11 (July 8, 1994.)

²⁶¹ Personnel in Air Force IG headquarters told us that they have AFOSI investigators available to conduct particularly difficult investigations. At the field and major command level, however, AFOSI does not report to the IGs and this option is not available.

Army IG's Assistance and Investigations Guide and the Naval IG's Interim Investigations Manual both are very useful.

f. Communication and Data Collection

The Army is the only Service that has a system of communication that operates throughout the IG system. The primary method of communication is through the Army's IGMET system. The IGMET is an automated multi-user computer network that links IG offices and enhances the ability to share and correlate IG information. From what we heard in the Army, this is extremely useful for IGs. Many problems occur more than once, and a system of communication allows IGs to obtain advice from others who have handled a certain type of problem before. It allows the IG system to identify trends and alert IGs to watch for them. Finally, it helps IGs identify with the IG system, which can strengthen the system without adding any formal reporting channels.

An important part of communication among IGs is some method of data tracking about IG complaints and investigations. To be useful, the system need not be complex. It is essential, however, for the headquarters IG and the Service Secretary to be able to track the kinds of problems that are being raised so that they can learn of Service-wide trends and see that problems do not get out of control. The Army and Air Force have data tracking systems; the Navy and Marine Corps do not.

3. Commander-Directed Investigations

All commanders possess the authority to investigate matters or incidents within their command. This authority is inherent and is considered essential to the military commander's ability to maintain good order and discipline. The ability to conduct investigations also provides commanders a tool to gather facts and allows them to keep abreast of what is happening in their

command. By far the greatest number of investigations conducted in the Services are commander-directed investigations. The majority of these investigations are conducted to find facts that will assist the commander in the efficient and safe operation of his or her command. A few examples of such investigations are investigations conducted to establish accountability for government property that is lost, damaged, or stolen; to determine whether injuries or deaths suffered by servicemembers were in the line of duty; to determine the cause of an accident to help prevent a recurrence; and to determine whether a breach in security has occurred, the reasons for the occurrence, the potential damage, ways to limit damage, and ways to prevent recurrence. As these examples indicate, the commander's authority to investigate is very broad and reaches to virtually all aspects of the functioning of his or her command. Commanders also direct investigations to determine whether a servicemember has engaged in misconduct.

Although commanders have the inherent authority to conduct these investigations, the Uniform Code of Military Justice and the Manual for Courts-Martial also establish guidelines for commanders to direct investigations into a servicemember's misconduct. The types of investigations conducted pursuant to the Code and the Manual for Courts-Martial range from the very informal to formal. An example of an informal investigation is a preliminary inquiry conducted pursuant to Rule for Courts-Martial 303.²⁶² There are no established procedures for the conduct or reporting of these inquiries. In contrast, Article 32, Uniform Code of Military Justice, establishes procedures for a formal investigative hearing at which witnesses testify and real evidence is examined. In the military, an Article 32 hearing fills the role of grand jury proceedings, although it provides additional discovery and confrontational rights to the accused. An Article 32 hearing is a commander-directed investigation that is clearly criminal in nature. Article 135 of the

Code establishes guidelines for courts of inquiry, which are formal investigative procedures that may be used to investigate any matter.

In addition to the investigative procedures established by the Rules for Court-Martial and the Uniform Code of Military Justice, each Service has developed regulatory guidance for the conduct of commander-directed investigations. Commander-directed investigations in the Army are conducted pursuant to the procedures established in Army Regulation 15-6. In the Navy and Marine Corps there are two commonly used types of commander-directed investigations; they are investigations conducted pursuant to the Manual for the Judge Advocate General (JAGMAN)²⁶³ and very informal investigations conducted by a single investigating officer in anticipation of imposing non-judicial punishment pursuant to Article 15, Uniform Code of Military Justice.²⁶⁴ Commander-directed investigations are used less frequently in the Air Force than in the other Services. Air Force Instruction 90-301 contains the general procedures for these.²⁶⁵

²⁶³ The JAGMAN and Army Reg. 15-6 contain guidance for both formal and informal investigations and investigations by a single officer or by a board. The types of JAGMAN and Army Reg. 15-6 investigations that are conducted most frequently are single investigator informal investigations.

²⁶⁴ Article 15 is designed to be used to punish minor misconduct, such as unauthorized absences and fights between servicemembers.

²⁶⁵ Air Force Inst. 90-301 is also the Air Force's instruction for the conduct of IG investigations. The Air Force adopted this instruction on May 23, 1994; before then, Air Force Reg. 120-3 applied to commander-directed and IG investigations. The two are identical in all respects relevant to our analysis.

²⁶² See Vol. II, Supplemental Reports, §III.D.1 for an explanation of Rule for Courts-Martial 303.

a. Potential for Abuse

(1) Credibility of Investigations

Although commander-directed investigations are very important to the maintenance of good order and discipline and the efficient operations of the Armed Services, they are, as a class, the type of investigation most subject to abuse. Several senior judge advocates told us that although it is important for commanders to have the authority to conduct these investigations, they can use them to whitewash or cover up an incident. Often, commanders will order a commander-directed investigation when they want to keep a matter "in house" until they know all of the facts.

One practice that almost inevitably creates at least the appearance of a whitewash is a commander's ordering a commander-directed inquiry when an investigation by an MCIO obviously would be more appropriate. The Navy's investigation of the USS IOWA incident²⁶⁶ created such an appearance. The Navy, by using the least formal type of investigation to investigate a major incident and initially refusing NCIS's assistance to investigate a matter within its jurisdiction, created the appearance that the Navy desired

²⁶⁶ On April 19, 1989, during a routine firing exercise off the coast of Puerto Rico, an explosion in gun turret number two aboard the USS IOWA killed 47 sailors. Within 24 hours after the explosion, NCIS offered to help the Navy in its inquiry. The offer was declined. On the day of the explosion, a rear admiral was appointed to conduct a "one officer" investigation in accordance with the procedures set forth in the JAGMAN. A technical support team was appointed to assist the investigating officer. On May 9, 1989, NCIS informed the investigating officer that while searching the locker of one of the explosion's survivors as part of an unrelated investigation it had discovered black powder similar to that used in the IOWA's guns. It also had discovered that the sailor was the beneficiary of a life insurance policy in the event of the accidental death of the Gunner's Mate Second Class who was operating the gun that exploded. Based on this information, the investigating officer recommended that a separate criminal investigation be undertaken by NCIS. NCIS opened its investigation on May 10, 1989.

to keep the investigation and its results "in house."

In another incident of which we became aware during our investigation, a senior officer successfully convinced the leadership of an MCIO to halt its investigation of alleged serious misconduct and allow him to conduct a commander-directed inquiry into the incident.²⁶⁷ The leadership of the MCIO agreed to suspend its investigation for a week until the investigating officer appointed to investigate the matter was available and then to conduct a joint investigation with him. After the joint investigation began, the MCIO agent no longer played a major role in the investigation. Although this investigation and a later investigation by the DoD IG both determined that the allegations of misconduct were unfounded, the use of a commander-directed inquiry created the appearance that the command was attempting to cover up the incident.

From the interviews conducted with NCIS agents, commanding officers, and judge advocates in the Navy, we perceive more of a problem in the Navy than in the other Services with attempts to keep investigations "in house" by conducting commander-directed investigations. As a result of a recent change to Secretary of the Navy Instruction 5520.3B, *Criminal and Security Investigations and Related Activities Within the Department of the Navy*, this should become less of a problem. This instruction now requires that, if NCIS objects to the initiation of a commander-directed investigation, the commander-directed investigation must be suspended and the matter referred to the officer exercising general court-martial jurisdiction.

(2) Command Influence

The investigators who conduct commander-directed investigations are more subject to command influence than MCIO

²⁶⁷ Because all the investigations conducted into this matter determined that there was no crime committed, we have chosen to discuss the case in general terms to protect the identity of the parties concerned.

agents. This is a result of the simple fact that they are appointed by and report their findings to their commanders. This "influence" can occur even when there is no overt action by a commander; indeed, a commander may have no intention whatsoever of influencing the process. Several commanders and judge advocates we interviewed commented that there is a natural tendency for investigating officers "to want to see things the commanding officer's way."

(3) Training and Experience

The investigators who are appointed to conduct commander-directed investigations often lack training and experience as investigators. This is one of the most prevalent criticisms of commander-directed investigations that we heard during the course of our interviews and is a particular problem when the investigations are used in complex cases. Again, the Navy's USS IOWA investigation illustrates the problem. In that case, an inexperienced investigating officer was assigned to conduct a JAGMAN investigation of a complex case. Although he was a rear admiral, he had conducted very few investigations in his career, and certainly none of the magnitude or complexity of the USS IOWA case, nor had he ever received any special training in the investigation of serious incidents. This proved to be a critical problem because of his lack of knowledge and experience concerning the preservation of evidence and chain of custody procedures. The investigating officer testified before Congress that he authorized the commander of the USS IOWA to clean the gun turret. He was aware that there was a possibility that some evidence may have been lost, but made the decision based on safety concerns. He also said he was "not looking" at a criminal possibility at this point in the investigation.

The lack of training for investigating officers also was mentioned frequently in interviews with staff judge advocates. Several commented that the investigations often are of such poor quality that a matter must be reinvestigated by a judge advocate before any disciplinary action can be taken against the subject. One Air Force judge advocate commented that commander-

directed investigations "for fact-finding only are o.k., but if they are used for disciplinary action they are a disaster." Another judge advocate said, "the officers conducting the investigations are not qualified investigators, and as a result, reports do not support disciplinary action."

(4) Protection for Subjects

There are fewer protections for subjects of informal commander-directed investigations than of more formal investigations. All of the Services' regulations require the investigating officer to inform subjects of their Article 31 rights. Although Army Regulation 15-6 and the JAGMAN specify that servicemembers designated as respondents or parties in formal commander-directed investigations have the right to be represented by military counsel, they do not contain similar provisions for subjects of informal investigations. Air Force Instruction 90-301 states that when subjects exercise their rights under Article 31, they are entitled to consult with military defense counsel. Based on interviews of judge advocates from the Services, we are aware that some military defense counsel do make themselves available to assist subjects of commander-directed investigations, but this often is not the case. In fact, we have heard that attorneys often will refuse to provide any assistance to the subject of an investigation until that person is charged with some misconduct. We are also aware from interviews with military defense counsel in the Department of the Navy that some Navy staff judge advocates have instructed military defense counsel not to provide assistance to subjects of informal JAGMAN investigations.

In interviews conducted with groups that represent the subjects of investigations, we heard that abuses of subjects' rights occur more frequently the less formal the investigation. Some of the more common abuses about which we were informed are the failure to inform subjects why they are under investigation, failure to inform subjects of their Article 31 rights, and improper seizure or collection of evidence. One subjects' rights group gave us examples of improper

seizure that included obtaining information through inspection of the mail, diaries, personal computer files, or other personal correspondence of servicemembers. We also heard that the lack of training that investigating officers receive contributes to abuses of servicemembers' rights in these informal commander-directed investigations. A representative of the same subjects' rights group said that her experience with the Army is that junior officers are often appointed to conduct these investigations. She said these officers "do not have the maturity or the training to conduct investigations" and as a result servicemembers often are not read their rights."²⁶⁸

Commander-directed investigations may be used as the basis for some types of administrative proceedings, such as administrative separation proceedings,²⁶⁹ or during non-judicial disciplinary proceedings pursuant to Article 15 of the Uniform Code of Military Justice. The servicemembers subject to these proceedings have a right to counsel and the right to respond to evidence against them. As a general rule, however, the rules of evidence do not apply to these proceedings. Therefore, a servicemember may not use abuses in the investigative process as a basis for excluding the evidence obtained during that process. We have heard from subjects' advocacy organizations that, because there is no exclusionary rule in administrative proceedings, there are insufficient disincentives for investigators to engage in abuses.²⁷⁰

²⁶⁸ Interview of Michelle Beneke, Executive Director, Servicemembers Legal Defense Network (May 4, 1994).

²⁶⁹ The majority of administrative separation proceedings are not based on a single investigation, but on a paper record of infractions over a period of time. They also, however, are the primary method of discharging servicemembers found to be in violation of the "don't ask, don't tell" policy.

²⁷⁰ The theory behind the lack of an exclusionary rule in both non-judicial disciplinary and administrative separation proceedings is that the proceedings expose the subject to less severe penalties and less stigma than more formal proceedings, like

b. Guidance for Investigators

Most officers or enlisted people chosen to conduct commander-directed investigations have no investigative training and little or no experience in how to conduct an investigation. Most often these investigators are selected from a duty roster; availability can be a more important qualification than experience or talent. In light of this, the guidance provided in the Service's regulations is not adequate. With the

courts-martial, but they also provide fewer protections because of their informal nature. In the case of non-judicial disciplinary proceedings, the servicemember may be punished, but although the potential penalties may be severe, they are not as harsh as is possible with courts-martial. See, *infra*, note 273, for a discussion of the potential punishment resulting from non-judicial disciplinary proceedings. Moreover, the servicemember may demand a court-martial proceeding -- with the accompanying evidentiary protections -- if he or she objects to the use of evidence that was obtained improperly.

Administrative separation proceedings result from employment decisions, and they are not a part of the criminal justice system. Although as a practical matter the results of these proceedings -- discharge from the Service -- can be quite detrimental, the servicemember is not convicted of or punished for a crime. Instead, a person who is discharged pursuant to an administrative separation proceedings has been found not to satisfy the Service's standards. Administrative separation proceedings allow the Services to discharge servicemembers involuntarily for a variety of reasons, including homosexuality, unsatisfactory performance, drug use, personality disorders, and minor disciplinary infractions. The Army's and Air Force's regulations for formal boards of officers, which establish the procedures for administrative separation proceedings, state that coerced or involuntary confessions are not admissible in administrative separation proceedings. These regulations, however, also state that the fact alone that the respondent was not advised of his or her Article 31 rights before a confession or admission does not make the confession inadmissible. The Navy's administrative separation regulations do not address the issue. The Board expresses no position on whether Article 31 requires the suppression of evidence obtained without rights warnings when such evidence is sought to be used in administrative or nonjudicial proceedings.

exception of Air Force Instruction 90-301, the Services' regulations provide very little practical guidance to investigating officers on how actually to organize and conduct a thorough, organized investigation while protecting the rights of servicemembers. For example, Air Force Instruction 90-301 gives investigating officers guidance on how to plan and outline their investigations, how to conduct interviews, and how to collect and use documentary and oral evidence. The other Services' regulations speak to the importance of these investigative steps, but they do not contain the level of detailed guidance found in Air Force Instruction 90-301. Although it provides more guidance than the other Services' regulations, Air Force Instruction 90-301 also could be improved by offering more detailed guidance to investigators.

The instruction officers receive in officer training courses does not address commander-directed investigations adequately. The only officers who receive any training in how actually to conduct commander-directed investigations are judge advocates in all Services, the Navy's legal officers, and commanding and executive officers in the Navy. Our investigation into the training provided to officers by the Service academies, by the Reserve Officer Training Course (ROTC), Officer Candidate or training schools, and in officer professional military education courses revealed that the subject of commander-directed investigations is taught only in the abstract. That is, the instruction deals with the existence of pertinent regulations and when they should be used, but not with their actual content. Navy ROTC students receive one hour and Navy Officer Candidate School students receive two hours of instruction on the use of JAGMAN investigations. In the precommissioning programs of the Air Force and Army, the subject of commander-directed investigations is not covered in detail but as part of general instruction on the military justice system. None of the Services includes instruction on the conduct of these investigations in its officer professional military education courses.

c. Coordination with Judge Advocates

Only Air Force Instruction 90-301 requires commander-directed investigators to coordinate with a judge advocate before beginning their investigation, and to have a judge advocate review the report of investigation when completed. Although Army Regulation 15-6 and the JAGMAN contain no such requirement, the greatest area of consensus among the commanders and judge advocates interviewed in all the Services was that investigating officers should coordinate with a judge advocate before beginning their investigations. A Marine Corps commander we interviewed summed up the opinion of many of the commanders when he said "the quality of investigations is a function of the investigating officer and the investigator's coordination with the staff judge advocate." Although not required by regulation, most of the commanders we interviewed said they require all investigating officers to coordinate with a judge advocate before beginning their investigations.

In fact, we learned in our investigation that commanding generals of at least one Army and one Marine Corps command have created policies requiring coordination and review by a judge advocate. Many of the commanders and judge advocates we interviewed commented that coordination was needed with a judge advocate to educate the investigating officer on how to conduct an investigation and how to give proper rights advisement. One Air Force wing commander we interviewed said "I stress the importance of the investigating officer coordinating with the SJA, so the investigating officer knows among other things, how and when to read rights." The commanders and judge advocates also commented that coordination with a judge advocate noticeably increases the quality of the investigation. We also found that a judge advocate's review of the investigator's completed report before it is submitted to the commander is important to assess the thoroughness of the investigation and to ensure that the findings made by untrained, often inexperienced investigators are supported by the evidence.

d. Selection of Investigators

Because of the nature and influence of rank in the military, commander-directed inquiries are more likely to escape influence or bias if investigating officers are senior in rank to the subject of the investigation. Many of the commanders we interviewed said it was important to appoint an investigating officer senior in rank to the subject. If investigating officers are allowed to be junior in rank to the subject of an investigation, the potential for a perception of improper influence or a lack of impartiality arises. Air Force Instruction 90-301 directs that the investigating officer be separated by a level of command or by functional assignment from the complainant and subject and equal or senior in grade to the subject of the investigation. The Army, which conducts the greatest number of commander-directed investigations, requires that investigating officers be commissioned or warrant officers who are senior in rank to the subject, unless impractical because of "military exigencies." The JAGMAN requires that investigators be senior to the subject "whenever practical," and requires that the convening authority appoint personnel who are "best qualified for the duty by reason of their age, education, training, experience, length of service, and temperament."

B. Recommendations

1. Departmental Inquiries

a. Improve Training of Departmental Inquiries Investigators

Because of the highly sensitive nature of the investigations that Departmental Inquiries conducts, it is imperative that its investigators receive training at least equal to that received by counterpart IGs in the federal Government. We recommend that all investigators receive training at the Army IG course, not only because of its high quality, but also because it would enhance their understanding of the military culture in which

they will be operating. In addition, we recommend that a more formalized refresher training (or in-service) training program be instituted to ensure investigators receive advanced training on investigative techniques required to complete their investigative duties properly.

b. Inform Subjects of Departmental Inquiries Reports of Tentative Conclusions

The DoD IG should be required to inform subjects and other individuals about unfavorable information it has developed and tentative conclusions it has drawn before a Departmental Inquiries report is final. The individuals should be given the opportunity to respond to those criticisms, and the response should be included in the final report.

c. Allow Subjects Facing Adverse Action on the Basis of Departmental Inquiries Reports Access to Underlying Materials

Subjects of Departmental Inquiries investigations who have been criticized and who face any adverse action, including personnel actions, should be provided an opportunity to review the evidence underlying factual conclusions that they dispute. The number of "hoops" through which a subject must jump in order to obtain the evidence should be kept to the absolute minimum.

d. Require Civilian Departmental Inquiries Investigators to Provide Article 31 Warnings to Servicemembers

Departmental Inquiries civilian investigators should be required to provide Article 31 warnings to military members under the same circumstances that active duty military investigators must provide them.

e. Identify the Criteria Applied and Analyze the Applicable Standard in Departmental Inquiries Reports

Departmental Inquiries investigators should be required to identify and analyze in their reports the applicable laws, rules, regulations, instructions, and other standards pursuant to which the subjects of the investigation were or should have been acting. If no standards exist, the report must state the criteria its author used and the reasons for adopting those criteria. The reports should not rely on the opinions of their authors about what the standard was or should have been.²⁷¹

f. Develop and Apply More Rigorous Standards for Accuracy and Tone of Departmental Inquiries Reports

Departmental Inquiries should develop more rigorous standards for factual accuracy of its reports and for the avoidance of provocative language.

²⁷¹ Departmental Inquiries may wish to look to the Army's IG Assistance and Investigations Guide for guidance on how best to implement this recommendation. That guide tells investigators that they must frame the allegations they are investigating in a way that identifies the acts of which the subject is accused and defines what standard he or she is alleged to have violated. The Guide instructs investigators to research the standard very carefully and articulate it with precision. If no standard exists, investigators are told to research and document that fact thoroughly. If there is no articulated standard, investigators are instructed that they may sometimes conclude that the subject's behavior violated an ethical principle, but they must support this with facts; it must not be simply unsupported opinion.

g. The Assistant IG for Departmental Inquiries Should Not Conduct Investigations Personally

The Assistant IG should not become involved in the day-to-day conduct of investigations.

h. Departmental Inquiries Reports Should Not Make Recommendations About Disciplinary Action

The DoD IG should not make recommendations that disciplinary action be taken in Departmental Inquiries reports. Moreover, the DoD IG should not judge or assess the adequacy of disciplinary action in individual cases.

i. Provide Departmental Inquiries Investigative Files to Management When It Requests Them for Consideration of Discipline

When a Departmental Inquiries report recommends consideration of disciplinary action, Departmental Inquiries should work with the management (and management's lawyers) of the DoD component and allow it access to whatever portion of the investigative files it deems necessary to support a decision. The DoD components should not be required to rely on the DoD IG's representation of what the investigative files contain, nor should they have to reinvestigate matters that Departmental Inquiries already has investigated.

j. Do Not Increase Role in Initial Investigation of Senior Officials

Departmental Inquiries should not increase the percentage of senior official investigations that it conducts itself.

2. Service Inspectors General

a. Increase IGs at Lower Echelons of Navy

The Navy must increase the number of IGs at the lower echelon commands. All Echelon III commands should have IGs, and they should hold the rank of captain (O-6), even if that means that being an IG is an additional duty. Moreover, the Echelon III IGs, particularly if they are not full-time IGs, must have trained investigative staff who provide continuity and some experience and knowledge of the IG's investigative duties.

We are not able to recommend categorically that the Navy have IGs at commands below Echelon III, but certainly in many cases it should. If commands below Echelon III do not have IGs, it should be clear what person in the command is responsible for IG-type investigations (perhaps the executive officer or the chief of staff) and that person should know to use the Echelon III IGs as resources.

Although we do not recommend the Navy assign IG personnel to ships, we do recommend that the commander and the executive officer be made aware of the availability of IG personnel at the closest echelon with an IG and be encouraged to call on those people for advice or to conduct sensitive or complex investigations that they determine inappropriate to handle in their own command.

b. Increase IG Training

The Navy, Marine Corps, and Air Force all must increase the amount of training they provide to their IG personnel. In the Navy, as we already have said, the IGs at the lower echelons need trained investigators on their staffs. Because there will be no trained IG investigators on ships, the Navy should provide more training to its command-level officers on how to handle IG-type investigations and how to increase communication with the IGs at the echelons above them.

The Air Force system of untrained IGs and ad hoc investigators in every case simply is not adequate. Air Force IGs at all levels should receive formal training. From what we have heard, there may not be enough work at the installation level to keep a trained IG investigator on the IG's staff occupied full time. If this is true, the Air Force should consider making IG investigations an additional duty for an officer and providing that officer formal training. At the very least, the detailed IG staff at each installation should receive training so they can be more effective at providing direction to the investigators and reviewing the investigative reports when they come in. Finally, the Air Force should consider having a cadre of trained investigators at the major command level, so that if an installation IG gets a particularly complex or sensitive case that should not be handled by an untrained investigator, he or she can refer the matter to the major command for investigation.

The Marine Corps should continue training its command inspectors and their staff. Although many command investigators currently receive training, not all do. It is critical that they do.

c. Consolidate IG Training at Army IG Course

From all that we have heard about the training at the Army IG course, it is clear that it should be the place that the IG personnel receive their training. To the extent that other Service IG personnel are trained, this is where they go. Although there is an IG school at the Federal Law Enforcement Training Center, it is not a military IG school. Much that is important to the function of military IGs is not taught there. The Secretary's Board on Investigations should work with the Army and the other Services' IGs to create a non-Army IG course that suits their needs. It is possible that they will conclude that there should be a basic portion and each Service should have its own add-on course. We do not attempt to cover those details.

Finally, this is not meant to discourage the Services from sending their IG investigative personnel to courses in addition to the Army IG course, such as the white collar crime course at the Federal Law Enforcement Training Center.

d. Provide Manuals to All IG Personnel and Investigators

All IG personnel should have a detailed easy-to-read manual for referral when conducting IG investigations. The Army's IG personnel already have this. The Navy must be sure its manual is sent to IG personnel at all levels, not just Echelon II IGs. The Marine Corps IG should complete its manual as soon as possible and send it to all command inspectors. The Air Force should develop a manual that contains more detail than its current regulations or Air Force Instruction 90-301.

e. Refer Some Sensitive Investigations

All Services have some mechanism by which IGs at the lower level may elevate matters that, to maintain credibility, should not be handled at the level at which they were raised. The Services must ensure that lower-level IG personnel are aware of these mechanisms and are instructed to use them when appropriate.

f. Develop a Method to Track Data in the Navy and Marine Corps

The Navy and Marine Corps should develop some method to track data about IG complaints at all levels of the IG system.

g. Consider Measures to Strengthen IG System

All Services, except the Army, should consider ways to strengthen their IG systems. For example, we agree with the Navy's decision to make the Naval IG a

three-star admiral. The Marine Corps should increase the IGM staff and consider lengthening the tours of duty of its command inspectors. The Services should consider having the headquarters IG play a role in the selection of the IGs at the lower levels, as the Army does now. The Secretary's Board on Investigations should work with the Services at creating and implementing methods of strengthening the IG systems.

h. Adopt Measures to Increase Communication

One simple way to strengthen the IG system without interfering with the chain of command is to increase communication between the IGs. The Services, other than the Army, should consider adopting an e-mail system like the Army's, or at least having conferences that IGs at all levels attend.

3. Commander-Directed Investigations

a. Coordinate with Judge Advocate or Legal Officer

Investigating officers should be required to coordinate with a judge advocate or legal officer during the course of their investigations unless impractical because of military exigencies. A judge advocate or legal officer also should review the investigating officer's report of investigation to ensure a thorough, impartial investigation is conducted and that the findings are supported by the evidence. The Services should include these requirements in each of their regulations for the conduct of commander-directed investigations. The order appointing the investigating officer should instruct the investigator to contact a judge advocate or legal advisor at the earliest opportunity.

b. Strengthen Requirements for Selection of Investigating Officers

The JAGMAN and Air Force Instruction 90-301 should include a requirement that investigating officers must be senior to the subject of the investigation, unless impracticable because of military exigencies.²⁷²

The JAGMAN and Army Regulation 15-6 should include a requirement similar to that found in Air Force Instruction 90-301, which requires the investigating officer be from outside the rating chain and "separated by one level of command or by functional assignment from the organization or person who is the subject" of the investigation. This requirement will help ensure that an impartial investigation is conducted and prevent the perception that the command is attempting to protect the subject or whitewash an incident.

Commanders should be encouraged not simply to appoint an officer from a duty roster to conduct investigations. All Services' regulations should contain language similar to that in the JAGMAN, which instructs convening authorities to appoint personnel who in their opinion are the "best qualified for the duty by reason of their age, education, training, experience, length of service, and temperament." Commanders should be instructed to consider the investigating officer's abilities and experience on a case-by-case basis. When possible, and particularly in the more complex cases, commanders should draw on officers with experience conducting these investigations.

²⁷² The JAGMAN now requires investigating officers to be senior to the subject "whenever practical" and Air Force Inst. 90-301 requires that the investigator be equal or senior in grade to the subject; we believe these requirements should be more stringent.

c. Improve Guidance to Investigating Officers

The Services should include blocks of instruction concerning commander-directed investigations in their curriculum at the Service academies, in ROTC programs, at Officer Candidate or training schools, and in officer professional development courses. This should be practical instruction in how to conduct investigations, as well as when to use them. Practical exercises involving hypothetical and mock investigations should be included in the courses. This is necessary considering the virtual complete lack of training that officers receive in how to conduct investigations. Because of the frequent use of commander-directed investigations in the Navy, Marine Corps, and Army, increased training is especially appropriate in these Services. The courses should include instruction on how to protect subjects' rights because officers with no or inadequate training about how to conduct investigations are much more likely to infringe upon a servicemember's rights.

The Services' regulations should be rewritten to include more practical guidance in how actually to conduct and organize a thorough investigation, or, in the alternative, an investigating officer's manual should be developed.

The Services' regulations should contain more practical advice to commanders on when commander-directed investigations are appropriate. They should stress to commanders not only the folly inherent in undue influence but these regulations also must impress upon investigators the importance of determining the neutral facts wherever they may lead. The regulations also should stress to commanders that the use of commander-directed investigation to investigate serious criminal matters is inappropriate.

d. Allow Subjects Access to Counsel

Subjects of commander-directed investigations should have the right and

ability to consult with a military defense attorney during the course of the investigation. Although non-judicial punishment often is the most serious punishment a subject faces, even minor non-judicial punishment is, for all practical purposes, career ending in today's military.²⁷³ That consequence is serious enough to require counsel's advice during the investigation.

Services to review the cases to determine whether trends exist Service or DoD-wide.

e. Examine Methods to Increase Accountability for Flawed Investigations

The Secretary's Board on Investigations and the Services should consider appropriate disincentives for abuse of subjects' rights during informal investigations. The Secretary of Defense should take a fresh look at the issue of imposing an exclusionary rule on administrative separation proceedings or non-judicial punishment proceedings. In any event, the Services should consider alternative methods -- perhaps within the evaluation and promotion process -- for making investigators and their commanders accountable for investigative abuses.

f. Examine Methods of Collecting Data

The Secretary's Board on Investigations and the Services should consider establishing central Service repositories for the retention and analysis of commander-directed investigations. This would allow the

²⁷³ For enlisted persons, non-judicial punishment may include up to 30 days correctional custody. Correctional custody is the physical restraint of a person during duty or non-duty hours, or both, imposed as punishment under Article 15, and may include extra duties or hard labor as an incident of correctional custody. Correctional custody normally is not served in a confinement facility. If a person is required to serve correctional custody in a confinement facility, when practicable, the person is not placed in an area resulting in immediate association with persons awaiting trial or held in confinement post-conviction.

VI. Administrative Versus Criminal Investigations

A. Findings

A general theme that cuts across many of the types of investigations we reviewed is the need to define when and how to draw the line between criminal and administrative investigations. Generally, the primary purpose of administrative investigations is to determine why something happened and fix systemic problems. The purpose of criminal investigations is to provide a factual predicate for an adjudicator to assign responsibility and impose punishment. Administrative investigations can and often do support some type of disciplinary action, but if their purpose truly is to find out what happened, their methods can be inconsistent with criminal prosecution.

The most difficult context in which the problem of choosing one procedure or the other -- administrative or criminal -- comes up is the investigation of matters that involve both individual misconduct and major systemic problems. Often the investigation of these types of matters is conducted in a highly charged environment and there is enormous pressure both to find out what happened and to prosecute those responsible.

The investigations of the events at the Tailhook convention are the most notorious example of this problem. When the Navy began investigating Tailhook, it faced two difficult issues: it had reports of criminal assaults, but it also had evidence of widespread non-criminal misconduct and a serious systemic problem.

One thing about which almost all people familiar with the Navy's investigation of Tailhook agree is that the Navy did not do an adequate job of investigating the non-criminal matters. That is, it did not conduct an adequate administrative investigation that got to the bottom of the events at the convention, identified non-criminal misconduct, and identified the problems that allowed Tailhook

to happen. The Naval Investigative Service (NIS, later NCIS) investigated the criminal misconduct. It is not NIS's role, however, to investigate administrative issues unless someone in the Navy's leadership instructs it to do so. The Naval IG, whose role is to investigate administrative matters, was not in the lead of the investigation and did not feel he had the authority to take the lead.²⁷⁴ Thus, the Naval IG investigation relied on NIS's investigative product and, although it looked at some of the systemic problems, the Naval IG did not conduct a full-blown administrative investigation.

What the Navy lacked was one individual in a leadership position with whom both of these investigative organizations coordinated and who saw it as his or her responsibility to advise the Secretary on whether the investigation should be primarily criminal or administrative, or how those two aspects of the investigation both could be accomplished. At that time, the Naval IG reported to the Secretary through the Under Secretary, and NIS reported through the Chief of Naval Operations. In large part because of this leadership problem in the Tailhook investigation, the Navy changed NIS's reporting relationship (and changed its name to NCIS). After Tailhook, NCIS was to report directly to the Secretary of the Navy, as was the Naval IG, and the Secretary established a Special Assistant to the Secretary for Investigations whose job was to monitor and coordinate investigations. The Special Assistant was to advise the Secretary, among other things, on which investigative organization should have primary responsibility for an investigation and whether an investigation should be pursued primarily as administrative or criminal.

When administrations changed, the new Navy leadership did not maintain the position of the Special Assistant for Investigations. Instead, the Secretary asked the Navy General Counsel to be the reporting senior of NCIS. That is, the General Counsel supervises NCIS. The Naval IG does not

²⁷⁴ Interview of Rear Admiral George W. Davis, former Naval IG (May 10, 1994).

coordinate with or report through the General Counsel. Thus, the Navy, again, does not have one person with whom both major investigative organizations coordinate and who is responsible for advising the Secretary on how a major matter like Tailhook should be handled.²⁷⁵ The Navy General Counsel explained that the decision to have the Naval IG and NCIS report to different offices provides a system of "checks and balances" and is, for that reason, preferable.²⁷⁶ We believe, however, that any theoretical benefit from reporting to separate offices is outweighed by the benefit of having one office responsible for advising the Secretary on all investigations.²⁷⁷

The DoD IG encountered a similar problem with its investigation of events at the Tailhook convention. The purpose of its investigation was two-fold: to determine what happened and prepare a report, and to support prosecution of criminal offenders. According to the Assistant IG for Investigations, the *Tailhook II* report was never intended to support prosecutions or to be evidence; the evidence to support prosecutions was contained in the referral files that DCIS sent to Navy prosecutors.²⁷⁸

²⁷⁵ Both the Army and the Air Force have one office that fulfills a leadership role with respect to advising the Secretary on investigations. In the Army, the Army IG and the Commanding General of USACIDC both coordinate their reporting to the Secretary on investigations through the Army General Counsel's office. In the Air Force, the Air Force IG is the reporting senior for AFOSI, so the IG advises the Secretary on all investigation issues.

²⁷⁶ Interview of Steven S. Honigman, Navy General Counsel (May 3, 1994).

²⁷⁷ Moreover, as we discuss in more detail, *infra*, §VII.A.2, we believe it is ill-advised to have Navy General Counsel in the role of reporting senior of a criminal investigative organization.

²⁷⁸ Interview of Donald Mancuso, Assistant IG for Investigations (Oct. 12, 1994). According to the Assistant IG, to the extent prosecutors were to use the *Tailhook II* report, it was only to provide a context for some of the behavior in which subjects engaged.

Nonetheless, the release of the report confused matters and certainly created the appearance that the behaviors and offenses described in the report could and should be the subject of prosecution. Moreover, we heard from a senior Navy judge advocate that, because the DoD IG investigators were attempting to get as much information as they could, they did not always do what was necessary to make the investigation useful for prosecutions. The judge advocate described the DoD IG investigation as "quasi-criminal."²⁷⁹ It is not necessarily a criticism of an investigation to say it was not criminal; sometimes this is the correct decision to make. The problems come when the leaders do not make the decision to pursue one type of investigation or the other.²⁸⁰ In the case of the DoD IG investigation of Tailhook, it does not appear that the DoD IG leadership understood the problems that a dual-purpose investigation could cause.

It is not necessary in all cases to choose either a criminal or administrative investigation. In the Services it is not uncommon to have criminal investigations by the MCIO and commander-directed administrative investigations conducted concurrently.²⁸¹ Although this may be a waste of resources,²⁸² it becomes a serious problem if the investigations interfere with

²⁷⁹ Interview of Captain C. E. Ellis, Jr., Commanding Officer, Naval Legal Services Office, Norfolk Naval Base, VA (Apr. 19, 1994). See, *supra*, §III.A.1.a, for additional discussion of the DoD IG investigation of the Tailhook events.

²⁸⁰ This problem also arises in the context of counterintelligence.

²⁸¹ See, *supra*, §V.A.3, for discussion of commander-directed investigations. We discuss in that section why it is ill-advised in many cases to conduct a commander-directed investigation in lieu of a criminal investigation by the MCIO or police investigators.

²⁸² We heard several complaints about the requirements in the Navy for conducting JAGMAN investigations of many matters irrespective of whether NCIS also is conducting an investigation.

each other. In most cases when a criminal and a commander-directed investigation conflict, the criminal investigation should take precedence. Again, in some cases, such as aircraft accidents, the Service might decide that it is more important to determine what happened, even if it means taking a chance that a wrongdoer is not prosecuted.²⁸³ What is important is that there be a mechanism for making this decision and that the decision is, in fact, made. It is not acceptable to have two investigations interfering with each other and no way to decide which should take precedence.

The Navy has a procedure to deal with the situation when a commander-directed investigation interferes with a criminal investigation. Secretary of the Navy Instruction 5520.3B6.a(1) states that command investigations pursuant to the JAGMAN "must not compromise or otherwise impede the NCIS investigation." That instruction requires a commander to inform NCIS when he or she orders a JAGMAN investigation of a matter that NCIS is investigating, so the matters can be coordinated. Finally, it states "if NCIS objects to the initiation of the inquiry by a command fact-finding body, the command inquiry will be suspended and the matter referred for resolution to the officer exercising general court-martial jurisdiction, or the area coordinator via the chain of command."

The Army and Air Force do not have analogous procedures. In an interim change to Army Regulation 15-6, the regulation that establishes procedures for commander-directed investigations, the Army clarifies that commander-directed investigations may be conducted concurrently with criminal investigations. The regulation instructs the commander directing the administrative

investigation and the investigators to ensure that the commander-directed investigation does not "hinder or interfere with a concurrent investigation . . . being directed by a criminal investigative agency." The regulation does not, however, contain any mechanism for resolving disputes if the criminal investigators believe the commander-directed investigation is interfering with their investigation. Air Force Instruction 90-301, which contains procedures for IG and commander-directed investigations, does not offer any guidance about how to handle the situation when a commander-directed investigation and a criminal investigation are proceeding concurrently.

B. Recommendations

1. Have One Senior Official Responsible for Advising the Secretary of the Navy on Investigations

The Navy must institutionalize the leadership role of one office with respect to major investigations. That office must be responsible for coordinating investigations that fall within the responsibility of the Naval IG, the IG of the Marine Corps, and NCIS, and exercising a leadership role with respect to those investigations. This includes advising the Secretary of the Navy on whether an investigation should proceed primarily as criminal or administrative. We do not express a preference for who performs this leadership role.²⁸⁴

2. Adopt Procedures for Coordinating Criminal and Administrative Investigations in the Army and Air Force

The Army and Air Force should adopt procedures similar to those in Secretary of the Navy Instruction 5520.3B6.a(1) for ensuring that when a commander-directed investigation

²⁸³ Indeed, in most accident cases, such as training death accidents, it is best for the Service to have the MCIO begin the investigation, simply to rule out the possibility of criminal misconduct. This avoids a situation like the USS IOWA incident in which investigators realize too late that criminal misconduct might have been involved.

²⁸⁴ We are not suggesting that the Navy must create any new office for this purpose.

is interfering with a concurrent criminal investigation, the conflict can be resolved.

**3. Determine Whether DoD IG
Investigations Are
Administrative or Criminal**

The DoD IG must, in all cases, and as soon as practicable, determine whether an investigation is criminal or administrative and proceed accordingly, recognizing the limitations of each approach.

VII. The Proper Role of the Attorney in Investigations

A. Findings

1. The Role of Judge Advocates

a. General Crimes and Administrative Investigations

In each of the Services, judge advocates play an important role in the criminal process. The staff judge advocate to a command advises commanders on the proper disposition of criminal cases. In cases referred to courts-martial, a judge advocate is assigned as trial counsel to prosecute the case on behalf of the United States. In general, however, they do not become involved until the investigative portion of the process is complete. Yet, we heard a consistent theme from the judge advocates interviewed that there must be early and constant coordination between trial counsel or an attorney on the staff judge advocate's staff and MCIO agents during the course of investigations. The judge advocates commented that coordination between trial counsel and MCIO agents allows the trial counsel to gain a greater understanding of the case and thus increases the trial counsel's confidence in presenting the case at trial. They also commented that coordination improves the quality of the investigation because trial counsel help assure that the investigation addresses all the elements of any potential charges as they are listed in the Manual for Courts-Martial.²⁸⁵

Several of the judge advocates spoke of the need for a partnership between the MCIO agents and trial counsel. One Air Force staff judge advocate we interviewed said as long as there is a "partnership" between the staff

judge advocate's office and OSI there are few problems.²⁸⁶ The judge advocates suggested that this partnership can be developed by appointing a trial counsel to an investigation as soon as an investigation is begun and having weekly meetings with the investigators to discuss ongoing cases. They commented that when this partnership exists, cases are delayed less often due to matters extraneous to the prosecution of the case. For example, an investigator might be waiting to close a case until he or she interviews a witness that clearly is not necessary for the prosecution of the case. Moreover, the number of cases in which the prosecution must ask the investigator to reopen an investigation are reduced significantly.

Several MCIO commanders in the field who work closely with the staff judge advocate's office and trial counsel commented that when trial counsel are assigned early in the investigation, they provide guidance earlier and thus eliminate late discoveries of investigative shortcomings. MCIO commanders also said weekly meetings between prosecutors and agents are very helpful because they provide an opportunity for the judge advocates to brief the investigators on changes in the law and recent court decisions affecting the conduct of investigations.

Based on the information gathered from judge advocates and MCIO commanders in the field and basic common sense, we conclude that the appropriate role of judge advocates in investigations is that of advisor and educator. They must be advisors in the sense that trial counsel or a judge advocate on the staff judge advocate's staff should coordinate with investigators throughout the course of an investigation to ensure that the investigators are aware of prosecutorial needs. The attorneys also should provide continuing education to investigators in the form of briefings or memoranda of law on changes to statutes or significant court

²⁸⁵ Part IV of the Manual for Courts-Martial, titled Punitive Articles, and the Uniform Code of Military Justice create elements for each crime under the Uniform Code of Military Justice. Each element of an offense must be proven in order to convict.

²⁸⁶ Interview of Lieutenant Colonel Karl A. Kaszuba, Staff Judge Advocate, Pope Air Force Base, NC (Mar. 23, 1994).

opinions affecting the conduct of investigations, especially those opinions dealing with the rights of suspects.

Even though the importance of a close relationship between judge advocates and investigators is apparent, we discovered that the existence of a close relationship between the two groups is not consistent among or within the Services. The Army is the only Service that requires MCIO agents to coordinate with a judge advocate during the course of an investigation. USACIDC Regulation 195-1, paragraph 5-21, states "special agents conducting or directing investigations will maintain coordination concerning their investigations with appropriate judge advocates." The regulation also requires USACIDC supervisors to coordinate reports of investigation with appropriate staff judge advocates to determine whether the investigation is complete and sufficient for legal purposes. USACIDC special agents also are directed to keep the staff judge advocate informed of any developments that might affect the prosecution of any subject, such as the pending reassignment of a witness, obstruction of justice, or lack of jurisdiction. In practice, however, many Army judge advocates we interviewed said USACIDC agents only coordinate with judge advocates to determine whether there is credible information to list an individual as a subject of an investigation in a final report.²⁸⁷

AFOSI regulations require AFOSI special agents to coordinate with a judge advocate only before requesting search authorization. In practice, however, the local detachment commander, the staff judge advocate, and the chief of security police meet once a week or once every two weeks to discuss cases with the wing commander. These meetings,

which are called "status of discipline" meetings, foster coordination of cases between the detachment commander and the staff judge advocate. Although there is coordination between the detachment commander, and the staff judge advocate, many of the Air Force judge advocates we interviewed nevertheless said closer coordination is needed between the case agent and the judge advocate assigned to prosecute the case.

NCIS regulations do not require agents to coordinate with a judge advocate during the course of investigations. The majority of the NCIS agents and judge advocates we interviewed said very little, if any, coordination occurs during the course of an investigation. In short, although there is some coordination taking place between judge advocates and MCIO agents, in the majority of cases investigated by the MCIOs, a good working relationship is not established early enough in the investigation.

The need to establish a relationship between a judge advocate or legal officer and an investigator is also important in investigations conducted by the Services' police investigators. The police investigators are neither as well trained nor as experienced as MCIO agents. Thus, it is all the more crucial that police investigators coordinate early and throughout the course of an investigation with a judge advocate or legal officer.

As we discussed in the section on commander-directed investigations, coordination with a judge advocate is especially critical during those investigations because the investigators conducting them have no training and often have little or no experience in conducting an investigation. The same is true for IG investigations, particularly in the Air Force and at the lower levels in the Navy and Marine Corps where IG investigators often are selected on an ad hoc basis and have never conducted an investigation before. Even if these Services begin using trained investigators to conduct IG investigations, these investigators still must coordinate with staff judge advocates, as must Army IG investigators. IG

²⁸⁷ On May 14, 1992, Department of Defense Directive 5505.7, *Titling and Indexing of Subjects of Criminal Investigations in the Department of Defense*, established a "credible information" standard as the criteria to title and index an entity as a subject of a criminal investigation. See, *supra*, §III.A.1.b(4)(b), and Vol. II, Supplemental Reports, §II.D.2, for further discussion of this standard.

investigations can be sensitive and complex. They often result in some adverse action and sometimes the line between criminal investigations and IG investigations is very fuzzy. Currently, the Air Force is the only Service that requires IG investigators to coordinate with a judge advocate before beginning an investigation and to submit their investigative report to a judge advocate for review when completed. The Army requires a judge advocate to review only IG investigations conducted at the Department of the Army level. The Assistance and Investigations Guide that all Army IG personnel receive, however, suggests coordination with staff judge advocates, and we heard in our interviews that IGs at the field level often coordinated with staff judge advocates. There is no requirement in the Navy or Marine Corps for IG investigators to coordinate with a judge advocate or to submit their reports for review by a judge advocate. The Naval IG's Interim Investigation Manual advises IG personnel to coordinate with attorneys, but from what we learned in interviews, they do not do so consistently at any level.

b. Counterintelligence Investigations

All the Services have prosecuted serious espionage and other national security crimes in recent years. We interviewed several military judge advocates who served as trial or defense counsel in espionage courts-martial. Judge advocates told us that in some cases trial preparation has been difficult because the trial counsel joined the investigation towards the end of the investigation. This has imposed a "time crunch" on trial counsel who, in some cases, had to obtain security clearances for themselves, defense counsel, and court members, and in one case draw up charges, without the benefit of a clearance and complete knowledge of the evidence. It has made it necessary in some cases for trial counsel to take a "crash course" in counterintelligence, intelligence, and applicable law; and has made it necessary for trial counsel to cast quickly a wide net to find other judge advocates with previous

espionage case experience and knowledge of espionage plea bargains and damage assessments.

We asked for recommendations to minimize these difficulties. None of the judge advocates interviewed endorsed creation of a centralized national security crimes legal office on the OSD staff, unanimously stating that the relative paucity of such cases on a day-to-day basis makes such a solution unnecessary and impractical. The judge advocates told us they have received some *ad hoc* training on security crimes law during their careers, which was helpful. They said training and working with investigators also was helpful. They told us they especially benefited from lessons-learned reports written by prosecutors of prior espionage cases, and from a handbook written by Major Frank Short, USMC (retired), formerly of the Special Programs Division, Office of Judge Advocate General, Department of the Navy. We reviewed the handbook and found it to be an excellent, concise reference.²⁸⁸

2. Service General Counsel

Each Service has a General Counsel responsible for providing legal advice, counsel, and guidance to the Service Secretary on all types of issues, such as business and commercial law, environmental law, civilian personnel law, real and personal property law, and patent law. The role of the Service General Counsel in MCIO investigations varies with each Service, but they are all responsible for certain specific functions pursuant to DoD Directives, such as approving consensual intercepts.

The Service General Counsel's Offices in the Army and Navy have some coordinating role with respect to their Service's MCIO. The Commander of USACIDC reports to the Secretary of the Army through the Army

²⁸⁸ See *Trial Counsel's Handbook for Prosecutions Involving Classified Materials*, January 1994, Special Programs Division, Office of the Judge Advocate General, Department of the Navy.

Chief of Staff, and coordinates this reporting with the Army General Counsel's Office. The Army General Counsel's Office does not have an oversight role in the USACIDC chain of command, but USACIDC coordinates regularly with that office on high visibility issues and issues of interest. The Navy General Counsel has an oversight role with respect to NCIS. NCIS reports to the Secretary of the Navy directly through the Navy General Counsel's Office. Specifically, the Navy General Counsel meets regularly with the NCIS Director to discuss a wide range of issues, including investigative policy, specific cases, budget issues, public affairs, and legal affairs. The Navy General Counsel informs the Secretary of the Navy regularly about NCIS issues.²⁸⁹ The Air Force General Counsel's Office is not in the organizational reporting chain between the MCIO and the Service Secretary. AFOSI contact with the Air Force General Counsel's Office is on an advisory basis only, regarding specifically defined functions of the General Counsel's Office, such as the approval of consensual interceptions.

We believe it is ill-advised to have the Navy General Counsel in the role of reporting senior of a criminal investigative organization. The General Counsel serves a crucial role as advisor to the Secretary. A role in the criminal investigative process that amounts -- in practical terms -- to serving as counsel to and advocate for NCIS runs the risk of interfering with the General Counsel's primary role. On the other hand, although the Air Force General Counsel, as legal counsel for the Service, participates in some meetings between the Air Force Inspector General and the Secretary of the Air Force, we note with concern the fact that the Air Force General Counsel does not have a coordinating role with respect to AFOSI and does not report to the Secretary, either formally or informally, on AFOSI matters. We place value in civilian oversight of the MCIOs, and believe, for this reason, that the MCIO and the Service benefit if the General

Counsel plays a role in advising the Secretary on matters relating to MCIO investigations.

Service General Counsel have few defined roles in investigations. The investigative function most commonly identified as belonging to the Service General Counsel is approval authority for consensual interceptions. DoD Directive 5200.24, *Interception of Wire and Oral Communications for Law Enforcement Purposes*, addresses approval authority for interceptions within DoD; all three Service General Counsel have approval authority for consensual monitoring.²⁹⁰ Each MCIO headquarters reviews field requests for consensual monitors and forwards them to the Service General Counsel's Office for approval. A revision to DoD Directive 5200.24 is expected in the near future. These revisions will incorporate the 1983 U.S. Attorney Guidelines and move consensual monitoring approval authority from the Service General Counsel to the MCIO Headquarters level.

The Service General Counsel role in posse comitatus²⁹¹ determinations involving the MCIOs essentially is limited to its review of consensual monitoring requests and a circumscribed role in narcotics investigations. DoD IG Policy Memorandum, *Criminal Investigations Policy Memorandum Number 5 - Criminal Drug Investigative Activities*, imposes a reporting requirement on the MCIOs to provide the Service General Counsel with information pertaining to MCIO approvals of the purchase of illegal drugs off base from persons not subject to the Uniform Code of Military Justice.

The authority to suspend or debar defense contractors is another specific function of the Air Force and Navy General Counsel's Offices. Unlike the Navy and the Air Force, the Army's suspension and debarment

²⁸⁹ See Interview of Steven S. Honigman, Navy General Counsel (May 3, 1994).

²⁹⁰ See, *infra*, §IX.A.5.a, for a detailed discussion of consensual and nonconsensual monitoring within the DoD.

²⁹¹ See, *infra*, note 331 and accompanying text, for explanation of the Posse Comitatus Act.

functions are organized within the Procurement Fraud Division, Office of the Staff Judge Advocate General, instead of the General Counsel's Office. AFOSI and NCIS field elements refer procurement fraud investigations to their respective Service General Counsel for suspension and debarment action. The Service General Counsel has the authority to determine whether a defense contractor should be suspended or debarred from doing business with the government.

The Service General Counsel also have a defined role in counterintelligence investigations. Executive Order 12333, *U.S. Intelligence Activities* (Dec. 4, 1981), assigns responsibility to the Service General Counsel to ensure that their respective intelligence unit²⁹² collects foreign intelligence in conformance with regulations. When a classified program is implicated in litigation, the Service General Counsel Offices, working with Service Security Offices, also assist in determining what classified or sensitive documents may be released in court.

The Service General Counsel have differing roles in the review of MCIO investigative policy. The Navy General Counsel's office reviews and approves NCIS investigative policies and regulations. USACIDC reviews and approves its own investigative policies and regulations. The Army General Counsel's Office reviews Army regulations other than MCIO regulations that address investigative matters. Within the Air Force, both AFOSI and Air Force regulations are forwarded to the staff of Secretary of the Air Force, including the General Counsel, for review and comment.

In addition to specific required functions, the Service General Counsel coordinate with each other on matters affecting the respective MCIOs. The three Service General Counsel coordinate and address jurisdictional DoD directives and seek interpretations of legislation. For example, the three Service

General Counsel recently combined to contest the issuance of a DoD IG memorandum on jurisdiction of criminal fraud investigative offenses by the DCIOs.²⁹³

3. DoD General Counsel

Because of its mission as counsel to the Office of the Secretary of Defense, the Office of the DoD General Counsel often becomes involved in issues related to investigations. The only office within the DoD General Counsel's Office that has regular involvement with investigations, however, is the office of the Deputy General Counsel (Inspector General), the office that provides support to the DoD IG.²⁹⁴ The office of the Deputy General Counsel (Inspector General) works very closely with the DoD IG's leadership and is involved in many aspects of the criminal and administrative investigative missions of that office. Currently, the office of the Deputy General Counsel (Inspector General) has a staff of six, in addition to the Deputy General Counsel. Two staff members work with the offices of the Assistant IG for Investigations and the Assistant IG for CIPO, and two work with the office of the Assistant IG for Departmental Inquiries.²⁹⁵

The lawyers in the office of the Deputy General Counsel (Inspector General) have significant substantive involvement with the work of the office of the Assistant IG for Departmental Inquiries. The lawyers review each Departmental Inquiries report when it is in draft form. The review is for legal

²⁹³ See Memorandum from Navy General Counsel, et al., for the General Counsel, DoD, and the Deputy Inspector General, DoD (Feb. 4, 1994).

²⁹⁴ If, however, the Secretary of Defense accepts our recommendation to establish a Board on Investigations within the Office of the Secretary of Defense, the DoD General Counsel's Office will have additional ongoing involvement with investigations as counsel to that committee.

²⁹² AFOSI, NCIS, and Army MI are the designated military counterintelligence agencies.

²⁹⁵ The other two staff members work with offices in the DoD IG not involved with investigations.

sufficiency on the face of the report. Except in unusual circumstances, the lawyers do not review the underlying evidence unless their review of the report generated a question. In more complex or sensitive matters, the lawyers work with the investigators throughout the investigative and report writing process. In addition, the lawyers review all reports of military reprisal investigations that the Service IGs conduct. The Service IGs reports must attach all significant documentation; the lawyers' review of these reports includes extensive review of evidence. The lawyers from the office of the Deputy General Counsel (Inspector General) also review any hotline completion reports²⁹⁶ that raise significant legal issues.

The office of the Deputy General Counsel (Inspector General) also works with the office of the Assistant IG for Investigations, which includes DCIS, on a regular basis. Among the functions it performs are reviewing subpoenas, reviewing requests for consensual monitoring, reviewing subpoena enforcement requests, and reviewing and helping respond to discovery requests from third parties and others in litigation. The office also is involved with many issues in *qui tam* lawsuits²⁹⁷ and a number of other issues that arise on a daily basis. The lawyers in the office of the Deputy General Counsel (Inspector General) also work with CIPO by, among other things, reviewing policy letters, reports, and memos the office issues, reviewing requests for IG subpoenas from the Services, which come through CIPO, and working with the CIPO staff on the Voluntary Disclosure program.²⁹⁸

The office of the Deputy General Counsel (Inspector General) does not, for the most

part, become involved in the substance of the fraud investigations that DCIS conducts. The DCIS investigators work primarily with Assistant U.S. Attorneys and other lawyers at the Department of Justice when their fraud investigations are being pursued either criminally or civilly. If DCIS is involved with an investigation for which the Department of Justice has decided not to pursue civil or criminal remedies, the Deputy General Counsel (Inspector General) told us that the investigators work with the Services' administrative and contractual remedies programs, and get whatever legal advice they require from the Services.

From everything we have heard, the DoD General Counsel's Office, through the office of the Deputy General Counsel (Inspector General), provides significant and adequate support to the DoD IG's investigative functions. The leadership of the Office of the DoD IG is very pleased with the support it receives. We have heard criticisms of the legal support that the DoD IG receives only when DCIS investigators lack access to Department of Justice lawyers. As we discussed earlier,²⁹⁹ the DCIS investigation of Tailhook suffered because the investigators did not have access to experienced Navy prosecutors familiar with the Uniform Code of Military Justice. We also have heard complaints that DCIS investigators do not coordinate with lawyers on fraud matters that the Justice Department is not pursuing. We recognize that it would not make sense for the DoD General Counsel to maintain experienced prosecutors on its staff for the relatively few cases in which DCIS does not have access to Department of Justice lawyers. The office should, however, review the support that DCIS receives when it does not work with the Department of Justice.

²⁹⁶ These are the reports that the Departmental Inquiries DoD Hotline Directorate completes for every hotline complaint.

²⁹⁷ See Vol. II, note 60, for a discussion of *qui tam* suits.

²⁹⁸ See Vol. II, The Organizations, §I.F.2, for a discussion of the Voluntary Disclosure program.

²⁹⁹ See, *supra*, §III.A.1.a.

B. Recommendations

1. Establish Procedures in the Services for Close Coordination Between Judge Advocates and Investigators

The Services should establish procedures to ensure that close and constant coordination between judge advocates and investigators occurs during the course of all investigations. The Services also should establish procedures to ensure that IG investigators submit their final investigative reports to a judge advocate for review before the reports are forwarded to the commander. The Secretary's Board on Investigations should monitor the creation and implementation of regulatory guidance for each Service with an eye towards standardization where practicable.

2. Designate One Judge Advocate General Office as Executive Agency for Training on National Security Crimes

The DoD Office of General Counsel should designate one Service Judge Advocate General's office as the executive agency for DoD legal training on national security crimes. The office should consider holding an annual symposium on national security crimes. The symposium could be used as a low-cost means of introducing attorneys and investigators to new and unique aspects of national security crime prosecution and defense, and updating their knowledge of these matters. It also would provide a forum for professional exchange between attorneys and investigators of the Services and other federal agencies with responsibility for national security crimes enforcement.

3. Create a National Security Crimes Handbook

The Service Judge Advocate General's office given executive agency responsibility for national security crimes legal training should write and maintain a national security

crimes handbook, based on the Navy's handbook. The handbook should be used in training provided to judge advocates and to investigators to give them an appreciation for the role of the attorney in a national security crimes prosecution.

4. Increase Role of Air Force General Counsel in Investigations

The Secretary of the Air Force and the Air Force General Counsel should consider methods of increasing the General Counsel's role -- whether formal or informal -- in the conduct of investigations in the Department of the Air Force.

5. Navy General Counsel Should Not Be the Reporting Senior of NCIS

Although we believe the Navy General Counsel can and should play an important role in advising the Secretary of the Navy about investigations, that office should not be the MCIO's reporting senior. As a practical matter, the responsibility to provide counsel to and be an advocate for NCIS could interfere with the General Counsel's responsibilities to the Secretary.

6. The DoD IG Should Continue to Obtain Its Legal Services from the DoD General Counsel

Although there has been some concern in Congress that the independence of Inspectors General could be compromised if they receive counsel from lawyers in their Department's Office of General Counsel, we see absolutely no indication that this is a problem in DoD. We believe the Office of the DoD IG benefits from its relationship with the General Counsel's Office and should continue that relationship.

**7. The DoD General Counsel's
Office Should Review DCIS's
Coordination with Service
Prosecutors**

The office of the DoD General Counsel should review the support DCIS investigators need and receive on the Uniform Code of Military Justice and other investigations in which the Justice Department is not involved. It should seek help from the Judge Advocate General Corps and other lawyers from the Services in those matters and encourage DCIS investigators to coordinate with those lawyers. Such coordination becomes imperative if the Secretary accepts the Advisory Board's recommendation to consolidate procurement fraud investigations under the DoD IG.

**8. The DoD General Counsel's
Office Should Assist
Departmental Inquiries in
Implementing the
Recommendations in this
Report**

We believe the office of the Deputy General Counsel (Inspector General) can be very useful to Departmental Inquiries in implementing our recommendations for that office.

VIII. DCIO and Army MI Workforce

It is imperative, particularly with the downsizing of the military and the reductions in the DCIO workforce, that the special agents conducting criminal investigations be of high quality. A major focus of our investigation was the DCIOs' practices for hiring, training, and keeping the best agents possible.

A. Findings

1. Recruitment

The DCIOs have no difficulty attracting large numbers of motivated applicants interested in serving as investigators. DCIS and NCIS supervisors have told us that civilian applicants continually approach them for information about their organizations, and applications and resumes from highly - qualified applicants lie dormant in their offices awaiting position vacancies. USACIDC and AFOSI, because of their predominantly military makeup, experience greater agent turnover. These two organizations both require and recruit successfully a continuous influx of new agents, principally enlisted personnel. Army MI, unlike the DCIOs, receives Army enlisted candidates directly upon their enlistment into the Army.³⁰⁰

a. Women and Minorities

The recruiting standards and policies of the DCIOs generally are sound, with exceptions noted below. Interviews of DCIO customers generally have validated the DCIO

recruiting standards. Commanders told us that DCIO investigators are professional and responsive. Interviews and surveys of DCIO agents confirmed that the DCIOs follow their published recruiting policies. Interviews and anonymous surveys³⁰¹ of agents disclosed no evidence of gender or racial discrimination in DCIO recruiting and hiring practices. Demographic analysis confirmed that the DCIOs are recruiting women and minorities, and are attracting motivated applicants with significant law enforcement and military experience, and with educational credentials superior to those they police. The gender and racial composition of the DCIOs as a whole generally approximates or approaches the military population they police.

The composition of the most recent basic investigator classes for the DCIOs suggests an earnest effort is being made to recruit qualified women and minority applicants. Of 51 applicants DCIS most recently offered employment, over half the new hires (26) are female or minority males. In the last USACIDC class of 23, 7 recruits (30 percent) were female or minorities. In the last NCIS class of 23, 6 recruits (26 percent) were female or minorities. And in the last AFOSI basic-agent class, 8 of 31 recruits (26 percent) were female or minorities. These percentages compare favorably with current DCIO force structure diversity. DCIS and NCIS currently are 24 percent female or minority; USACIDC is 21 percent female or minority; and AFOSI is 19 percent female or minority.

Army and Air Force representatives of AFOSI and USACIDC have argued before the Board that military agents -- specifically enlisted agents -- are uniquely qualified to understand, empathize with, work effectively among, and police military members and

³⁰⁰ Both Army MI and AFOSI recruit young officers directly from the Service academies, Reserve Officer Training Corps programs, and Officer Candidate Schools. AFOSI also recruits through officer "crossflow." See Vol. II, Supplemental Reports, §IV.A.1.e, for definition and discussion.

³⁰¹ We telephoned field offices of all the DCIOs and Army MI and spoke anonymously with supervisors and investigators. The sample of agents with whom we spoke is small compared to their overall number, and we do not attempt to draw any scientifically valid conclusions. The survey was useful, however, for identifying recurring themes.

enlisted personnel because they share a common "culture." We find the culture argument compelling and accept as axiomatic that the law enforcement organizations of the Services should strive to reflect the culture of the populations policed. We also believe, for the same reasons, that the racial and gender make up of the DCIOs should reflect the diversity of the populations policed. We are somewhat perplexed by the low percentage of Black male enlisted USACIDC agents, 6.4 percent, compared to the enlisted Black male population in the Army (24.6 percent), particularly in light of the comparative percentages in AFOSI (8 percent) and the Air Force (13.2 percent). We find merit, however, in the efforts by the DCIOs to recruit more women and minorities into their investigative corps. For example, USACIDC recently implemented "Project Parallel," a program that emphasizes recruitment of women and minorities. We believe USACIDC should continue to place increased emphasis on recruiting enlisted Black males into its agent corps to reflect more accurately the Army population it serves.

b. Educational Background

There is a significant disparity in the educational attainment levels within the DCIO agent corps. One hundred percent of DCIS and NCIS agents hold at least a bachelor's degree. In contrast, only 43.5 percent of active duty USACIDC agents hold at least a bachelor's degree and 45.4 percent hold an associate's degree. Over 60 percent of the USACIDC civilian agents hold a bachelor's degree. Only 47.3 percent of the active duty AFOSI agents hold at least a bachelor's degree, and 15.5 percent of the active duty agent corps holds an associate's degree. Over 57 percent of the civilian AFOSI special agent force holds at least a bachelor's degree. Only 31 percent of Army MI agents hold at least a bachelor's degree, while only 10 percent hold an associate's degree.

We recognize that other criteria of suitability -- maturity, integrity, character, work record, writing and speaking ability, for example -- are equally important, but educational attainment is an accepted,

objective measure of an individual's diligence, reasoning ability, and communications skills. We also recognize that given the Service-unique force structures of USACIDC, AFOSI, and Army MI, which rely heavily upon enlisted personnel, educational attainment levels of the agent corps are difficult to elevate. Nevertheless, we find that educational attainment is an indispensable and objective criterion for ensuring a minimum standard of agent competence and a minimum, uniform level of investigative capability across the DCIOs.

USACIDC currently has a waivable Military Occupational Specialty requirement that enlisted agents have at least two years of college credit from an accredited institution. Figures that USACIDC Headquarters provided disclose that for the period June 1992 to June 1994, 51 percent of the new agents attending the USACIDC Apprentice Agent Course did not meet this requirement. These figures suggest that the USACIDC waiver is being used to excess. AFOSI has no education requirement above a high school diploma for its enlisted agent applicants. Statistics provided by the AFOSI Headquarters disclosed that for the period June 1992 to June 1994, 68 percent of the enlisted agents attending the Special Investigations Academy had only a high school diploma. A comparison of these entry-level education figures to the overall AFOSI and USACIDC education levels disclosed that both encourage continuing education for their enlisted corps. We further note that DoD has made a significant investment in post-secondary educational services and subsidies available to active duty personnel. Military men and women have ample opportunity to avail themselves of DoD higher education programs. USACIDC and AFOSI must recruit highly educated enlisted and civilian agents and encourage continuing education of their enlisted special agent corps.

c. Military Experience of NCIS Agents

NCIS is exempt from the civil service requirement to offer veterans preference in

hiring. Unlike the other DCIOs, it has not placed emphasis on prior military experience when ranking and hiring its civilian applicants. We note that 84 percent of the AFOSI civilian agent corps have prior military experience and 82.5 percent of the USACIDC civilian agent corps have prior military experience; in stark contrast only 47 percent of the NCIS civilian special agent corps has prior military experience. Even DCIS, at 50 percent, has a higher percentage of civilian agents with prior military experience.

d. DCIS Recruiting Practices

We were told during our interviews that DCIS's recruiting practices are significantly less formal than those of the other DCIOs. During its formative years, from 1982 to late 1993, DCIS primarily recruited and hired senior grade GS-12 and GS-13 investigators from other government agencies. The aging of its work force, however, has caused it recently to hire more junior agents to improve the balance of its force structure. DCIS does not conduct a formal applicant screening process and its investigator hiring system is decentralized. The agents in charge of major and subordinate field offices interview applicants, conduct informal background checks, and hire new agents with headquarters approval. There are no formal guidelines for hiring or the conduct of background investigations.³⁰²

We subsequently learned that once an application is received at the DoD IG Personnel Office, it is processed in accordance with recognized Office of Personnel Management procedures. We were troubled, however, to learn that DCIS is not required to publish vacancy announcements and much initial recruiting is accomplished by local DCIS offices.³⁰³

³⁰² Interview of Jane Charters, Director, Investigative Support, DCIS (Feb. 28, 1994); Interview of Robert L. Hengstebeck, Assistant Director, Investigative Support (Training, Fitness and Security), DCIS (Feb. 28, 1994).

³⁰³ Interview of Jane Charters, Director,

We believe this unstructured recruiting philosophy is unacceptable. A decentralized approach to recruitment may have been an expedient means to staff its investigative corps quickly during the early 1980s, but DCIS is now a mature investigative organization with more than sufficient headquarters infrastructure to develop, promulgate, manage, and monitor uniform recruitment standards. Also, DCIS now is hiring proportionately more inexperienced personnel and fewer trained and experienced agents from other federal law enforcement agencies.

Under the circumstances, permitting special agents-in-charge of field offices the latitude to staff their offices by following unregulated, ad hoc, informal screening and background investigations procedures, is, in our opinion, a situation fraught with potential for discrimination and abuse. This is particularly true given the infrequent transfers of DCIS agents between offices. This "system" conjures up images of individual field office "fiefdoms," and their accompanying management abuses. We also note that the DCIS practice of decentralized "who you know" recruitment by the predominantly white male management force is self-perpetuating and may place women and minority applicants at a disadvantage.

2. Training

Each of the DCIOs and Army MI provide training to investigators throughout the entire length of their employment with the organization. The training provides knowledge and skills needed to ensure a quality investigative service and product to DoD and Service commanders worldwide. Both DCIS and NCIS extensively utilize the training facilities at the Federal Law Enforcement Training Center (FLETC), Glynco, Georgia. Newly hired agents attend the eight-week FLETC Criminal Basic course followed by agency specific "add-on" courses, also provided at FLETC. DCIS agents receive the bulk of their advanced

Investigative Support, DCIS (Nov. 3, 1994).

training at FLETC, while NCIS supplements FLETC advanced training with NCIS-sponsored training and training provided by other law enforcement agencies. New USACIDC agents and Marine Corps CID agents attend training at the 15-week Apprentice CID Special Agent course at the U.S. Army Military Police School (USAMPS), Fort McClellan, Alabama. Advanced training for USACIDC agents is provided by USAMPS and other law enforcement agencies. AFOSI agents attend the Basic Investigators Course at the Air Force Special Investigations Academy, Bolling Air Force Base, Washington, D.C. The Special Investigations Academy also provides various advanced training courses for AFOSI agents, along with coordinating agents' use of training opportunities with other law enforcement agencies.

a. Basic Agent Training

The basic investigator training of all the DCIO agents is of high quality, whether the instruction is provided at USAMPS, FLETC, or the Special Investigations Academy. With a few exceptions, customers of DCIO agents work product are happy with the quality of training the new agents receive. Supervisors of recent basic course graduates from all three schools told us that all basic criminal investigator courses are doing a good job preparing novice agents for initial assignments. They told us that report writing is the weakest of the novice agents' skills, but they expressed confidence that with time, experience, and field training the writing deficiencies can be overcome.

(1) Redundant Training Facilities

We recognize that all three training facilities the DCIOs use provide quality basic training, but we find significant redundancy in training facilities. A review of basic training curricula from the three facilities discloses that although the exact number of hours of instruction in particular areas varies, the basic investigative topics covered are the same. All cover areas such as legal issues, interviews and interrogations, crime scene processing, evidence collection, and report

writing. In these days of DoD downsizing, the duplication in schoolhouse facilities, instructor and support staff, and equipment, to teach the same subjects to new investigators is not only unnecessary but also inefficient.

We also learned during our reviews of course curricula, field interviews, and visits to the different training facilities, that although each facility teaches the basic investigative techniques, the training programs' emphasis is not uniform. An example of this lack of uniformity is the emphasis USAMPS places on crime scene processing. USAMPS devotes 109 hours to training on crime scene processing. In contrast, NCIS and AFOSI devote 20 hours to this topic, and DCIS devotes 8 hours to crime scene processing.

Each of the training facilities reacts to changes in mission and newly developed investigative techniques by revising its course of instruction. Usually, each agency is responding to the same changes. Therefore, each develops and implements similar programs of instruction. For example, USACIDC and AFOSI each have revised training provided to their basic agents as a result of recent investigative support provided during contingency operations. All four DCIOs reacted to the need for increased awareness and sensitivity to victims and witnesses by developing training in each of the basic agent courses.

An argument that USACIDC and AFOSI personnel made consistently against consolidation of basic agent training is that the agents must be acculturated into the organizations of which they are becoming a part. Although at first we found this a compelling argument, further research did not support it. We found that both USACIDC and AFOSI accept few new agents into the investigations career field who have no prior Army or Air Force experience. In fact, all new USACIDC agents, with the exception of a handful of civilians, are enlisted members with several years of Army experience. The same is true of the enlisted personnel training to be AFOSI agents. Some of the officer and civilian trainees for AFOSI duty also have

prior Air Force experience. We note that the Military Police Investigations course is, as a practical matter, consolidated at USAMPS and police investigators from all Services attend the course. These investigators predominantly are younger, and have less time in their respective Service, than those attending training to become USACIDC and AFOSI agents, yet they are trained without "acculturation."

Both DCIS and NCIS argue that there are many advantages to attending training at FLETC, including quality of training facilities, the training environment, and the cost to them. They state that the full-time professional staff and state-of-the-art facilities are great advantages to this training. Additionally, students in the basic course from both agencies attend training tuition free, with only minimal expenses for room and board. Both DCIS and NCIS agents commented upon the "campus" environment in which students from many law enforcement agencies can exchange ideas and develop contacts for use in future investigations.

DCIS, in its comments to our draft report said it is important that its agents attend the basic criminal training course at FLETC because it conducts a significant number of investigations with other federal law enforcement agencies, several of which train at FLETC. We note that although it is beneficial to develop contacts with investigators from other agencies, it is more important to develop a camaraderie and understanding of fellow DCIO agents and organizations. We feel this is especially true during basic agent training. If procurement fraud investigations are consolidated, relationships with MCIO agents will be even more important if DCIS (or DFIS) is to be responsive to Service needs. Joint training will be one of the few ways to develop these relationships, however, because the consolidated agency will not be conducting joint investigations with the MCIOs.

There is ample opportunity to interact and develop contacts with other federal agencies through joint advanced training and on-the-job training. In addition, some of the most

meaningful and long-lasting relationships are developed when conducting investigations jointly with local, state, and federal law enforcement agencies.³⁰⁴ Although DCIS and NCIS cite the low cost of sending their agents to FLETC for training, that same argument could be made for the USACIDC training at USAMPS and AFOSI training at the Special Investigations Academy. Students attending the basic course at these schools also pay no tuition.

The biggest factor to be considered in consolidating basic training is identifying the best facility at which to train all DCIO investigators. We visited each of the locations where DCIO agents receive basic instruction, as well as the FBI Academy. It was apparent to us that the staff of each facility provides quality instruction to its trainees. Neither the FBI Academy nor the Air Force Special Investigations Academy has adequate classroom facilities to train all of the agencies' novice agents. FLETC and USAMPS have adequate facilities to train, house, and feed all basic course agents.³⁰⁵ Although FLETC is willing to train the DCIO agents, its Director has rejected the proposal that the DCIOs establish a DCIO Investigations Academy at FLETC that would include using DCIO instructors and adapting the basic course to suit the particular needs of agents working in the military environment. If the DCIOs are to train at FLETC, they must take FLETC's eight-week Criminal Basic course and address any additional subjects -- such as increased crime scene training or training in the Uniform Code of Military Justice -- in add-on courses.

³⁰⁴ DCIS also argued that its agents must train at FLETC to ensure consistency in investigative techniques with the other federal law enforcement agencies with which it conducts cases. We note that neither the FBI nor the U.S. Postal Inspection Service -- both agencies with which DCIS works jointly quite often -- train at FLETC.

³⁰⁵ Although the Army has offered Fort McClellan twice to the Base Closure and Realignment Commission as a potential installation for closure, the Commission has voted twice to keep the installation open.

USAMPS can and is willing to accommodate a DCIO Investigations Academy.

(2) NCIS Basic Training

Of all the MCIO basic investigator training programs, the basic course at FLETC appears to provide training that is least tailored to the criminal mission of the MCIOs. The training NCIS receives at FLETC does not prepare NCIS agents adequately for the "city detective" aspects of their mission, such as homicides, child abuse, and robbery, nor does it acculturate them sufficiently into the Navy and Marine Corps. This is understandable given the broad mission of FLETC to provide basic investigator training for over 60 different federal law enforcement agencies, many of which rarely, if ever, encounter or investigate crimes such as rape and child abuse. Nevertheless, it is regrettable.

As of December 1, 1993, 497 NCIS special agents were conducting principally "general criminal" investigations, 354 were working in counterintelligence, and 160 were working on procurement fraud investigations.³⁰⁶ In fiscal year 1993, NCIS closed over 14,000 general crimes investigations, including 583 death cases, 2,194 sexual assaults, 328 child abuse cases, 791 aggravated assaults, 219 robberies, and over 2,000 narcotics investigations. General criminal investigations comprise the bulk of the NCIS caseload and represent the greatest service provided to the Navy and Marine Corps.

Typical of the comments we heard regarding comparisons of the training at other schools and at FLETC were remarks made by a former Marine Corps CID investigator who served a tour on active duty with NCIS as a special agent and who currently is a civilian NCIS procurement fraud agent. He said the USAMPS Apprentice Agent Course was better than the FLETC Criminal Basic for general criminal investigations. He said

USAMPS instructors acquaint students with the Uniform Code of Military Justice, whereas the Code was not discussed during Criminal Basic at FLETC; USAMPS strongly emphasizes crime scene processing, whereas the FLETC training on the subject is inadequate. This agent said that although FLETC provides good instruction in the federal rules of evidence, officer safety, firearms, and defensive tactics, all NCIS agents should receive USAMPS training to accomplish the general crimes mission.

NCIS recognizes the limitations of FLETC and attempts to correct these weaknesses through the NCIS "add-on" course. During the course of field interviews, however, recent graduates of the add-on course told us that the add-on training was of only fair quality. Two agents criticized the NCIS add-on instruction to the FLETC Criminal Basic saying that the NCIS instructors, generally from the headquarters staff, were too far removed in time from their field experience to provide current, substantive training about the practical application of investigative techniques. In addition, interviews with NCIS supervisors of recent graduates disclosed training weaknesses in interviews and interrogations, military law and procedures, military rules of evidence, and report writing.

(3) DCIS Basic Training

Although DCIS regulations require newly hired agents to attend FLETC Criminal Basic, the IG Basic, and the DCIS follow-on courses within two years, we found this is not always accomplished. Possibly the most vexing case we discovered was that of a DCIS agent who was assigned investigations immediately. He was given a badge and credentials and conducted investigations for six months with DCIS before attending FLETC Criminal Basic. At the time of the interview, the same agent had not attended the IG Basic or the DCIS follow-on courses, almost one and a half years after being hired. When asked the reason for the delay in his training, the agent stated he was conducting a significant investigation and he could not get away for training. Yet this same agent was sent to FLETC for an advanced training

³⁰⁶ These figures were provided to the Advisory Board by NCIS in a general briefing book dated December 22, 1993.

course. The potential legal ramifications of allowing a new agent to possess credentials and conduct investigations without the proper training are disturbing.

While conducting interviews with DCIS supervisors and newly trained agents, we were told that the FLETC Criminal Basic course instruction dedicated to interview techniques was inadequate, but that the deficiencies were remedied during the IG Basic course at FLETC. One DCIS agent told us duties prohibited him from attending the IG Basic for 15 months after completing the Criminal Basic course, and he did not attend the DCIS follow-on instruction until 20 months after graduating from the Criminal Basic course. IG Basic personnel confirmed that it is preferred that personnel attend the course at least six months after graduation from the FLETC Criminal Basic so the agents have "real world" experience to draw upon during the course. Though "real world" experience no doubt can be useful to the IG basic student, we find it unacceptable that the main supplement for the inadequate interview training received in FLETC Criminal Basic too often is provided long after these new agents are in the field.

Moreover, new DCIS agents currently receive no training to prepare them for working with military organizations. It is essential that investigators know the law of the jurisdictions in which they work. Government investigators need to know appropriate regulations and policies of the activities they investigate. DCIS agents investigate criminal activities in the Department of the Defense and the separate Service contracting divisions, yet receive no training to acquaint them with the operations of their customers. The procurement fraud investigators within the MCIOs attend Service procurement and contracting schools to enhance their understanding of the procurement systems within which they conduct investigations.³⁰⁷

³⁰⁷ USACIDC procurement fraud agents attend the Army Basic and Advanced Contracting Officer Courses; NCIS procurement fraud agents attend courses such as Ship Acquisition Contract Administration Manual Course and Ship Repair

b. Advanced and Specialty Training

All the DCIOs offer advanced training for their special agents. The DCIOs are sensitive to the need for agents to keep current with investigative techniques and procedures, and the agencies either send their investigators to established training courses or develop new training courses as required. The advanced training courses, whether given at FLETC, USAMPS, or the Special Investigations Academy, are of high quality and are taught by dedicated professionals. Many of the courses currently have a mixed student population, not only of DCIO agents, but also of other federal, state, and local law enforcement agents. It is not unusual to find MCIO agents of one Service attending advanced training sponsored by another Service. AFOSI agents, for example, attend the Child Abuse Prevention and Investigative Techniques course at USAMPS. All the DCIOs take advantage of the extensive computer-related training at FLETC.

Continued separation of advanced investigative training is illogical and financially unsound. Experienced investigators who attend advanced training have acclimated to their agency cultures and do not need further acculturation during their professional training. Advanced training focuses on investigating the more complex crimes, such as criminal investigations in an automated environment or advanced financial fraud investigations, and developing effective investigative techniques and procedures. Whether a USACIDC agent or an NCIS agent investigates a complex narcotics conspiracy, the procedures and the skills required of each agent are virtually identical. In practice, the Services generally are conducting more and more joint investigations with other military and federal investigators. Consolidated advanced training would foster camaraderie among the DCIOs that would promote greater understanding and efficiency during joint

Contracting Manual Course; and AFOSI procurement fraud agents attend the Air Force Central Systems Contracting Officer Course.

investigations. A course with a student population mix from all the DCIOs also would provide a greater pool of resources and contacts for all agents.

One area in which we found a significant problem with advanced training was for Army counterintelligence agents. Formal advanced schooling in investigative skills and techniques is very limited for these agents. After the initial, and comparatively limited, investigator training that counterintelligence agents receive during their basic training, there is little advanced investigator schooling offered to them. They do not attend the advanced investigator courses at FLETC, USAMPS, or the Special Investigations Academy. Rather, advanced training focuses only on the counterintelligence discipline. Unless an agent is selected to attend the Advanced Foreign Counterintelligence Training Course,³⁰⁸ he or she receives advanced investigator training only on an informal, irregularly scheduled basis in the field.

We also heard from Assistant U.S. Attorneys that procurement fraud agents in general need improved training in interview techniques and tracking financial assets. These Assistant U.S. Attorneys believe the agents need a better understanding of the importance of witness testimony and how the interview of a pertinent witness can lead to a better understanding of relevant documents. Others said that most DoD investigators are not trained or experienced in searching for financial assets. To compensate for these weaknesses, some Assistant U.S. Attorneys prefer to have the FBI (for interviews) or the IRS (for financial tracking) participate in certain investigations.

c. Probation Programs

Robust probationary agent programs are essential to the professional strength and vitality of the DCIOs. For a probationary program to be successful in fulfilling its purpose - - to cull, fairly and uniformly, unsuitable personnel from the professional ranks of the DCIOs -- the program must be monitored centrally and be exacting. Supervisors should not pass probationary agents if they do not meet minimum standards. Headquarters should lend great weight to recommendations by field supervisors when supervisors recommend removing a probationary agent from the agency. Overturning a supervisor's well-documented recommendation should be a rare event, undertaken only in exceptional circumstances. The DCIOs should set high standards for their agent corps and insist all agents meet or exceed those standards.

USACIDC and AFOSI, accustomed to a constant influx of newly recruited agent personnel, have tested and established training and probationary programs for young, inexperienced agents. Though not as subject to constant new agent pools, NCIS also has an established, centrally managed Field Training Agent Program for all its newly assigned agents. Throughout all three MCIO probationary agent programs, new agents, under the supervision of senior agents, receive training on basic investigative skills and monthly evaluations counseling the agents about their achievements and areas in which to improve. These probation periods are designed to allow new agents to ease into the complexities and demands of investigative work. For the most part, agents in a probationary status do not conduct complex investigative tasks without supervision of senior agents and are assigned to conduct simple investigations until they demonstrate they are ready for increased responsibility.

All three MCIOs require the field supervisors of the probationary agents to submit a terminal probationary evaluation report to headquarters for review of the agents' performance and for determination whether to grant accreditation to the agents. Interviews with field supervisors indicate that

³⁰⁸ The Advanced Foreign Counterintelligence Training Course at Fort Meade, Maryland currently is offered to fewer than 40 Army personnel per year. See Vol. II, Supplemental Reports, §IV.B.3.C, for further discussion.

the MCIOs use the probationary period as a time to weed out those agents whose performance and personal traits do not meet organizational standards. Although we heard isolated accounts that some sub-standard probationary agents are permitted to slide through the probationary agent program, anonymous agent surveys and attrition statistics confirm that the MCIOs do terminate employment of some sub-standard agents during probationary programs. USACIDC, NCIS, and AFOSI should continue rigorous implementation of these programs.

In contrast to the MCIOs, DCIS does not have a centrally managed, formalized probationary program. Several field supervisors advised that they conduct self-structured probationary programs for new agents and have those agents work under senior field office supervisors. Another DCIS supervisor stated that as a result of the recent influx of new and inexperienced agents, his special agent-in-charge took the initiative and compiled a set of instruction binders filled with examples of various investigative documents to assist the new agents. These ad hoc programs, however, cannot substitute for a formal, structured probationary program. According to DCIS headquarters, some probationary agents have resigned after discovering that procurement fraud investigations were "not their cup of tea," but we found no evidence that any newly hired DCIS agent was discharged due to unsatisfactory performance during any initial, informal probationary period.

While the MCIO agent force has been shrinking in number due to military downsizing, the DCIS agent force has been expanding, with agent numbers increasing particularly at the lower skill level and pay grades. DCIS, with an agent population in which more than 50 percent of its investigators have 16 or more years investigative experience, is faced with the challenge of training and supervising properly a growing corps of new and inexperienced agents. DCIS must develop a formal, centrally directed, rigorous probationary agent program.

d. In-Service Training

All the DCIOs conduct in-service field training programs. DCIS policy and NCIS regulations mandate how frequently agents must receive in-service training -- annually for DCIS and monthly for NCIS -- and list broad categories of topics on which the agents are to train. USACIDC and AFOSI military agents receive training on a daily basis, although much of that training is Service-mandated military skills training.³⁰⁹ USACIDC and AFOSI agents also receive formal weekly or bi-weekly in-service training. Many Army MI counterintelligence agents are soldiers subject to the same soldier training as military USACIDC agents.

(1) DCIS In-Service Training

The MCIOs execute frequent, regularly scheduled in-service training programs that conform to Service-mandated and agency requirements. DCIS, however, conducts its in-service training program only on an annual basis -- much less frequently than the MCIOs. Although the annual DCIS in-service training week with training sessions on firearms qualifications, arrest techniques, policy discussions, case development presentations, and technical training may have been sufficient for the once very experienced DCIS agent force, it is not adequate for its increasingly less experienced and less mature agent force. Annual training is not frequent enough for new agents to reinforce and hone basic investigative skills and techniques. Young agents require more monitored practical experience and training. Furthermore, current DCIS-mandated

³⁰⁹ DCIO-specific training requirements generally are listed in a few policy letters and regulations. It is much more difficult to cite all the Service training requirements because many different Service regulations provide for mandatory semi-annual, annual, and biennial training. For example, all soldiers must perform the Army Physical Fitness Training test semi-annually, receive an annual ethics brief, and receive Security Awareness training from counterintelligence agents every two years. Each of these three training requirements is found in a separate Army regulation.

training topics provide too narrow a training focus for inexperienced investigators. The in-service curriculum should be expanded to include basic skill review, such as interview techniques and report writing.

(2) In-Service Investigative Training for Army MI

Unlike USACIDC agents, Army MI counterintelligence agents are not all assigned to one command. Consequently, job specialty training for Army MI counterintelligence agents is highly decentralized, with little monitoring by a single headquarters organization. This decentralization causes investigation-specific training for counterintelligence agents, particularly those assigned to combat units, to be spotty and infrequent. Lack of a centrally managed and monitored in-service investigator training program for Army counterintelligence agents, particularly those agents embedded in the force, is a serious problem. Although some counterintelligence supervisors try to overcome the in-service training difficulties, such as geographical dispersion of agents, at least one counterintelligence supervisor has determined that his senior agent staff requires no investigative training. Indeed, one MI battalion has not provided investigative training for counterintelligence agents in two years. Under this system, a mid-level counterintelligence agent whose most recent investigative training was the basic counterintelligence course conceivably could investigate a case involving a major national security crime. Army MI, drawing on the expertise of the faculties of the U.S. Army Intelligence Center and the Advanced Foreign Counterintelligence Training Course, has the resources and the professional investigative experience to develop a strong in-service program for investigative training of its counterintelligence agents. Whether by mobile training teams, packets of practical exercise scenarios, or training films, counterintelligence agents in the field need investigative procedure, technique, and report writing training. Training only at the discretion of the field supervisor is unsatisfactory.

3. Supervision

At least as important as hiring and training to the quality of an agency's investigative product is the supervision investigators receive, particularly the more junior agents. The DCIOs and Army MI all have published standards, either in an agent's manual or in agency regulations, about initiating and closing investigations and the levels of review to which cases are subject. These published standards generally provide that supervisors conduct periodic formal review of cases and often describe special processing and supervision of sensitive cases.³¹⁰ During telephone surveys and field interviews of DCIO and Army MI supervisors and agents, we learned that supervisors generally are conducting standard reviews and on-the-job training, at least minimally, in accordance with agency requirements. Depending upon the supervisor's style, the investigator's experience, and the seriousness of the investigation, case reviews may be more or less frequent and intense. Some supervisors, particularly in smaller offices, visit with their agents daily, discuss cases, and provide on-the-job training. Other supervisors read case files on a regularly scheduled basis and then speak with the investigators. Still others, because of their caseload volume, simply discuss each case with the agent and review the file only if the agent reveals problems. No matter what the office case review schedule, all supervisors with whom we spoke advised that agents informed them immediately of any significant development in an investigation.

With limited exceptions, agents from all the DCIOs and Army MI gave high marks to

³¹⁰ The investigative jurisdiction of each agency determines the definition of a sensitive case. The following are examples of sensitive cases, but the examples are not all inclusive. For all DCIOs, investigations of senior officials and of procurement fraud above a designated dollar amount constitute serious cases. For the MCIOs, a death investigation is sensitive. For AFOSI, NCIS, and Army MI, national security crime investigations are sensitive.

their supervisors concerning integrity, professionalism, and technical knowledge.

a. Supervisory and Management Training

Most special agents receive supervisory training as they are promoted within their organizations. This training, however, is not always mandatory prior to assuming supervisory duties. Military agents, with their required military education courses, benefit from more regular and progressive supervisory training than their civilian counterparts. Two MCIOs, USACIDC and AFOSI, have recognized that less experienced agents increasingly are being delegated more supervision responsibilities and have developed specialized training programs to cope with that development.

DCIS has the least structured of all the DCIO supervisory training programs. Although DCIS requires that all new supervisors attend a basic supervisory course, generally sponsored by the local civilian personnel offices, agents may serve as supervisors for six months without having received any basic management training. After initial supervisory training, management training becomes increasingly dependent upon agents pursuing it through their individual development plans working for special agents-in-charge who ensure they receive the training. What qualifies as "advanced supervisory training" for DCIS also can be very non-traditional and unstructured in that it includes fortuitous, unscheduled assignments, such as participation in task force investigations.

Some DCIS special agents-in-charge do provide investigators with supervisory opportunities as assistant resident agents-in-charge, but these opportunities are office specific and not a DCIS-wide practice. We find merit in providing agents with assignments of increasing supervisory responsibilities. These on-the-job field supervision experiences may assist new field supervisors who must sometimes wait six months to attend basic supervisory training.

b. Commissioned Officer Supervisors in USACIDC

Military police commissioned officers with no prior USACIDC experience have been selected as senior USACIDC commanders -- either at the district or group level. Currently, some lieutenant colonels serve as USACIDC district commanders,³¹¹ and, in the past, some colonels served as USACIDC group commanders,³¹² during their initial USACIDC tours. These senior commanders supervise geographically dispersed units with as many as 367 enlisted, warrant officer, and civilian professional investigators. As we discuss elsewhere in this report,³¹³ these senior leaders supervise units in which they have had no on-the-job experience as junior officers. These leadership circumstances are unusual in the Army and do not conform to Army leadership principles, namely that effective leaders must learn before leading and know the standards, the job, and the unit.³¹⁴ Two military police commissioned officers, currently serving their initial USACIDC tours as districts commanders, confirmed in interviews the importance of serving as a junior officer in USACIDC for success as battalion commanders.

We realize that an Army command selection board, not USACIDC, selects the officers to serve as USACIDC district and group commanders. The selection board, however, must be sensitized to the need for military police commissioned officers to have USACIDC experience, technical proficiency, and on-the-job training before selection to serve as senior USACIDC commanders. There is already a mechanism in place for the Chief of Staff, Army, to provide instructions to command selection boards. We feel that

³¹¹ USACIDC district commands are equivalent to line unit battalion commands.

³¹² USACIDC group commands are equivalent to line unit brigade commands.

³¹³ See, *supra*, §III.A.1.b(3)(a).

³¹⁴ Army Field Manual 22-100, *Military Leadership*.

these instructions should be used to stress the importance of USACIDC experience for this organization's senior leadership.

c. Effect of the Military Drawdown

The military drawdown, with its reduction in the agent force and the flattening of the middle level of supervision, is beginning to affect the quality of supervision in the MCIOs adversely. AFOSI detachment commanders have assumed some of the responsibilities of the now eliminated district commands and have less time to devote to supervision and case reviews. Some NCIS supervisors admit that they just do not have the time to devote to supervising cases. USACIDC supervisors did not tell us that their supervisory duties had become more burdensome during the drawdown, but they voiced the strongest complaints about the large caseload carried by individual investigators. USACIDC did not eliminate district commands during its downsizing, and special agents-in-charge of field units have not had district commander duties imposed upon them.³¹⁵

MCIO leadership is alert to the supervisory challenges of downsizing, and the MCIOs are adapting quickly to their new management structures. For example, recognizing that more warrant officers would assume management responsibilities within USACIDC, the command quickly developed management training for warrant officers moving into management positions. Agencies like DCIS and NCIS long have had the luxury of hiring college graduates, many with prior management or military leadership experience. This personnel advantage has allowed these agencies to adapt successfully to supervisory challenges during the past two years. Although its agent corps, on the whole, is less experienced and educated than those of DCIS and NCIS, AFOSI has the advantage of an established military officer

corps that brings supervisors up through the ranks and cultivates them throughout their careers.

Although these findings were encouraging, nonetheless, rapid downsizing of the MCIOs³¹⁶ and rapid restructuring can only hurt effective supervision of investigations. We are concerned that the burden placed on supervisors and case agents is increasing to the point at which the investigative capability of the MCIOs could suffer. Increased case review and management training will go a long way toward remedying some supervision problems. Solutions to the problem, however, must come principally from decreasing the supervisory burden by recruiting high quality agents, training agents well, retaining the good ones, and -- just as important -- not retaining the agents who perform poorly and who add disproportionately to the supervisory burdens of an agency.

4. Retention

With the exception of NCIS, neither the DCIOs nor Army MI maintain a database of statistics on retention and attrition rates in the organizations that can be retrieved easily.

³¹⁶ We restrict much of this discussion to the MCIOs because while the MCIOs are downsizing, DCIS is actually growing in size. DCIS also has a considerably higher supervisor-to-field agent ratio than do the MCIOs. DCIS has 67 supervisors to 288 field agents, a ratio of 1 supervisor for every 4.3 field agents. See DCIS response to RFI FA-001, encl. 4 (May 10, 1994). Also, we calculated adjusted caseload per supervisor in each of the DCIOs and found that DCIS supervisors manage an average 20 open cases per supervisor. Comparable ratios in the DCIOs (procurement fraud cases only) are:

DCIS: 1 supervisor for every 4.3 field agents, and 20 cases per supervisor;
USACIDC: 1 supervisor for every 10 field agents, and 39 cases per supervisor;
NCIS: 1 supervisor for every 8.5 field agents, and 40.4 cases per supervisor;
AFOSI: 1 supervisor for every 8.6 field agents, and 53 cases per supervisor.

³¹⁵ USACIDC consolidated its group commands (regions) and reduced their number from five to two. It also realigned its district units.

Further, none of the above organizations conducts periodic studies to account for agent retention and attrition. The organizations may not have seen a need for this information because their recruitment programs have been successful and they have a large pool of candidate resumes on file.

Despite the lack of retention and attrition data, DCIO and Army MI agents, through field interviews and telephone surveys, did provide some insight into why they continue to serve with their organizations. The number of agents interviewed and surveyed is small in comparison to the total agent force, and although we chose field agents randomly to be interviewed, the sample is not statistically significant. Despite the *caveats*, two strong impressions emerge from the agent interviews: on the one hand, agents from all the organizations enjoy conducting investigations; on the other, many agents are distressed and distracted by a concern for their future and that of their organization because of the continuing military drawdown and possible consolidation of investigative organizations.

Agents know what it takes to progress and succeed professionally in their organizations. In the military, enlisted agents know they need a college degree. Agents, particularly supervisors, in all organizations appreciate that continuing training in investigative techniques and skills is critical to professional competency and advancement. In part, agents remain with their organizations because they are confident they can compete for advancement based on merit. When responding to interview questions, almost no DCIO agent found discrimination or favoritism in promotion, duty assignment, or the selection of agents for training and supervisory positions. USACIDC, AFOSI, and Army MI agents stated that the centralized military promotion system, outside their organizations, ensures an unbiased selection process. Those very few agents who expressed reservations about promotion objectivity are in DCIS and NCIS, organizations that control their agent promotions internally. These agents attributed some agent promotions to "who you know." Because the interview sample

and the number of agents expressing this view were quite small, we did not determine whether the promotion systems within DCIS and NCIS lack objectivity.

NCIS is not always consistent in providing professional career progression guidance to agents. For example, although agents are encouraged to endure the rigors of an afloat assignment on a deployed aircraft carrier, ostensibly because it is a career enhancing move, of the last 39 agents promoted competitively to GS-13, only 6 had served assignments on deployed aircraft carriers. We find this inconsistency counterproductive to promotion of a rational career progression plan. Agents have told us inaccurate or contradictory career progression guidance has a significant adverse effect on agent morale.

Although agents interviewed, including female and minority male agents, stated that they would progress in their career based on personal merit, gender and race statistics indicate that female agents in some DCIOs may not be competing successfully with male agents for leadership positions. Minority male agents in the DCIOs appear to be competing more successfully for leadership positions. In the majority of circumstances, male minority agents hold leadership positions in numbers proportional, or nearly proportional, to the percentage of minority male agents in each DCIO agent force.

Although 16 percent of the DCIS agent corps is female, women hold no SES or GM-15 positions. They do hold 6 of the 60 GM-14 positions. No DCIS female agents hold field-level supervisory positions of special agent-in-charge or resident agent-in-charge. Female agents hold 2 of 17 assistant special agent-in-charge positions. DCIS minority male agents, who comprise 8.5 percent of the agent force, hold 4 of 49 field office leadership positions -- about 8 percent -- and 5 of 75 SES, GM-15, and GM-14 positions -- about 7 percent. For the field supervisory positions, minority male agents are represented at a level comparable to minority male representation in the total agent force. Minority male agents are represented in senior agent and headquarters positions at a

rate slightly less than proportional to their rate in the total agent force.

Among USACIDC agents, the average length of service of all minority male agents -- warrant officer, enlisted, and civilian -- exceeds that of their white male agent counterparts. Of that part of the agent force eligible to compete for the 104 special agent-in-charge positions,³¹⁷ 12 percent are minority male agents and they hold 11 percent of these positions. Female agents eligible to compete for the special agent-in-charge positions constitute 10 percent of the qualifying force and they hold 9 percent of those positions. No eligible female or minority male agent holds any of the four GM-14 and GM-15 USACIDC positions.

In NCIS, where the average length of service is about equal among all male agents, minority male agents comprise approximately 9 percent of the total agent force. Of the 69 SES, GM-15, and GM-14 positions, minority male agents hold 5 positions -- about 7 percent. Of the 153 senior supervisor and staff positions, 15 are minority males -- 4 special agents-in-charge, 9 resident agents-in-charge, and 2 assistant special agents-in-charge -- which is about 10 percent. In NCIS, where women have an average length of service greater than any other DCIO, women are noticeably underrepresented in leadership positions. There are 150 female NCIS agents, approximately 15 percent of the agent force. No women agents serve as either special agents-in-charge or assistant special agents-in-charge. Four women serve as resident agents-in-charge, less than 3 percent of field supervision

positions. Of the 69 SES, GM-15, and GM-14 positions, women agents hold 5 positions (all GM-14 positions), or 7 percent of those senior leadership jobs.

In AFOSI, where the average length of service among white male, minority male, and female agents is almost identical, eligible agents generally hold supervisory positions in numbers proportional to their representation in the total eligible force. In the AFOSI officer agent force, there are 132 leadership positions as detachment commanders, region commanders, and headquarters directors. Female officer agents, who comprise 10 percent of the officer agent force, hold 11 percent of the leadership positions. Fourteen of 115 detachment commanders are females; female officer agents serve in no other leadership positions. Minority male officer agents comprise 8 percent of the officer agent force and hold 9 percent of the supervisory positions. There are 11 minority male detachment commanders. Seven percent of the female special agent force and 14 percent of the minority male special agent force are eligible to compete for the 9 special agent-in-charge positions in AFOSI. Women hold 22 percent and minority male agents 11 percent of those 9 positions. Eight percent of the female agent force and 9 percent of the minority male agent force are eligible to compete for the SES, GM-15, and GM-14 positions -- 3 percent of eligible women and 11 percent of eligible minority male agents hold these positions.

B. Recommendations

1. Recruitment

a. Recruit More Women and Minorities

Although we find the recruiting and hiring practices of the DCIOs demonstrate a sincere effort to diversify the agent corps, retention rates and career progression of women and minorities suggest that an even greater effort to increase the pool of qualified female and minority recruits is required to

³¹⁷ Analysis of female and minority male agents who hold leadership positions in USACIDC and AFOSI will differ from the analysis provided in discussions of DCIS and NCIS. In DCIS and NCIS, where all agents are civilians, all agents compete equally for the supervisory positions. In USACIDC and AFOSI, certain positions are designated as enlisted, warrant officer, commissioned officer, and civilian leadership positions. Therefore, in discussion of USACIDC and AFOSI leadership positions, the base number for comparison will not be the total agent force, but the total agent force eligible to compete for that leadership position.

achieve greater organizational diversity and balance throughout the force structure of the DCIOs in coming years. We recommend the DCIOs employ additional resources and ingenuity to identify and recruit higher percentages of qualified females and minorities. We recommend they establish aggressive recruiting programs with professional organizations such as Women in Federal Law Enforcement, Service career development offices, and university career placement offices, particularly at traditionally minority and women's colleges. We recommend the DCIOs coordinate with the Services to identify and recruit highly qualified women and minority veterans being released from active duty for civilian agent positions. We recommend the Secretary's Board on Investigations work with the DCIOs on increasing efforts to recruit qualified female and minority applicants.

b. Require at Least an Associate's Degree

We recommend that USACIDC, Army MI,³¹⁸ and AFOSI revise their civilian-equivalency, minimum education requirements for enlisted agents. All enlisted agents should have, or be working toward, at least an associate's degree. The goal should be that all senior, enlisted special agents have at least an associate's degree.

Educational waivers should be granted only in special circumstances, progress toward a two-year degree should be monitored, and achievement should be a condition of promotion to E-8. Supervisors should be evaluated on the progress of their agents toward these goals. Although we recognize the inherent tension in recruiting and retaining college-educated enlisted agents who are paid enlisted salaries for the same work being performed by officer and civilian agents, we do not believe requiring at least an associate's degree of senior enlisted agents is unreasonable or unattainable.

³¹⁸ For Army MI, we recommend the revision of educational requirements apply only to credentialed counterintelligence investigators.

c. Enforce Higher Educational Standards for Procurement Fraud Agents

Because of the complexity of the types of investigations major procurement fraud investigators conduct, a minimum of a bachelor's degree should be a requirement. When possible, these agents also should have backgrounds in areas of law, accounting, government contracting, or engineering to enhance their ability to work in this complex area. If procurement fraud is not consolidated, special attention should be paid to the number of USACIDC and AFOSI civilian agents with only a high school diploma. Both of these Services have argued that the majority of their civilian work force conduct complex procurement fraud investigations, yet many have minimal civilian education. In AFOSI's case, one third of its civilian agent corps has only a high school diploma.

d. Develop Degree-Granting Programs

DoD should develop civilian educational equivalency degree-granting programs for all DoD investigative personnel. We note that the Special Investigations Academy is accredited by the Community College of the Air Force, which in turn is accredited by the Southern Association of Colleges and Universities, to award 17 credit hours for college-level training provided to basic students. In the event DCIO training is not consolidated, the Air Force should examine expansion of this program for advanced training courses, and the Army should examine emulation of the program. Any consolidated training program should offer accredited training.

e. DCIS Should Formalize Its Recruiting and Hiring Practices

DCIS has no established recruiting and screening procedures and, in practice, DCIS recruiting and hiring is decentralized and virtually unregulated. We believe this unregulated management style must be

scrutinized further. We recommend Congress ask the General Accounting Office to investigate DCIS's recruiting and hiring practices and recommend ways to establish and codify procedures consistent with those of comparable federal law enforcement agencies.

2. Training

a. Consolidate Basic Training

The Interservice Training Review Organization (ITRO) is, among other things, charged with reviewing proposals for consolidation of training. The Executive Board of ITRO is composed of the Commanding General, U.S. Army Training and Doctrine Command; the Chief of Naval Education and Training; the Commander, Air Education and Training Command; the Commanding General, Marine Corps Combat Development Command; and the Commandant, U.S. Coast Guard (as required).³¹⁹ The organization is charged with conducting a thorough review of all technical and operational training to eliminate unnecessary duplication and training redundancy and create cost savings. ITRO committees are composed of members of all affected Service organizations. The process requires that the members examine all aspects of consolidation, including potential savings, and resource requirements of infrastructure, manpower, equipment, and location. Where feasible, participants strive to develop single-site training.

DCIO and Marine Corps CID basic agents should receive the same basic investigator training at a single, consolidated DCIO training facility using a consolidated, joint staff of instructors and administrators. In order to determine the best, most cost-effective site for consolidated training, we recommend that ITRO review the matter and

³¹⁹ The ITRO process would have to be modified to include DCIS participation. We believe this would not be unreasonable because DCIS and NCIS attend the same Criminal Basic program at FLETC.

report recommendations to the Secretary's Board on Investigations for DCIO coordination and implementation.

b. Improve NCIS Training for General Crimes Investigations

We recommend -- in the short term, before consolidation of basic training -- that NCIS review the curricula of the FLETC Criminal Basic and the NCIS add-on courses to ensure that the general criminal investigations training provided at FLETC, particularly in the areas of crime scene processing, interviews and interrogations, sexual assault, and child abuse investigations, is comparable to what USACIDC agents receive. The NCIS add-on instructors should be detailed from the designated training field offices to which new agents are assigned. Only seasoned, experienced field agents should be assigned to provide training in investigative techniques.

c. Require DCIS Probationary Agents Complete Three Basic Courses Within One Year

We recommend -- again, in the short term prior to consolidation of training -- that DCIS ensure that its agents complete the three training courses at FLETC within the first year of employment. We recommend that DCIS agents attend the DCIS follow-on course immediately following completion of the FLETC Criminal Basic. Because the interview techniques portion of the FLETC Criminal Basic was cited consistently as inadequate, the DCIS follow-on course should incorporate the interview techniques training agents require to conduct successful investigations. We also recommend that newly hired DCIS agents be precluded from performing investigations as credentialed agents until they have completed the FLETC Criminal Basic and DCIS follow-on.

Additionally, DCIS should consider scheduling its novice agent training at FLETC to take full advantage of this consolidated facility. It would seem sensible to have

novice agents attend the FLETC Criminal Basic (8 weeks), the DCIS follow-on course (13 days), and the IG Basic course (2 weeks) one immediately after the other. This sequence of training would add no more than a month to the training curriculum and would save the expense of flying students back and forth to FLETC three separate times to get basic training that otherwise could be accomplished during a single visit to the facility. Scheduling this sequence should not be an obstacle.³²⁰

d. Require DCIS Agents to Attend Service and DoD Contracting Courses and Make Greater Use of Service Experts

We recommend that DCIS agents attend appropriate training to gain greater awareness of the need to be responsive to the civil remedies mission of the Services. At a minimum, DCIS agents should participate in DoD and Service contracting courses early in their careers. Even this, however, is not enough. Particularly if procurement fraud investigation is consolidated and only civilian agents investigate procurement fraud -- which we have recommended -- it is essential that those agents talk and work with experts in the Services on an ongoing basis. No matter what their background, procurement fraud agents cannot be expected to know the range of subjects necessary to investigate procurement fraud successfully.

e. Examine Consolidated Advanced and Specialty Training

We recommend the ITRO process study the feasibility of further consolidation of advanced training among the DCIOs. Although much of that training will not be

relevant to Army MI, it should examine the DCIOs' advanced courses and participate in those that will enhance the investigative skills of its counterintelligence agents.

f. Increase Training for Army MI Investigators

Although investigations are just one part of the counterintelligence agent's duties, basic investigator training is not enough to keep an agent proficient over the course of his or her career. Therefore, Army MI should increase counterintelligence participation in the Advanced Foreign Counterintelligence Training Course. That, however, is only one option for providing quality advanced training to Army counterintelligence agents. Participating with the DCIOs in advanced training, for example, is another. Army MI should develop a continuous, comprehensive advanced investigative training program in addition to what the Advanced Counterintelligence Training Course provides. The Army Deputy Chief of Staff for Intelligence and the Commander, USACIDC should explore ways to improve communication and coordination between Army MI counterintelligence investigators and USACIDC investigators. Moreover, we recommend that the Secretary's Board on Investigations conduct a thorough review of Army MI counterintelligence investigative training to identify and implement necessary improvements.

g. Increase Training in Interview and Financial Tracking Techniques for Procurement Fraud Agents

Procurement fraud agents must receive additional training in the specialized interviewing skills needed to get witnesses to help make sense of documents in these document-intensive cases. Moreover, they must receive additional training in the skills necessary to perform complex financial tracking.

³²⁰ A DCIS special agent is currently the Deputy Director of the IG Institute, DCIS controls scheduling of the DCIS follow-on course, and we know from our site visit to FLETC and our interviews of officials at the facility that FLETC has excess capacity to accommodate students.

h. Emphasize Stringent Probationary Programs

We recommend that DCIS develop and implement a mandatory, standardized probationary agent program that is managed by Headquarters, DCIS. DCIS should review the MCIO probationary agent programs and adopt those provisions relevant to DCIS's mission and agent force. Since the MCIOs apply the probationary agent programs to their GS-1811 civilian investigators, DCIS may find the programs readily adaptable. At a minimum, however, Headquarters, DCIS must manage centrally the probationary program for all newly hired agents and should exercise final accreditation authority for all probationary agents.

We recommend that Army Regulation 381-20³²¹ be revised to mandate that Army MI establish a formal, centrally supervised probationary program for all agents in assignments in which they are authorized to conduct counterintelligence investigations. The program should incorporate a mandatory senior-junior agent "partner" system for a designated number of interviews and investigations. A formal probationary program will assist Army MI in ensuring uniform standards for its often geographically dispersed and locally supervised investigative personnel, and it should enhance the quality of counterintelligence investigations.

The Secretary's Board on Investigations should develop minimum DoD special agent probationary qualifications and standards. These minimum standards should be promulgated as DoD policy and the DCIOs should adopt those, or more rigorous standards.

i. Increase DCIS and Army MI In-Service Training

For the MCIOs, in-service training is a highly-structured, closely documented component of organization operations. DCIS and Army MI would be well-served to review the MCIO training programs and discuss the MCIOs' training philosophies with military supervisors who have years of experience training a young and less experienced agent force.

3. Supervision

a. Increase DCIO Commitment to Formal Management Training of Supervisors

The DCIOs do not place enough emphasis on management training. Agents must be prepared throughout their careers to assume increasing levels of management responsibilities. We recommend that the training departments of the DCIOs address supervisory training at all levels of agent progression and integrate supervisory training topics into all courses and during in-service training. DCIOs should provide on-the-job opportunities to develop management skills and ease the responsibilities of senior supervisors with liberal delegation of supervision and review responsibilities to assistant special agents-in-charge, team chiefs, squad leaders, and experienced senior agents.

b. Field Supervisors Should Conduct Regular Case Review

The DCIOs and Army MI recognize that regular case reviews are an effective way to monitor, train, and supervise agents. We recommend that field supervisors conduct regularly scheduled case reviews with agents during the course of major investigations. Case reviews of routine investigations can be delegated to team chiefs, assistant special agents-in-charge, and squad leaders, but senior supervisors should receive regular updates on all ongoing investigations. The

³²¹ According to Army Reg. 381-20, *The Army Counterintelligence Program*, the Deputy Chief of Staff for Personnel, the Commanding General, Army Personnel Command, and the Commanding General, U.S. Army Reserve Personnel Center are responsible for administration and supervision of, among other things, a probationary program for newly trained counterintelligence agents.

DCIOs and Army MI should determine the review format that best suits their mission. To ensure continued case reviews, supervisors should be held accountable for their case review program during all inspections.

c. Make Prior Service in USACIDC a Significant Qualification Criterion for Later Selection to Senior Command and Senior Staff Positions in USACIDC

To focus the attention of Army command selection boards on the importance of USACIDC experience in the selection of senior USACIDC commanders, we recommend that the Chief of Staff, Army, in his Memorandum of Instruction to the board, remind board members that an Army organization operates most efficiently and effectively with senior leaders who have had junior command and middle level staff experience in the organization. Further, the Memorandum should instruct that of the 29 military police battalion positions, 11 are within the USACIDC organization. We recommend that a similar instruction be given concerning the two USACIDC group commands. The instructions should alert command selection board members that a number of the military police officers selected for command will serve in USACIDC command positions.

Military police commissioned officers also hold senior staff positions at USACIDC headquarters. These staff positions, such as Deputy Commander and Deputy Chief of Staff for Operations, require more than a tangential acquaintance with investigative procedure and skills. Other than the Commander, USACIDC, these staff officers are the most senior supervisors and trainers of USACIDC personnel. They are required to supervise, train, evaluate, coordinate, and plan the efforts of 890 subordinates. It is imperative that these leaders, before serving as senior USACIDC leaders, know the USACIDC organization and have some technical proficiency in felony criminal investigations. We recommend, therefore,

that the Commander, USACIDC, when selecting headquarters senior staff members, give due consideration to qualified officers who have prior USACIDC experience. Finally, we recommend that the Army require the Commander, USACIDC to have significant USACIDC experience before he or she is assigned to that position.

d. Maintain High Performance Standards

Agents who perform poorly add disproportionately to the supervisory burdens of an agency. Supervisors must be empowered to withhold promotions of poor performers more easily, and to initiate termination procedures more easily against agents who require inordinate supervision for their grade or rank.

4. Retention

a. Promote Diversity in the DCIO Agent Corps

We believe diversity within the DCIO agent corps is a worthy goal. A police force that mirrors the population policed is better able to empathize with and relate to that population. We believe greater effort is required to identify and recruit more women and minorities into the DCIOs. We recommend that all DCIOs examine whether female and minority agents are provided opportunities for critical training and middle management positions that will make them more competitive for senior supervisory positions. DCIOs should ensure that all agents are advised about management opportunities when reviewing and revising their career development plans, and incorporate management training sessions into local training efforts.

Female agents in DCIS and NCIS are still under-represented in the senior leadership positions within their agencies. Rectifying this imbalance may take time as more female agents achieve the tenure and experience required to compete fairly and successfully

for executive leadership positions within both agencies. DCIS and NCIS should strive to retain highly qualified female and minority agents and promote them -- based not on gender or race, but on merit -- into significant supervisory and other leadership positions. Now that the ban against women on combat ships has been lifted, NCIS should make a concerted effort to assign more female agents to agent afloat tours aboard deployed aircraft carriers because those tours provide excellent investigative experience and are regarded as (and should be) career enhancing. Mentoring of junior female and minority agents to assist them with career planning and career progression should be a priority of all managers.

b. NCIS Should Promote Agents Afloat

As we discuss elsewhere in this report, NCIS must place greater emphasis on Service acculturation and reward civilian agents who strive to understand and serve the customer. Failure to promote agents who volunteer for afloat assignments sends the wrong message to the civilian agent corps. If these agents, in fact, are selected for their technical proficiency, productivity, judgment, and customer orientation, and a carrier tour, is, in fact, excellent training and good acculturation to the Navy and Marine Corps, then these agents should be promoted over agents lacking the afloat agent credential. This inconsistency in the NCIS career progression program deserves greater scrutiny. We recommend NCIS review promotion criteria critically and promulgate a clear "road map" of those career enhancing assignments to which agents should aspire if they wish to assume supervisory positions.

IX. Investigative Tools and Techniques

A. Findings

1. Automated Data Processing

The capability to gather and analyze at the DoD level the enormous amount of data related to DoD investigations -- much less do it quickly -- is virtually nonexistent. At last count, 23 different, incompatible database systems exist within DoD to gather and archive data on investigations, law enforcement activities, prosecutive activities, and confinement records. Although the Secretary of Defense has directed the Department to standardize and integrate DoD automated data processing (ADP) systems, DoD has not yet linked these databases to permit quick retrieval of data for useful management analysis.

There has been some recent effort by the DCIOs to improve automated processing of investigative data. For example, the DoD IG has created a criminal investigations "Corporate Information Management" (CIM)³²² working group to study ways to integrate more effectively the ADP systems of the DCIOs.³²³ This group is not, however, reviewing the ADP systems of the police organizations, nor is it studying the need for management of data for the myriad of non-criminal investigations in DoD.

³²² "CIM" is the term used to describe the DoD initiative to modernize and standardize DoD information management, permit greater integration of systems, and reduce system acquisition and software development costs over time. The CIM process involves dissecting a specific task, such as report-writing, identifying opportunities to improve each step of the task, and implementing cost-effective changes, which may include automation, to improve the task.

³²³ This working group, known as the DCIO Steering Committee, is tentatively scheduled to issue recommendations to the DoD IG during the second quarter of fiscal year 1995.

The Office of Legal Policy in the Office of the Under Secretary of Defense (Personnel and Readiness) assembled a CIM working group that developed a strategic plan to integrate all of the investigative database systems in DoD.³²⁴ The proposed new system is called the Defense Incident-Based Reporting System (DIBRS). One purpose of DIBRS would be to compile data on criminal incidents and be compatible with the National Incident Based Reporting System (NIBRS), which DOJ maintains. DIBRS, however, also would contain and permit analysis of non-criminal incidents such as suicides, Sudden Infant Death Syndrome, and sexual harassment.

We have found two significant obstacles to effective integration of investigative ADP systems in DoD. First, there is no standardization of report writing and definitions among -- or even within -- the Services and other DoD entities. Reports of investigation are the data that investigators produce on which any database must be based. An integrated database must have uniform reports -- based on uniform definitions -- for it to be at all useful. There can be no true analysis of trends in sexual harassment complaints, for example, if the definition of sexual harassment is different in each Service. Similarly, currently the definition of "solved" is not the same in each DCIO, which makes analysis of solve rates difficult.

No two investigative organizations in DoD have the same report formats; most are not compatible. This is even true with the DCIOs, despite the fact that the DoD IG promulgated a DoD instruction in 1983, DoD Instruction 7050.2, which stated "[i]t is DoD policy to ensure that criminal investigations within the Department of Defense are reported uniformly by all DoD Investigative Agencies." The problem with this Instruction is that its guidelines are so broad that they amount to no guidelines at all.

³²⁴ See Defense Incident Based Reporting Program Strategic Plan (Sept. 14, 1994).

The second obstacle to successful integration of ADP systems has been that responsibility for various aspects of investigations is dispersed among too many offices. The Under Secretary of Defense (Personnel and Readiness), the DoD IG, the Assistant Secretary of Defense (Command, Control, Communications, and Intelligence), and the Service Secretaries all play significant roles in investigative policy making. The result of this decentralized authority is a perpetuation of a Tower of Babel in investigative ADP, communication, and report-writing. No one office has seen to it that all investigative data is standardized and integrated, although, with the DIBRS initiative, the Under Secretary of Defense (Personnel and Readiness) has taken the first step.

2. Laboratories

USACIDC and NCIS are the only DCIOs that have their own forensics laboratory systems. The majority of the DoD police and investigative organizations use the Army Criminal Investigation Laboratory system for forensic support on investigations.³²⁵ The Navy developed its limited laboratory system to supplement the Army system. It previously had experienced delays in routine processing of evidence by the Army Criminal Investigation Laboratory system, and other DoD, federal, state, and local forensic laboratories. NCIS told us that its laboratories are cost effective and provide service to their Naval customers on a priority basis. When the NCIS laboratories are unable to provide the required forensic support, they too rely on the Army Criminal Investigation Laboratory system.

In 1990, the Tri-Service Working Group considered potential consolidation of the DoD laboratory system. The group concluded that the issue merited further study but no move in that direction took place. The Army Criminal Investigation Laboratory system and the NCIS laboratories do work together to

manage their caseloads when one becomes overloaded with forensic work. For example, when the Army laboratories lost a number of certified examiners as a result of the drawdown, NCIS examiners temporarily helped off-set the Army laboratory workload. We see this type of support and cooperation between the two DoD laboratory systems as a good example of efficiencies that can be realized within DoD.

3. Polygraph Services

There are two distinct types of polygraph examinations that the DCIOs and Army MI use: criminal and counterintelligence security polygraphs. Criminal polygraphs are authorized only to supplement the investigation of a crime involving an offense punishable under federal law, including the Uniform Code of Military Justice, by death or confinement for a term of one year or more. The counterintelligence security polygraph is used to assist in determining the initial eligibility and thereafter, on a random basis, to assist in determining the continued eligibility of DoD civilian, military, and contractor personnel for access to certain categories of classified information. In the Army, USACIDC is the program manager for all law enforcement polygraph examinations and Army MI is the manager for all counterintelligence and intelligence polygraph examinations. NCIS and Marine Corps CID provide polygraph support for the Navy. AFOSI is the polygraph program manager for the Air Force and provides all criminal and counterintelligence support for that Service. DCIS also possesses trained polygraph examiners to support that agency's investigations.

The Joint Security Commission addressed polygraph support to the federal Government in a final report issued on February 28, 1994.³²⁶ The Commission found that polygraph training already is consolidated within DoD, and recommended that training be consolidated further on the

³²⁵ See Vol. II, Supplemental Reports, §V.A, for a discussion of the Army and Navy laboratory systems.

³²⁶ *Redefining Security, a Report by the Joint Security Commission* (Feb. 28, 1994).

national level to include the CIA and the National Security Agency. The Commission further recommended that government-wide standards be developed to ensure consistency in the administration, application, and quality control of screening polygraphs. Although there may be some benefit to consolidating the programs for counterintelligence screening polygraphs,³²⁷ we do not advocate consolidating the criminal polygraph mission. The MCIOs require criminal polygraph support and need to own the support to be responsive to their customers. In addition, it is essential that criminal examiners be able to develop rapport and communicate accurately with personnel from each military component when conducting a polygraph on a complex criminal issue. Introducing an examiner unfamiliar with the Service environment, mission, and customs during the conduct of a criminal investigation could affect adversely the successful resolution of the case. Finally, these programs are relatively small and efficient already. We do not believe the marginal efficiencies and small savings possibly realized through consolidation warrant a move that will remove examiners from their customer and thus run the risk of interfering with responsiveness.

Interviews of judge advocates in each Service disclosed a general agreement that the agents conducting criminal polygraph examinations are performing work of high quality. Although most judge advocates stated they "were not big fans" of polygraph examinations, all stated numerous checks and balances exist to ensure the quality of the polygraph programs. An Air Force Chief Appellate Counsel stated the USACIDC examiners he has dealt with have been very competent.³²⁸ In the past, the Services occasionally used the polygraph examination on victims of sexual assault; however, each

³²⁷ Because these screening polygraphs are not used in investigations, we did not study whether these programs should be consolidated.

³²⁸ Interview of Lieutenant Colonel Frank J. Spinner, Chief, Appellate Counsel, Appellate Defense Division, Air Force Legal Services Agency (Feb. 14, 1994).

has changed its policy to preclude this use of the tool in most circumstances.

Several military attorneys said investigators use the polygraph examination too frequently as a tool to close an investigation. The Chief of Military Justice for the Air Force opined that overuse of the polygraph examination is the fault of both command officials and investigators.³²⁹ He said in his experience, if AFOSI provides a report of investigation of an incident that is a "one-on-one swearing contest" with no supporting evidence (e.g., date rape), commanders ask AFOSI to conduct a polygraph examination to help them make the tough decision on whether to take action against the accused. He also said AFOSI agents sometimes use the polygraph examination too early in an investigation because they have a high caseload and are under pressure to provide a report of investigation to command officials. By using the polygraph early in an investigation, agents sometimes feel they can save "weeks of investigation."³³⁰

4. Arrest Authority

With the exception of DCIS agents, who have been designated Special Deputy U.S. Marshals, DCIO agents do not have arrest authority over civilians. The Posse Comitatus Act, 18 U.S.C. section 1385, prohibits the use of any part of the Army or Air Force to aid in the execution of civilian laws.³³¹ DoD Directive 5525.5, *DoD Cooperation with Civilian Law Enforcement Officials*, applies the prohibitions of the

³²⁹ Interview of Colonel Robert E. Reed, Chief, Military Justice, Air Force Legal Services Agency (Aug. 9, 1994).

³³⁰ *Id.*

³³¹ The Act, by its terms, applies only to the Army and the Air Force. Nevertheless, some courts have held that it also applies to the Navy and Marine Corps. See *United States v. Walden*, 490 F.2d 373 (4th Cir. 1974). But see *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

Posse Comitatus Act to all the Services, including the Navy and Marine Corps. The Act and the DoD Directive, however, do not apply to activities regarding investigations and other activities related to the commander's inherent authority to maintain law and order on a military installation. Therefore, it is not the Act or the DoD Directive that restricts the authority of DCIO agents to arrest civilians on military installations. The Act and the Directive also do not apply to actions that are taken for the primary purpose of furthering a military function of the United States, regardless of the incidental benefits to civilian authority, nor do they apply to audits or investigations conducted under the direction of, or at the request of, the DoD IG.³³² Courts have held that these provisions exempt procurement fraud investigations conducted by the DCIOs from the constraints of the Posse Comitatus Act.³³³

Although the Posse Comitatus Act and DoD Directive 5525.5 do not restrict the DCIOs' authority to arrest civilians on a military installation or the authority of DCIO procurement fraud investigators to arrest civilians, the Department of Justice has established guidelines that must be met before a federal law enforcement agency may be granted authority to arrest civilians. Pursuant to these guidelines, the Department of Justice will support legislation to grant arrest authority to a federal law enforcement agency only if: (1) there is a significant likelihood that, in the course of performing his or her assigned duties, the employee frequently will encounter situations in which it is necessary to make such an arrest or search; (2) it is unlikely that timely and effective assistance will be available from another agency; (3) the employee has graduated from an accredited course of training in the execution of arrest and search warrants; and (4) the agency agrees that, if the requested authority is

granted, the agency will establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to seek and execute arrest or search warrants by its employees.

In certain circumstances, the MCIOs' current lack of arrest authority can be a serious problem. Because MCIO agents do not have arrest authority over civilians, they must rely on the installation commander's inherent authority to protect installation property and personnel in order to detain civilians on a military installation. Although MCIO agents do not have arrest authority, they are allowed to detain civilians on a military installation for a reasonable period of time for the purpose of turning the civilian suspect over to civilian law enforcement authorities for arrest. If, however, civilian law enforcement authorities refuse to arrest the civilian or are unavailable to respond to an MCIO agent's request for assistance, the MCIO agents are forced to release the civilian suspect. For crimes committed on a military installation, MCIO agents sometimes cannot obtain timely assistance from civilian law enforcement personnel and, without arrest authority, cannot police their own installation adequately. For example, no federal law enforcement agencies with arrest authority have agents assigned within the Jacksonville, North Carolina area adjacent to Camp Lejeune, a Marine Corps installation with a combined military and civilian population of approximately 60,000. In fact, the nearest U.S. Marshal is located more than 50 miles from the installation. When NCIS agents at Camp Lejeune need to have a civilian arrested on that installation, timely and effective assistance from other federal law enforcement officials is not always available.

Because of the problems associated with conducting investigations involving civilian suspects on military installations, the MCIOs could satisfy DOJ's guidelines for a grant of arrest authority. It is our view that the MCIOs clearly meet the requirements of the first and second guidelines. That is, in the course of conducting investigations on a military installation, MCIO agents frequently encounter situations in which it is necessary to make arrests of civilians, and it is often

³³² 5 U.S.C. App. 3, §8(g); DoD Directive 5565.5, *DoD Cooperation with Civilian Law Enforcement Officials*, encl. 4, ¶2.

³³³ See *United States v. Stouder*, 724 F. Supp. 951 (M.D. Ga. 1989).

unlikely that timely and effective assistance will be available from another agency. Because NCIS agents attend FLETC, they satisfy the third DOJ requirement, which requires the employee to graduate from an accredited course of training in the execution of arrest warrants.³³⁴ For USACIDC and AFOSI to meet this guideline, they would need to add a block of instruction regarding the execution of civilian arrest warrants. To meet the requirements of the fourth DOJ guideline, all the MCIOs would be required to establish policies and procedures, approved by the Attorney General, for preventing the unauthorized use or misuse of the power to seek and execute arrest warrants by their employees.

As noted earlier, DCIS agents currently possess arrest authority over civilians. They were initially granted this power in December 1990, when DCIS agents were appointed as Special Deputy U.S. Marshals by the Deputy Attorney General of the United States. This grant of authority allows DCIS agents to act as Special Deputy U.S. Marshals when investigating matters within their current jurisdiction. This authority is renewed annually. This grant of authority by the Department of Justice recognizes the fact that DCIS agents involved in the investigation of procurement fraud cases within the Department of Defense need civilian arrest authority. In our view, this authority should be granted to all DoD procurement fraud agents outright and not as Special Deputy U.S. Marshals.³³⁵ Again, for this authority to be granted, the request must satisfy the requirements of the DOJ guidelines. All agents conducting procurement fraud investigations should meet the requirements of the first and second of the DOJ guidelines. Procurement fraud investigations by their nature frequently involve situations in which it is necessary to arrest civilians, and it is

often unlikely that timely and effective assistance will be available from another agency. Many procurement fraud investigations involve civilians such as DoD contractors, DoD employees, and other civilian personnel. Only a small percentage of these investigations are conducted on military installations or involve military members. These investigations often involve the execution of search warrants and undercover operations, situations in which it would not be unusual for an agent to need arrest authority.

The MCIOs are responsible for providing protective services for a number of Service, DoD, and visiting foreign officials and dignitaries. The MCIO agents assigned to provide protective services often perform their duties off military installations. The nature of their duties requires them to be prepared to react at a moment's notice to any threat, including those posed by civilians, directed toward the individuals they are charged to protect. The question in this case should not be whether there is adequate support from other law enforcement agencies. The important question is whether the protective service agents are equipped adequately to carry out their assigned duties. It is our view that a lack of civilian arrest authority unnecessarily restricts the ability of protective services agents to provide the maximum protection possible. When MCIO protective service agents perceive a threat to the individuals they are charged with protecting, they need the authority to react immediately without regard to whether the threat is posed by a military member or civilian.

5. Undercover Operations

a. Consensual and Nonconsensual Monitoring

During the course of an investigation, it may become necessary to obtain information not available through traditional investigative means. Electronic aids, defined as electronic interception devices, pen registers, and telephone tracing devices, are valuable

³³⁴ See, *supra*, §VIII.A.2, for a discussion of consolidation of DCIO training. A central training facility for all DCIOs should include instructions on the execution of civilian arrest warrants.

³³⁵ See, *supra*, §II.B.1, for our recommendation that procurement fraud investigations be consolidated.

investigative tools used to record criminal conversations, conduct surveillance, and ensure the safety of the agent. Interceptions may be consensual or nonconsensual. A consensual interception occurs after one or more of the parties to the communication gives oral or written consent for the interception.³³⁶ This typically occurs when an agent or informant wears a "wire" to record a conversation with a subject of an investigation. In contrast, a nonconsensual interception occurs without either of the parties to the communication having knowledge of or giving consent to the interception.³³⁷ Nonconsensual interceptions are referred to commonly as "wiretaps" or "bugs."

All of the DCIOs adhere to the same policy guidance -- DoD Directive 5200.24, *Interception of Wire and Oral Communications for Law Enforcement Purposes* (Apr. 3, 1978) -- for direction when conducting consensual or nonconsensual interceptions. This document was the first DoD-level directive formalizing policies on wire and oral interceptions and was, in part, a result of public concern regarding military monitoring of civilian organizations. DoD Directive 5200.24 addresses numerous consensual and nonconsensual monitoring policies and procedures, including who within DoD may monitor or approve monitoring, request or approve procedures, and control or dispose of interception equipment. The Directive also provides guidance on record keeping and reporting requirements.

DCIS,³³⁸ AFOSI,³³⁹ NCIS,³⁴⁰ and USACIDC³⁴¹ are the only DoD agencies

authorized to conduct criminal interceptions. DCIO agents in the field initiate requests and send them through their designated chain of command to their agency's final approval authority. The DoD IG has designated the Director of the DCIS as the approval authority for consensual interception within the DoD IG's Office. As we said earlier, within the Services, the Service General Counsel have consensual intercept approval authority.³⁴² The DCIOs may conduct nonconsensual intercepts only with the Attorney General's approval and a federal court order.

In 1983, U.S. Attorney General Guidelines broadened significantly approval authority for consensual and nonconsensual interceptions. The Electronic Communications Privacy Act of 1986 addressed policies regarding the monitoring procedures for recent technological advances, such as cellular phones, computerized electronic mail systems, and facsimile machines. Since 1983, CIPO has attempted to revise DoD Directive 5200.24 to incorporate the 1983 U.S. Attorney General Guidelines and later the 1986 Electronic Communications Privacy Act. Based on these guidelines, the revised DoD Directive 5200.24 would not require DCIO agents to obtain additional authority when conducting joint investigations with other federal, state, local, or foreign law enforcement personnel who have authority. Currently, during joint investigations, the DCIO agent must get approval from his or her agency even though the other non-DoD agent already has authority. In addition, unlike under the current directive, intercept authority would no longer be restricted by the type of criminal offense under investigation. The revised directive also would not place the same limits on the delegation of authority to approve consensual intercepts, as currently is the case. Further, unlike at present, nonconsensual intercept requests could be made to DOJ by the Service Secretaries or their designees; they would not have to come from a DoD official. The revised directive

³³⁶ See DoD Directive 5200.24.

³³⁷ *Id.*

³³⁸ See *id.*

³³⁹ See Air Force Reg. 124-9.

³⁴⁰ See SECNAVINST 5520.2A.

³⁴¹ See Army Reg. 190-53.

³⁴² See, *supra*, §VII.A.2, for further discussion of the roles of Service General Counsel.

also would reduce restrictions on emergency requests for consensual interceptions.

By statute, the DoD IG is responsible for developing policy and providing guidance with respect to all DoD activities relating to criminal investigative programs. CIPO, established to carry out this responsibility, has been the proponent for various DoD instructions, directives, and criminal policy memoranda. A CIPO official attributed the ten-year delay in finalizing revisions to DoD Directive 5200.24 to numerous changes the Services have made to the draft revised directive, and to the requirement to recoordinate any comments that are more than six months old.³⁴³ Although CIPO does not have complete control of the directive process, as the proponent for criminal policy the office must share responsibility for the fact that special agents have had to adhere to an outmoded and unnecessarily restrictive electronic surveillance policy for a decade.

Despite the administrative difficulties involved, staff judge advocates, Assistant U.S. Attorneys, defense attorneys, DOJ officials, and other DoD representatives with whom we have spoken all agree that electronic surveillance is a valuable investigative tool. They also agree that DCIO agents are well trained in the laws and policies governing the use of electronic surveillance. Some believe, however, that DCIO agents do not use this tool as often as they should. In particular we have heard that fraud cases "cry out for" intercepts,³⁴⁴ but DCIO agents are quick to follow standard interview and subpoena investigative techniques and shy away from intercepts. One Assistant U.S. Attorney told us of a situation in which, rather than set up a consensual wiretap, a DCIS agent went to a suspect's house and convinced the suspect to confess. According to the Assistant U.S.

Attorney, obtaining a wiretap would have been relatively simple; attempting to obtain a confession was quite risky and could have compromised the investigation.³⁴⁵ This reluctance to use electronic surveillance may stem, in part, from a fear that it is too difficult administratively, but we also heard that DCIO agents simply do not appreciate how useful this tool can be.

b. Storefront Operations

"Storefront operations" are undercover operations in which an investigative agency sets up a commercial business or "storefront" to assist it in identifying criminals operating in a community and to gather evidence to be used in prosecuting these criminals. For example, a storefront, also referred to as a sting operation, may buy and sell military equipment to identify individuals who have been stealing government property, or a "military subcontractor" storefront may purchase spare parts to identify suppliers who are providing substandard parts. In addition to property and contract investigations, storefronts are used in money laundering and weapons export investigations.

The U.S. Attorney General Guidelines for Undercover Operations limit the number of agencies with authority to conduct storefront operations because many actions an investigative agency might take to legitimize a storefront operation are prohibited by law. For example, government agencies are prohibited from establishing a commercial entity,³⁴⁶ making or obligating funds not yet authorized by appropriations,³⁴⁷ and lending, using, or depositing public money.³⁴⁸

³⁴³ Testimony of Bruce Drucker, Director, CIPO Operations, before the Advisory Board 123, 130-131 (Mar. 18, 1994).

³⁴⁴ Interview of Johnny Frank, Assistant U.S. Attorney, Eastern District of New York (Apr. 11, 1994).

³⁴⁵ *Id.*

³⁴⁶ 31 U.S.C. §9102.

³⁴⁷ *Id.* at §1341.

³⁴⁸ *Id.* at §3302.

Apart from certain specific exceptions,³⁴⁹ none of the DCIOs is authorized to conduct independent storefront operations. DCIOs conduct storefront operations jointly with the FBI or other federal agencies so authorized by the Attorney General. If the FBI or another agency is not willing to participate in a storefront operation with a DCIO, the DCIO cannot initiate one on its own. The FBI or other agency may decline to participate in an investigation for a number of reasons, such as manpower limitations, lack of interest, or the inconvenience of traveling to an isolated military base.

In February 1994, the DoD Office of Inspector General proposed legislation, entitled *"To grant the authority to the Defense Criminal Investigative Service, Office of the Inspector General, Department of Defense, to operate independently commercial entities,"* which would have authorized DCIS to conduct storefront operations independently of the FBI. In our view, regardless of intention, this legislation made it appear that DoD was acting on behalf of one DCIO at the expense of the others. AFOSI, DCIS, and NCIS all have conducted successful storefront operations jointly with the FBI.³⁵⁰ We are sensitive to the need for limited access to this particular investigative tool, but believe whatever action is taken should be for all DCIOs or none of them.

³⁴⁹ Under certain limited circumstances, DCIOs can and do conduct narrowly defined independent storefront operations. For example, a DCIO can set up a storefront to purchase stolen property, if it uses a short term lease, does not make a profit, and does not sell property. This type of storefront operation is conducted rarely. Agents do not like to conduct this type of storefront operation because criminals are highly suspicious of a business that only buys property and does not sell it. This type of storefront investigation also must be completed within a limited time frame.

³⁵⁰ USACIDC has not conducted any joint storefront operations in the recent past. Telephone interview of Mervin G. McConnel, Chief, Policy and Plans Division (June 30, 1994).

6. Psychological Autopsies

A psychological autopsy is an attempt to clarify the intention of a decedent at the time of death -- that is, it is an attempt to aid the final decisionmaker in determining whether the decedent died as a result of suicide, accident, or homicide. The procedure concentrates on the psychological aspects of a death as derived from the known history of the individual, physical evidence, life style, circumstances of the death, behavior and personality of the individual, and events that led to the death. In addition to reviewing a variety of existing records, those who conduct psychological autopsies interview individuals who knew the decedent sufficiently to comment on his or her behavior and actions.

The Navy used psychological autopsies in its investigation of the explosion on the USS Iowa. In its hearings on that investigation, Congress raised questions regarding their use, particularly as to the quality of the material upon which the psychological autopsies were based, the degree of certainty of the opinions, and the qualifications of some of the personnel performing the analyses.³⁵¹ We have not revisited the use of psychological autopsies in the USS Iowa investigation, but the concerns expressed at that time have led us to review the procedures that currently govern the MCIOs' use of psychological autopsies.

We found a significant variance among the Services in the amount of existing regulatory guidance for the conduct of psychological autopsies and the manner in which the Services use them. For example, USACIDC does not have anyone on its staff that conducts psychological autopsies; it relies on Army mental health officers. NCIS has used the FBI in the past, and NCIS and AFOSI have licensed psychologists on their headquarters staffs to conduct these procedures. USACIDC uses psychological

³⁵¹ See *U.S.S. Iowa Tragedy: An Investigative Failure*, House Armed Services Committee, Committee Print No. 7, 101st Cong., 2nd Sess. at 41-45 (Mar. 5, 1990).

autopsies in a large variety of circumstances if there is uncertainty about the manner of death. The Army also uses this procedure as a part of its suicide prevention program to, among other things, help identify trends, such as an increase in suicides at a specific installation or during deployments, and take preventative measures. The Navy uses psychological autopsies primarily for criminal investigations, although the NCIS staff psychologist performs a liaison function with the Navy and Marine Corps Bureau of Personnel to provide insight and information for use in suicide prevention, health, and safety programs. The Air Force uses psychological autopsies only for criminal investigations. The Navy and Air Force perform far fewer of these procedures than the Army.

It was almost the universal opinion of personnel we interviewed who are familiar with or use psychological autopsies that a standard protocol for their conduct must be established within DoD.³⁵²

B. Recommendations

1. Consolidation and Integration

a. Integrate DoD Automated Data Processing and Report Writing

We recommend the Secretary's Board on Investigations monitor the expeditious implementation of integrated and compatible investigative automated data processing systems in DoD. This integration should include relevant data bases such as the 23 databases currently in use in DoD, the Defense Clearance and Investigations Index (DCII), DIBRS, and uniform report writing. Uniform report writing format and reporting procedures should be taught to all DCIO agents in integrated basic and advanced training.

The DCIOs, Marine Corps CID, Service IGs, and military police must adopt common automated database systems, compatible hardware, software, and report writing systems. This integration of ADP will enhance communication among the organizations responsible for investigations within DoD and improve cooperation and coordination among them.

While we encourage integration of DoD investigative ADP systems, we caution that these enhancements should not lead to a proliferation of sensitive DCIO, Service IG, and police investigator data outside of those organizations. Specifically, access to personal identifying data and information about ongoing investigations should be limited exclusively to law enforcement organizations.

b. Study Consolidation of Laboratories

We recommend that the Secretary's Board on Investigations study whether consolidating all DoD forensic support under one integrated laboratory system would result in additional cost efficiencies and enhanced customer support.

c. Maintain Independent Capabilities Polygraph Services

We recommend that each Service maintain independent criminal polygraph capabilities. We do not believe it would be beneficial to consolidate this mission.

2. Avoid Overuse of Polygraph

DCIOs should be vigilant in training agents to use polygraph examinations appropriately rather than too early or too often as investigative short-cuts.

³⁵² See Vol. II, Supplemental Reports, §V.D, for additional discussion of psychological autopsies.

3. Grant Arrest Authority over Civilians to DCIO Agents Under Certain Circumstances

The Secretary of Defense should request that DCIO agents³⁵³ be granted the statutory authority to arrest civilians on military installations. This authority also should be requested for DCIO agents conducting procurement fraud investigations and protective services details.³⁵⁴

4. Adopt a DoD-Wide Consensual Monitoring Policy

The ten-year delay in revising the consensual monitoring policy is unacceptable. The Secretary's Board on Investigations must see to it that a new policy is adopted immediately.

5. Encourage Appropriate Use of Electronic Surveillance

DCIO agents -- particularly fraud agents -- should receive training that emphasizes the use of electronic surveillance. Agents and supervisors should assess the potential use of electronic surveillance early in investigations.

6. Examine the Need for Legislation Giving All DCIOs Authority to Conduct Storefront Operations

We recommend the Secretary's Board on Investigations examine, in consultation with DOJ, whether DoD should pursue legislation that would allow all four DCIOs to set up storefront operations.

7. Establish DoD Standards for Psychological Autopsies

The Assistant Secretary of Defense for Health Affairs should convene a working group of DoD and Service medical, mental health, legal, and investigative professionals to establish a standard protocol for psychological autopsies. This should include uniform requirements for when a psychological autopsy is conducted, how it is performed, qualifications of personnel conducting the examination, reporting format, and quality assurance.

³⁵³ Marine Corps CID also should be considered in this request provided our recommendation in §III.B.3 is implemented.

³⁵⁴ The Office of the Assistant Secretary of Defense, Command, Control, Communications, and Intelligence has pointed out that long term efforts by DoD to obtain specific statutory authority for the conduct of personnel security operations by DoD personnel have been unsuccessful. These attempts have included arrest authority for protective service agents in addition to the general authority for such missions and other police powers. Attempts to acquire statutory arrest authority must also address at a minimum the general authority for DoD personnel to conduct such missions. See Vol. II, Supplemental Reports, §II.E, for additional discussion of protective services.

X. Antideficiency Act

On July 1, 1994, the Senate passed the Senate version of the Fiscal Year 1995 DoD Authorization Bill. The Senate Armed Services Committee report accompanying the bill directed the Secretary of Defense to request this Advisory Board to review the DoD process for investigating Antideficiency Act violations.³⁵⁵ To comply with this request, we have conducted interviews within DoD, DoD IG, and the military Services and have reviewed sample reports and cases.

The Antideficiency Act is actually several statutes that contain statutory funding controls created to ensure congressional control of government spending.³⁵⁶ First passed in the 1800s, the statutes prohibit federal officials from making or authorizing obligations or expenditures exceeding amounts available in an appropriation or fund for the obligation or expenditure; from exceeding an apportionment or administrative division of an apportionment; and from involving the Government in a contract or obligation for the payment of money before an appropriation is made.³⁵⁷ The Act, in addition to delineating violations, sets out reporting requirements and possible punishments, including administrative action, fines, and imprisonment.

Within DoD, auditors discover the majority of potential Antideficiency Act violations, although command financial personnel also report potential violations.

³⁵⁵ See S. Rep. No. 282, 103rd Cong., 2nd Sess. 217-218 (1994). Our review focused on how possible Antideficiency Act violations are investigated after they are detected. We did not examine how possible violations are first detected. Although this is an important issue, it is beyond our expertise because it involves sophisticated accounting and auditing techniques, not investigation.

³⁵⁶ See 31 U.S.C. §§1341, 1342, 1349-1351, and 1511-1519.

³⁵⁷ DoD IG Semiannual Report to Congress, October 1, 1993 to March 31, 1994.

The most common violation is charging the wrong appropriation. For example, certain military construction contracts are limited to a \$300,000 funding limit. If, during the course of a construction contract, contract personnel use funds from other than the construction appropriation, the cost of the contract would exceed \$300,000 and cause an Antideficiency Act violation. Other violations occur for a variety of reasons, including accounting problems, failure to follow established policy and procedures, failure to maintain accurate tables in Automated Accounting Systems, and failure to charge the correct ACRN (Accounting Classification Reporting Number).³⁵⁸ It reportedly is quite rare for a command actually to overspend an appropriation.

Antideficiency Act violation investigations are very complex and time consuming. The Director of Financial Management, Office of the DoD IG, told us that simply detecting a possible violation is a "monumental task."³⁵⁹ Investigations usually are initiated long after the actual deficiency occurred, due to the complexities of the DoD accounting systems. In one case the DoD IG reviewed, the violation occurred in October 1983, it was not discovered until May 1986, the problem was corrected in 1988, a letter of censure was issued in March 1989, and DoD forwarded a report to

³⁵⁸ The Department of Defense is in the process of simplifying its accounting systems. In the short run, this may cause an increase in Antideficiency Act violations. For example, the merged (M) account, in existence since 1956, recently was phased out as required in the National Defense Authorization Act. The M account consisted of obligated but unspent funds, available indefinitely to cover obligations previously incurred. It was used as supplemental funding for programs without congressional control. Now that this fund is no longer available, the Comptroller's office expects to see a temporary increase in Antideficiency Act violations. In the long run, if reforms of the DoD accounting system continue, Antideficiency Act violations should be identified more easily and, as a result, be more preventable.

³⁵⁹ Interview of Russell Rau, Director, Financial Management, DoD IG (Aug. 3, 1994).

Congress in 1989. Because of these delays, records and responsible parties are difficult to locate.³⁶⁰

Even when an investigator locates the records and parties involved, he or she may find it difficult to determine accountability and responsibility because of the complexities and problems inherent in the DoD accounting systems. Mistakes in one appropriation can have a "ripple effect" through other appropriations. For example, in one Army review, an Army appropriation went through ten different accounting systems and crossed different appropriations.

The affected Service or DoD component currently is responsible for investigating potential Antideficiency Act violations. The Services conduct preliminary factfinding inquiries to determine whether a potential violation has occurred. After preliminary inquiries, if appropriate, the commander responsible for the appropriation initiates an investigation by assigning a command investigating officer who is senior to the person potentially responsible for the violation, or a command review team, to conduct an investigation.³⁶¹ According to the DoD IG, personnel assigned to conduct these commander-directed investigations frequently are inexperienced and need extensive periods of time to become familiar with the facts of a case and the financial regulations involved in Antideficiency Act cases.³⁶² Our findings on commander-directed investigations generally support the DoD IG. Those chosen to conduct commander-directed investigations frequently lack training and experience; the complex nature of Antideficiency Act cases would

only exacerbate the lack of investigative experience.

Several policy documents provide guidance to investigators on reporting about Antideficiency Act investigations. The Office of Management and Budget provides detailed guidance concerning the reporting of violations of the Act.³⁶³ DoD Directive 7200.1, *Administrative Control of Appropriations*, sets forth DoD policy on Antideficiency Act violations. The Services, in turn, implement DoD policy through their respective instructions or regulations. The instructions and regulations direct the command investigator to prepare a report that addresses the type of violation, the facts of the case, the responsible parties, and any corrective or disciplinary action taken.³⁶⁴

The investigating officer forwards Antideficiency Act violation reports through the installation commander, the major command commander, and on to the Service Secretary. At each stage, the report receives an administrative and legal review. The Services then send Antideficiency Act reports to DoD, where the DoD Comptroller's Office reviews them. In addition to the Comptroller's review, the DoD General Counsel's Office recently was assigned responsibility for reviewing the reports for adequacy. DoD releases the reports to the Office of Management and Budget, Congress, and the President of the United States. This system of oversight is a time consuming process; if anyone in the chain of command identifies problems, he or she sends the report back for correction, and it must go through review channels again.

³⁶⁰ Antideficiency Act investigations require statements from the parties involved, and due to the time that elapses prior to discovery, many of the parties will have transferred or retired.

³⁶¹ Review teams may consist of an investigating officer, command legal counsel, and a specialist, such as a civil engineer on construction contracts.

³⁶² Interview of Russell Rau, Director, Financial Management, DoD IG (Aug. 3, 1994).

³⁶³ See Office of Management and Budget Circular No. A-34, *Instructions on Budget Execution* (Aug. 26, 1985).

³⁶⁴ No individual has been prosecuted criminally for violating the Antideficiency Act, but individuals have received administrative punishments such as suspension from office, removal from office, and oral and written reprimands.

A. Findings

In recent years, the DoD Comptroller, with help from the DoD IG, has focused attention on Antideficiency Act violations and has increased the Act's visibility in DoD. In 1991, the DoD IG reviewed the investigation and reporting process for Antideficiency Act violations to evaluate the adequacy of policy and procedures. The DoD IG review found that investigative and reporting procedures were cumbersome, untimely, and inadequate. The DoD IG concluded that the review process took too long -- in some cases up to seven years -- and as a result, responsible parties frequently were reassigned, retired, or deceased before an investigation concluded. The review also found the Services do not treat violations seriously. For example, during the course of the review, the IG identified numerous unreported violations. The DoD IG recommended that the DoD Comptroller control and monitor all Antideficiency Act violations, establish a trained cadre of investigators, and revise DoD Directive 7200.1. Since then, the Comptroller has worked closely with the DoD IG to improve the process to ensure investigations are conducted in a timely and complete manner.

The Comptroller's Office currently is revising DoD Directive 7200.1 to implement two major changes. First, the revised directive will require the Services to establish and use a trained cadre of experienced investigators to conduct Antideficiency Act violation investigations rather than using ad hoc commander-directed investigations. The directive will require investigators to be appointed at the major command level from a roster of prequalified investigators, and it will require investigators to report to the appointing official. These changes are expected to add quality and independence to the process, as well as reduce the amount of time it takes for an investigator to get up to speed on the basics of conducting an Antideficiency Act investigation.

The second change in the revised DoD Directive is that the DoD Comptroller will have new authority to establish regulations,

not merely policy, regarding Antideficiency Act cases, such as placing timely reporting requirements on the Services. The DoD Comptroller, not the Services, will issue the implementing instructions to ensure standard procedures.

No one has ever been charged criminally with violating the Antideficiency Act. Both the DoD Comptroller and the DoD IG agree informally that the process of reviewing Antideficiency Act violations would be improved by eliminating criminal sanctions. Antideficiency Act investigations actually are more a review of the accounting process than they are criminal investigations. Administrative reviews can be conducted faster when criminal sanctions are not involved. Individuals fearful of involvement in a case with criminal ramifications may not be forthcoming or may request legal counsel, which can slow down an investigation. Moreover, sufficient laws exist to cover virtually any criminal conduct arising from a violation of the Antideficiency Act.³⁶⁵ Finally, command investigators investigating Antideficiency Act cases are not experienced in criminal investigations. Command investigators have no criminal training and are not knowledgeable in areas such as advisement of rights, evidence handling, and search and seizure. Should criminal sanctions be removed, any cases that suggest fraud against the government or other criminal violations can be referred to criminal investigators.

³⁶⁵ Some of these laws are the prohibitions of false statements (18 U.S.C. §1001), insufficient delivery of money or property for military or naval service (18 U.S.C. §1023), and major fraud against the United States (18 U.S.C. §1031).

B. Recommendations

1. Permit DoD IG and DoD Comptroller to Complete Review Before any Congressional Action

The DoD Comptroller's and DoD IG's examination of the Antideficiency Act violation reporting process is on course. We recommend that those offices continue to address the Antideficiency Act reporting process, quality of investigations, and related accounting problems. Those offices should take account of our recommendations for the conduct of commander-directed investigations³⁶⁶ in their analysis.

2. Propose Removal of Antideficiency Act Criminal Sanctions

DoD should submit to the Office of Management and Budget a legislative proposal to remove criminal sanctions from the Antideficiency Act.

³⁶⁶ See, *supra*, §V.B.3.

XI. Sexual Harassment

As a result of a series of highly publicized cases involving sexual harassment in the Services, Congress, in the Fiscal Year 1995 DoD Authorization Act,³⁶⁷ directed the Board to include in our report recommendations about whether the current Department of Defense organizational structure is adequate to oversee all investigative matters related to unlawful discrimination, sexual harassment, and other misconduct related to the sex of the victim. Congress also directed us to make recommendations on whether additional data collection and reporting procedures are needed to enhance the ability of the Department of Defense to respond to unlawful discrimination, sexual harassment, and other misconduct related to the sex of the victim.

A. Findings

1. Departmental Organizational Structure

The current Department of Defense organizational structure is adequate to oversee investigative matters related to unlawful discrimination, sexual harassment, and other misconduct related to the sex of the victim. This is true in large part because of several recent initiatives by the Secretary of Defense that focus on combating harassment and discrimination. First, the Secretary established the Office of the Deputy Assistant Secretary of Defense (Equal Opportunity) as a focal point for military and civilian equal opportunity programs within the Office of the Assistant Secretary of Defense (Force Management Policy). The Secretary also restructured the Department's Equal Opportunity Council in March 1994.³⁶⁸ The

Deputy Secretary of Defense now chairs the Council and the Under Secretary of Defense (Personnel and Readiness) serves as the vice chair. The Council is composed of the Service Secretaries, the Under Secretaries of Defense, the Director, Administration and Management/Washington Headquarters Services, the Chairman of the Joint Chiefs of Staff, and other members of OSD's senior management.³⁶⁹

The creation of the Office of the Deputy Assistant Secretary of Defense (Equal Opportunity) is especially positive. This office provides a focal point within the Department for the creation and implementation of policy, including investigative policy for discrimination and harassment matters, as well as an oversight mechanism within the Office of the Secretary of Defense. The office primarily is responsible for fulfilling the Assistant Secretary's responsibilities under DoD Directives 1440.1 and 1350.2 and DoD Instruction 1350.3, *Affirmative Action Planning and Assessment Process*. These responsibilities include representing and advising the Secretary on military and civilian equal opportunity matters; providing guidance on developing all DoD programs to ensure equal opportunity for military and civilian personnel; developing, executing, and monitoring the effectiveness of military and civilian equal opportunity policies; ensuring the DoD components fulfill their requirements under DoD Directives 1440.1

Program and DoD Directive 1350.2, The Department of Defense Military Equal Opportunity Program, direct the council to coordinate policy and review the military and civilian equal opportunity programs, monitor the progress of program elements, advise the Secretary of Defense on policies for equal opportunity matters, and assist in developing policy guidance for education and training in equal opportunity and human relations for DoD personnel.

³⁶⁷ National Defense Authorization Act for Fiscal Year 1995, Pub. No. 103-337, 532, 108 Stat. 2663, 2760 (1994).

³⁶⁸ DoD Directive 1440.1, *The Department of Defense Civilian Equal Employment Opportunity*

³⁶⁹ Prior to March 1994, the Assistant Secretary of Defense (Force Management and Personnel) chaired the Defense Equal Opportunity Council and the members were the DoD and Services' Assistant Secretaries (Manpower and Reserve Affairs) and the Office of the Secretary of Defense's Director of Administration and Management.

and 1350.2 and DoD Instruction 1350.3; establishing categories and monitoring goals to be included in the affirmative action programs and annual military equal opportunity assessments of each DoD component; reviewing and acting on (or referring to the appropriate Service) all complaints of discrimination arising under DoD Directives 1440.1 and 1350.2 (including sexual harassment) referred to the Secretary of Defense; ensuring fair, impartial, and timely investigation, resolution, and follow-up of all complaints of discrimination arising under DoD Directives 1440.1 and 1350.2 at all levels of the Department of Defense.

The Deputy Assistant Secretary (Equal Opportunity) also is responsible for providing supervision, direction, and policy guidance for the Defense Equal Opportunity Management Institute (DEOMI) located at Patrick Air Force Base, Florida. DEOMI's mission is to "enhance combat and/or operational readiness through improved leadership by functioning as the DoD center of excellence in all facets of military and civilian equal opportunity and human relations education and training,"³⁷⁰ one of its responsibilities is to provide training for all DoD military and civilian personnel assigned to military equal opportunity positions, and staff officers who directly manage equal opportunity and human relations programs.

In addition to fulfilling the responsibilities outlined above, the Deputy Assistant Secretary of Defense (Equal Opportunity) serves as the executive secretary of the Defense Equal Opportunity Council. As a result of the recent changes to the membership of the Council, this relationship gives the Deputy Assistant Secretary (Equal Opportunity) direct access to the senior leadership of the Department and the Services on a regular basis. We believe the creation of the Office of the Deputy Assistant Secretary of Defense (Equal Opportunity), the realignment of the Defense Equal Opportunity Council, and the relationship that is

established by naming the Under Secretary of Defense (Personnel and Readiness) the Vice Chair and the Deputy Assistant Secretary as the executive secretary of the Council, creates an organizational structure at the highest levels of the Department to combat unlawful discrimination. Further, and more specific to our charter, this organizational structure enables DoD to set and oversee investigative policy on discrimination and harassment matters Department-wide.

The Office of the Deputy Assistant Secretary (Equal Opportunity), however, currently consists only of a permanent staff of eight professional staff members and four administrative staff members. If this office is to administer and oversee effectively the vast number of responsibilities that have been consolidated within it, the size of the staff must be increased significantly. This is especially true if this office is going to provide effective oversight to the Services and DoD components, monitor the implementation of policy and the conduct of investigations of sexual harassment and discrimination, and participate in the conduct of those investigations. Currently, the Under Secretary of Defense (Personnel and Readiness), the Assistant Secretary of Defense (Force Management Policy), and the Deputy Assistant Secretary of Defense (Equal Opportunity) have programmatic oversight responsibilities for policy or investigations concerning sexual harassment and discrimination within DoD. Although the Office of the Deputy Assistant Secretary of Defense (Equal Opportunity) is charged with exercising oversight, it is not staffed adequately to execute fully its responsibilities.

Although the DoD IG has conducted two reviews in the past five years concerning sexual harassment, the DoD IG does not have any specific responsibilities to provide oversight in the area of sexual harassment and discrimination. Our conclusion that the Deputy Assistant Secretary (Equal Opportunity) is responsible for providing oversight in the area of sexual harassment and discrimination and needs an increase in staff to fulfill that role is in no way intended to detract from the DoD IG's oversight role,

³⁷⁰ DoD Directive 1350.2, encl. 4 ¶3.

including periodic reviews of the Deputy Assistant Secretary (Equal Opportunity) operations and policies.

On April 25, 1994, the Deputy Secretary of Defense created the Defense Equal Opportunity Council Task Force on Discrimination and Sexual Harassment to provide recommendations to the Council on how to investigate, report, and combat discrimination more effectively within the Department and the Services. The task force is scheduled to issue its recommendations in December 1994. The organizational structure that now exists within the Department is fully capable of implementing the task force's recommendations.

2. Data Collection

As we state elsewhere in this report, we find a significant deficit in DoD's capability to gather, compile, and analyze at the DoD level the enormous amount of data related to DoD investigations.³⁷¹ Additional data collection and reporting procedures are also needed to enhance the ability of the Department of Defense to respond to unlawful discrimination, sexual harassment, and other misconduct related to the sex of the victim. The only data that DoD compiles at the Office of the Secretary of Defense level relating to sexual harassment or sex discrimination complaints is the total number of complaints filed, the number of complaints substantiated, and the ethnic background/race and sex of the complainant. DoD Instruction 1350.3 requires DoD to provide a written analysis of each Service's data, as well as to prepare a DoD summary. The DoD analysis and summary however, has been compiled in only 2 of the last 12 years. This is not satisfactory.

The Services have differing requirements for the amount and type of data that must be reported regarding complaints of sexual harassment. The Army has a system that maintains data on the results of

investigations,³⁷² actions taken to resolve the complaint,³⁷³ and categories of complaints.³⁷⁴ The Navy and the Marine Corps have a system called the discrimination and sexual harassment (DASH) reporting system. Unlike the Army's system, the Navy's and Marine Corps' system contains very detailed information including a narrative of the incident. The system requires reporting regarding how the formal complaint was made, for example, whether it was by request mast, Article 138 complaint, IG hotline, or some other vehicle. It also requires detailed personal and military information regarding the recipient and alleged offender.³⁷⁵ Reports also include information regarding whether the complaint was substantiated or unsubstantiated and the action taken -- judicial, non-judicial, or administrative. This includes information about the length of sentences and other punishments imposed. The report also records detailed data regarding witnesses.

The Air Force's system for tracking complaints of discrimination and sexual harassment reports the total number of complaints, number of complaints resolved, demographics of the personnel involved, type of discrimination, Air Force specialty code and rank of the complainant and alleged offender, whether the discrimination was substantiated or unsubstantiated, and actions taken by the commander.

³⁷² The results are divided into the categories of substantiated, unsubstantiated - no corroborating evidence, and unsubstantiated - insufficient corroborating evidence.

³⁷³ The categories of actions taken are action pending, no action taken, administrative action, Article 15, court-martial, United States federal court, and other court.

³⁷⁴ These are broken down into categories of quid pro quo - favors, quid pro quo - threats, hostile environment, false complaints, reprisals, and other.

³⁷⁵ This information includes name, social security number, date of birth, gender, address, pay grade, age, military component, and duty status at time of the incident.

³⁷¹ See, *supra*, §IX.A.1.

The information DoD collects at the OSD level regarding sexual harassment and discrimination complaints is inadequate. The data is of little value in assessing trends or sources of discrimination within DoD. The Services, to varying degrees, are collecting much more data than the Department requires. The additional data that the Services collect would be useful to DoD and no doubt would enhance its ability to respond to unlawful discrimination. The problem with compiling the information the Services now collect into a useful Department-wide database is that each of the Services uses a different database and collects different data. DoD needs to adopt a uniform or compatible database and reporting system to track complaints of discrimination and sexual harassment. In short, the problems that arise in the reporting of discrimination and sexual harassment investigations are the same as those discussed in the section of this report dealing with DoD's use of automated data processing to report other Department investigations.

B. Recommendations

1. Increase the Staff of the Deputy Assistant Secretary of Defense (Equal Opportunity)

The staff of the Deputy Assistant Secretary of Defense (Equal Opportunity) must be increased if the office is to fulfill effectively its mission to provide policy guidance and oversight to the DoD in the areas of sexual harassment and discrimination.

2. Create a Complete, Uniform DoD Database

The Department of Defense should create a database to collect data similar to that which the Services compile on discrimination and harassment. The Services' databases should be compatible with the Department's system. This should be part of the broad overhaul and integration of investigative ADP we recommend.

3. Improve Affirmative Action Reporting

The office of the Deputy Assistant Secretary of Defense (Equal Opportunity) should take action to bring order to the reporting of data on sexual harassment and discrimination within the Department and take action to remedy the situation that has resulted in only two affirmative action assessments being analyzed in the last twelve years.

APPENDIX A

CHARTER

Advisory Board on the Investigative Capability of the Department of Defense

(A) This Advisory Board is officially designated the Advisory Board on the Investigative Capability of the Department of Defense.

(B) The Advisory Board will assess the criminal and administrative investigative capability of the Department of Defense, including the Military Departments. It will study the organization, personnel, procedures, and effectiveness of the investigative components. The Board will provide advice and recommendations to the Secretary of Defense based on its findings.

(C) It is anticipated that the Advisory Board will require approximately fourteen months to assess the investigative capability of the Department of Defense and to complete its report. The estimated time schedule is as follows:

November 1993	--	Commission Advisory Board; appoint staff.
November 1993 - July 1994	--	Develop and evaluate facts.
June 1994	--	Issue interim report.
August - September 1994	--	Prepare draft of report.
October 1994	--	Complete final draft of report; circulate for comments.
November 1994	--	Receive comments; finalize report.

December 1994 -- Issue final report.

(D) The Advisory Board is established by direction of the Secretary of Defense at the suggestion of the Congress, see H.R. 5006 Conference Report, National Defense Authorization Act for Fiscal Year 1993, at 742-745 (hereinafter, "Conference Report"; attached as Appendix 1), and the Board will report its advice and recommendations to the Secretary of Defense. The Office of the General Counsel, Department of Defense will provide one lawyer to act as liaison between the Advisory Board and the Department and also to act as the Designated Federal Employee under the Federal Advisory Committee Act, see 5 U.S.C. app. 2, §10(e).

(E) The Advisory Board will have a full-time staff of approximately 15 people drawn from the private sector, the federal civil service, and the military services. If needed, additional administrative or other support will be provided by the Office of the General Counsel, the Director of Administration and Management, and Washington Headquarters Services.

(F) The mandate of the Advisory Board is to assess the capability of the investigative components in the Department of Defense, specifically addressing investigative issues raised by the Conference Report. The components the Board will examine include, but are not limited to, the Department of Defense Office of Inspector General, the Defense Criminal Investigative Service, the Air Force Office of Special Investigations, the Army Criminal Investigation Command, the Navy Criminal Investigative Service, and the Military Departments' Inspectors General. The Board will consider the following issues:

(1) The organization of, and the division of responsibilities and coordination of activities among, the components responsible for investigations of major crime, fraud, and mismanagement, and other administrative investigations throughout the Department; and specifically whether procurement fraud investigations should be consolidated in the Department of Defense Office of Inspector General;

(2) The qualifications for the appointment of investigative agents, and the training and supervision of those agents; and

(3) The procedures to ensure prompt and thorough investigation of allegations concerning operational matters and the performance of persons in the chain of command; the procedures to ensure that investigative components are not subject to improper command influence while also ensuring that such components are responsive to the investigative and inspection needs of the command; and the procedures to ensure that the legal rights of individuals are protected during the course of an investigation and subsequent review.

The objective is to provide advice and recommendations for enhancing the timeliness, thoroughness, efficiency, independence, accuracy, and fairness of Department of Defense investigations.

(G) It is estimated that the total cost of operating the Advisory Board and its staff between November 1993 and December 1994 will be \$1,288,500. This includes the cost of approximately 15 support years.

(1) The Advisory Board will consist of a Chairperson and six members. The Board members will have experience in the fields of law, investigation, prosecution, and civilian and military government management, which will enable them to evaluate the investigative capability of

the Department with an objective and balanced viewpoint. The members will be part-time consultants to the Department of Defense serving not more than 130 days per year. They will not be compensated for their time, but they will be reimbursed for travel and per diem expenses incurred in the course of their duties as Board members. This reimbursement is expected to be approximately \$10,000.

(2) The Advisory Board Staff Director and staff members will be compensated at rates commensurate with federal law, see 5 U.S.C. app. 2, §7(d)(1)(A); 41 C.F.R. §101-6.1033(b), with their experience, and, if applicable, with their current government salaries. Individual arrangements will be made by the General Counsel, Department of Defense, and the Director of Administration and Management, Office of the Secretary of Defense. It is expected that the staff will work approximately 15 support years over the course of the Board's task. The salaries and benefits of the staff are expected to be approximately \$1,044,600.

(3) Staff members will be reimbursed for travel and per diem expenses incurred in the course of their duties as staff members. This reimbursement is expected to be approximately \$40,000.

(4) Other operating expenses, including rent, equipment, and printing costs, are expected to be approximately \$193,900.

(H) It is estimated that the entire Advisory Board will meet 10 times at approximately five-week intervals.

(I) The Advisory Board will terminate no later than December 31, 1994.

(J) This Charter was filed on November 27, 1993.

NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 1993

CONFERENCE REPORT

TO ACCOMPANY

H.R. 5006



OCTOBER 1, 1992.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

LEGISLATIVE PROVISIONS NOT ADOPTED

Conduct and review of investigations in the Department of Defense

The House bill contained a provision (sec. 902) that would require the Secretary of Defense to consolidate in the Defense Criminal Investigative Service the functions of the Army's Criminal Investigation Command, the Navy Investigative Service Command, and the Air Force Office of Special Investigations. The House bill

also contained a provision (sec. 903) that would repeal the statutes (10 U.S.C. 3020 and 8020) that require that the positions of deputies and assistants of the Inspectors General of the Army and Air Force be filled by military officers.

The Senate amendment contained a provision (sec. 911) that would require the Secretary of Defense to establish a Commission on the Management and Review of Department of Defense Investigations.

The House recedes with respect to its provisions and the Senate recedes with respect to its amendment.

The conferees agree that there is a serious problem in the conduct and review of investigations in the Department of Defense. The most recent example is the Navy's flawed inquiries into the incidents related to the 1991 Tailhook Symposium and the ensuing investigations. According to a report issued by the DOD Inspector General on September 21, 1992: "The principals in the Navy investigations erred when they allowed their concern for the Navy as an institution to obscure the need to determine accountability for the misconduct and the failure of leadership that had occurred. In our view, the deficiencies in the investigations were the result of an attempt to limit the exposure of the Navy and senior Navy officials to criticism regarding Tailhook 91."

This is not a novel problem, and it is not confined to investigations into issues involving sexual assault and harassment. Two years ago, the Senate Armed Services Committee took note of the committee's hearings and inquiries into a number of DOD investigations, including the Navy's investigation of the USS *Iowa* explosion (S. Rept. 101-384). The committee expressed serious concern about the conduct of investigations, the review process, and standards and procedures relating to assessment of accountability. The House Armed Services Committee has expressed similar concerns with respect to investigations by each of the military departments into matters such as acquisition management and friendly fire incidents, as well as the *Iowa* and Tailhook matters.

The conferees note that as a general matter, the Department's investigative reports reflect the work of dedicated, skilled professionals. There have been significant matters, however, in which the conduct, management, and review of investigations have been deficient. Too often, these have pertained to allegations involving leadership and management failures.

The process of conducting and reviewing investigations within the Department of Defense involves unique challenges. The activities under investigation may be classified. The investigation may involve ongoing or recently completed operations involving highly sensitive national security concerns. The matters under investigation may pertain to the responsibility and accountability of the chain of command. Under the Uniform Code of Military Justice, offenses such as dereliction of duty, conduct unbecoming an officer, and conduct to the prejudice of good order and discipline can result in criminalizing actions, and failures to act, which in civilian society are treated as noncriminal personnel matters. Military officers in the chain of command, as well as the Service Secretaries, the Secretary of Defense, and the President, have unique powers under the Uniform Code of Military Justice to convene and review courts-

martial. Because of these judicial powers, they must be particularly sensitive in the management and oversight of the Department of Defense, including its investigative functions, to avoid actions that could undermine the court-martial process through the taint of unlawful command influence.

The conferees note that both the House and Senate Armed Services Committees intent to give this matter detailed oversight consideration in the coming year, with a view toward determining the scope of legislation required to address the conduct and review of investigations within DOD.

The conferees also agree that the Secretary of Defense should conduct a prompt and vigorous review of the conduct and review of DOD investigations.

The conferees agree that the Secretary of Defense would benefit from receiving a broad range of advice on this matter, and recommend that the Secretary convene an advisory board comprised of present and past DOD officials who have had extensive experience in the conduct and review of investigations, as well as present and past officials with similar experience in other government agencies.

The Secretary should request such an advisory board to assess current state of affairs within the Department, and to provide him with advice and recommendations, with respect to the following matters: (1) the training and qualifications of investigative personnel; (2) the division of responsibilities among organizations with investigative, audit, and inspection functions within the Department of Defense; (3) the coordination of activities among such organizations; (4) the potential for savings, and for improvements in efficiency and effectiveness, through consolidation of functions or organizations; (5) procedures to ensure that such organizations are capable of, and responsive to, the needs of the unified commands, the defense agencies, and other joint organizations; (6) procedures to ensure prompt and thorough investigation of allegations concerning classified matters, operational matters, and the performance of persons in the chain of command; (7) procedures to ensure that investigative organizations are not subject to improper command influence while also ensuring that such organizations are responsive to the investigative and inspection needs of the chain of command; (8) procedures to ensure that there is timely and thorough coordination between organizations conducting investigations and officials within the chain of command who will be responsible for acting on the results of such investigations; (9) guidance as to the circumstances under which an investigative organization should withhold information about an investigation from the immediate chain of command, and present the information only to superior authorities; (10) procedures for ensuring a timely determination as to whether the investigation should be undertaken by a court of inquiry or other formal administrative board procedure; (11) procedures to ensure that the rights of individuals under the Uniform Code of Military Justice, administrative procedures, and other applicable laws and regulations are protected during the course of an investigation and subsequent review procedures; (12) guidance to ensure that military and civilian officials in the chain of command receive timely instruction and advice on the procedures for under-

taking appropriate management actions during the course of an investigation without interfering with the investigation or engaging in unlawful command influence; and (13) procedures to ensure that investigative materials are organized and presented in a manner that facilitates timely action by reviewing authorities.

Among other issues that such an advisory board could address are: (1) the appropriate chain of command for the Service investigative organizations; (2) whether the head of such organizations should be a military officer or civilian official; (3) if a military officer is so assigned, the rank of such officer; (4) the best command structure for these organizations; (5) whether fraud investigation responsibilities should be transferred to the Defense Criminal Investigative Service; (6) whether criminal investigation responsibilities should be consolidated into a DOD-wide criminal investigation bureau; (7) whether criminal investigations, procurement fraud, counterintelligence, technical services, and protective services should all be performed by the Service investigative organizations or should some or all of these missions be reassigned within the Services or consolidated at the DOD-level; (8) whether a DOD-level centralized technical services organization should be created; (9) whether allegations of homosexuality that do not involve homosexual acts should be investigated by criminal investigative organizations; (10) should special agents have a separate career path or should they be soldiers, sailors, or airmen first and special agents second; (11) should special agents be civilians, officers, or enlisted; (12) the appropriate number of special agents that are necessary to conduct general criminal investigations; and (13) the basic level of administrative support needed for the investigative function.

APPENDIX B

Advisory Board Members' Biographies

Charles F.C. Ruff is the Chairman of the Advisory Board on the Investigative Capability of the Department of Defense and a partner in the Washington, D.C., law firm of Covington & Burling. He graduated from Swarthmore College in 1960 and from Columbia School of Law in 1963. Mr. Ruff served as the U.S. Attorney for the District of Columbia, and the Associate Deputy Attorney General and Acting Deputy Attorney General for the Department of Justice. He also held the positions of Deputy Inspector General for the Department of Health, Education and Welfare, and Chief Inspector for the Drug Enforcement Administration. From 1973 to 1977, Mr. Ruff served as an Assistant Special Prosecutor and Special Prosecutor on the Watergate Special Prosecution Force. He has served as a member of the Board of Governors and as President of the District of Columbia Bar.

Manuel Briskin graduated from Cornell University with a Bachelor of Arts degree and from Cornell Law School. He is a member of the Bar of the State of New York. He served in the U.S. Army for six months and in the Army Reserves for eight years. From April 1960 until his retirement in 1992, Mr. Briskin served as an attorney with various organizations within the Department of Defense. In July 1973, he was appointed the Assistant General Counsel (Fiscal Matters), Department of Defense. In April 1981, Mr. Briskin was assigned the additional duty of counsel to the newly created position of Assistant to the Secretary of Defense (Review and Oversight), which in 1982 became the statutory Inspector General. He held these two positions until his retirement. After retirement, he served as special advisor to the Secretary of the Navy for Investigations from September 1992 to April 1993. Mr. Briskin and his wife are enjoying retirement in Greenville, North Carolina.

Eugene R. Fidell is a partner in the Washington, D.C. law firm of Feldesman, Tucker, Leifer, Fidell & Bank. He graduated in 1965 from Queens College, where he was elected to Phi Beta Kappa, and from Harvard Law School in 1968. He served in the Coast Guard from 1969 to 1972. Mr. Fidell is President of the National Institute of Military Justice, chairman of the Rules Advisory Committee of the United States Court of Appeals for the Armed Forces, and chairman of the board of the National Veterans Legal Services Project. In 1993, he taught military law as a Visiting Lecturer at Yale Law School. A native of New York, Mr. Fidell lives in Bethesda, Maryland with his wife and daughter.

Donald L. Graham is a United States District Judge for the Southern District of Florida. He graduated magna cum laude from the West Virginia State College, Institute, West Virginia, and from Ohio State University, College of Law in 1974. He served as both prosecutor and defense counsel in the Judge Advocate General Corps of the United States Army from 1974 to 1979. After leaving active duty, he served five years as an Assistant U.S. Attorney and seven years as a partner in a Miami, Florida law firm. Judge Graham is the recipient of the Department of Justice Special Achievement Award and the Certificate of Merit from the Dade County Bar Association. He was the Chairman of the Military Law Committee and past President and member of the Executive Board of the Federal Bar Association, South Florida Chapter.

Albert C. Harvey is a partner in the Memphis, Tennessee law firm of Thomason, Hendrix, Harvey, Johnson & Mitchell. He graduated from the University of Tennessee in 1961 and the University of Tennessee Law School, where he was awarded the Order of the Coif, in 1967. He served on active duty with the U.S. Marine Corps and is currently

a Major General in the U.S. Marine Corps Reserve. Mr. Harvey is a member of the Board of Governors and House of Delegates for the American Bar Association, a member of the Board of Governors for the Tennessee Bar Association, and a past-President of the Memphis Bar Association. He also is an instructor in Medical and Dental Jurisprudence at the University of Tennessee-Memphis. Mr. Harvey currently resides in Memphis, Tennessee with his wife, Nancy.

Judith A. Miller is the General Counsel for the Department of Defense. She served as an active member of the Advisory Board until President Clinton nominated her for that position in June 1994. Upon her nomination, Ms. Miller became an inactive member, and upon her confirmation in September 1994, she resigned from the Board. Prior to joining DoD, Ms. Miller was a partner in the law firm of Williams & Connolly, specializing in complex civil, criminal, and defense-contractor related litigation. She was a member of the Civil Justice Reform Act Advisory Group for the United States District Court for the District of Columbia, and has spoken frequently on civil, criminal, and appellate practice issues. She clerked for Judge Harold Leventhal, U.S. Court of Appeals for the D.C. Circuit, and Associate Justice Potter Stewart, Supreme Court of the United States. She was an assistant to the Secretary and Deputy Secretary of Defense in the Office of the Special Assistant from 1977 to 1979.

James A. Ring is the Director of Investigative Services for the Boston law firm of Choate, Hall & Stewart. He served as a special agent with the Federal Bureau of Investigation from 1965 to 1983, specializing in political corruption and organized crime investigations. From 1983 to 1990, Mr. Ring was a Supervisory Special Agent for organized crime investigations in Boston, Massachusetts. In 1991, he was presented the U.S. Attorney General's Award for Excellence in Law Enforcement by the U.S. Attorney General and Director of the FBI for his long-term accomplishments in organized crime investigations. Since retirement from the FBI, Mr. Ring has been a commentator on television, radio, and print media on

organized crime matters. He is married to Merita A. Hopkins, a former FBI agent and prosecutor, who is currently in private practice in Boston.

APPENDIX C

Hearings Held by the Advisory Board

January 14, 1994

Genesis and Charter of the Advisory Board
Introduction of Advisory Board members
and staff
DoD Ethics Briefing
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

February 12, 1994

Issue Briefings from U.S. Army Criminal
Investigation Command, U.S. Army
Military Intelligence, Defense Criminal
Investigative Service, Naval Criminal
Investigative Service, and Air Force
Office of Special Investigations
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

March 17 and 18, 1994

Issue Briefings from the Department of
Defense Assistant Inspector General,
Departmental Inquiries, Department of
Defense Assistant Inspector General,
Criminal Investigative Policy and
Oversight, the Army Inspector General,
the Naval Inspector General, the Marine
Corps Inspector General, and the Air
Force Inspector General
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

April 8, 1994

Classified Department of Defense
Counterintelligence Panel
Issue Briefing by the Deputy Department of
Defense Inspector General
Department of Justice Panel Discussion
Briefing on the UCMJ, Article 15
Discussion of site visits to Fort Bragg,
Pope Air Force Base, and Camp Lejeune,
North Carolina
Presentation of Organizational Models
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

May 13, 1994

Briefings from the Department of Defense
Comptroller's Office
Discussion of interviews with Defense
Criminal Investigative Organizations and
Federal Bureau of Investigation
procurement fraud agents in New
England
Discussion of interviews with Defense
Criminal Investigative Organizations
agents, military commanders, military
judge advocates, military police officials,
Federal Bureau of Investigation agents,
Assistant U.S. Attorneys, and local law
enforcement officials in California and
Virginia
Discussion of visits to the Federal Law
Enforcement Training Center, the U.S.
Army Military Police School, and the Air
Force Special Investigations Academy
General discussion of issues before the
Advisory Board
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

June 9, 1994

General discussion of issues before the
Advisory Board
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

July 8, 1994

Testimony by advocacy groups
Testimony by a representative from the
Department of Defense Comptroller's
Office
General discussion of issues before the
Advisory Board
The Reserve Officer's Association Building
One Constitution Avenue, N.E.
Washington, D.C. 20002

August 18 and 19, 1994

Discussion of sexual harassment
investigations and Antideficiency Act
investigations

Discussion of final Advisory Board report
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

September 9, 1994

Testimony by DoD Equal Opportunity
personnel

General discussion of issues before the
Advisory Board

Final Advisory Board report and substance
of recommendations
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

October 7, 1994

Final Advisory Board report and substance
of recommendations
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

November 9, 1994

Discussion of DoD and Service responses
to Advisory Board draft report
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

December 9, 1994

Final Administrative Matters
1700 North Moore Street, Suite 1425
Arlington, Virginia 22209

APPENDIX D

INDIVIDUALS CONTACTED

Department of Defense

COL David J. Anthony
Regina Bacon
Norma Bailey-Muller
Irvin L. Becker
Thomas J. Bonnar
David Botsko
Susan D. Boyd
Samuel Brick
COL John T. Burton
Col David A. Burt II
Yvette Cavanaugh
Jane Charters
Daniel W. Christman
LTG James R. Clapper, Jr.
Dale H. Clark
Maj Steve Cogswell
Albert V. Conte
David O. Cooke
Fred N. Cosby
Bob Cowles
Andrew H. Deranger
Matt T. Donlon
John F. Donnelly
Edwin Dorn
Bruce Drucker
John T. Elliff
Larry B. Elliott
L. Walter Freeman
William Goering
Adrianne Goins
Col William T. Gormley
John Graves
D. Hambrick
John J. Hamre
Claiborne D. Houghton Jr.
LTC Dave Hause
Lori Hendricks
Robert L. Hengstebeck
Philip M. Hitch
Larry Hollingsworth
Jack Hurley
John Jester
John Keenan
Richard Keevey
CDR Edward Kilbane

Capt Gerald J. Kirkpatrick
Odious O. Knight
Kenneth A. Kolben
Bruce Kovens
Christopher Lamb
COL Miles Lehmann
MG John A. Leide
Joel L. Leson
Donald Mancuso
Steve Marsh
Mary Massaro
Bill Matta
John F. Mazzuchi
Brian R. McAndrew
Kelly McCracken
Capt Paul T. McDavid
Lynn Moore
William D. Moore
Jacqueline E. Mosley
Cathy Moss
Col Brian P. Mullady
Thomas S. Myerchin
Peter R. Nelson
David W. Ogden
LTG Malcolm R. O'Neill
Ray W. Pollari
Stephen W. Preston
Richard T. Race
Russell Rau
Roy Reed
Russ Richards
Jordan E. Rizer
Arthur L. Robinson
Charles Rowdon
Tina Sanders
Fran Scalfani
Ken Schreier
John Schwartz
Ynette Shelkin
Michael R. Shiohama
Col Larry Shockley
John P. Springett
Charles J. Stahl
John L. Stremple
Lorinda Stringer
Michael B. Suessmann
Col Robert P. Summers

Robert Thompson
William J. Tomlinson
Nelson Toye
James Trost
William M. Turner
Derek J. Vander Schaaf
COL Paul Vasallo
CAPT Glen Wagner
Stanley Wecker
Drew Winneberger
Karen Yanello
Carl Zielke
Edward J. Zybul, Jr.
9 Anonymous DCIS Agents

Department of the Army

COL William C. Angerman
COL John P. Abizaïd
SFC Jimmy L. Alexander
CW4 Ana L. Alicea-Diaz
David G. Allen
COL John D. Altenburg, Jr.
COL Ronnie Alton
George Anderson
Richard Aujgeri
Lynda Avriett
COL S. A. Bain, Jr.
MAJ Craig D. Barta
Robert Bartel
Lawrence M. Baskir
LTC Daniel J. Baur
MAJ Gen Peter T. Berry
LTC Teddy D. Bitner
MAJ Michael Bisacre
LTC James H. Bonnes
LTC Timothy J. Braden
LTC Rexford T. Bragaw III
MAJ Stephen W. Bross
Mike Buck
Ronald Burke
CW4 Robert Burns
LTC Ronald R. Burton
MAJ Enedina Cerase
CAPT David Christy
COL Nicholas J. Ciccarello
Stanley Citron
Paul W. Cobb
MAJ Jeffrey G. Colley
John Conklin
CW2 Donald W. Conner, Jr.
Allan M. Craig
MAJ Susan Cross

BG Thomas R. Cuthbert
Edwin De Jesus
COL Lucious Delk
LTC Mary Ann Dillon
COL Daniel A. Doherty
LTG Charles E. Dominy
LTC Christopher D. Feeney
CW4 Roger J. Floyt
LTC Edward W. France, III
SFC Robert Fraser
COL Lee Gibson
CAPT Kathryn Giza
COL John M. Goebbler
LT Dan Goland
LTG Ronald H. Griffith
SSG Angela Grooms
William F. Gunter
COL William R. Hagan
LTC Stephen Haney
COL Robert A. Harding
Wilbur L. Hardy
SSG Rich Harne
LTC Jeanette M. Harris
COL Marshall L. Helena
MAJ Mark Henderson
Kathy Hill
Merton K. Hill
Richard Hinson
MAJ James Hohensee
COL J. Thomas Holloman
CW3 Constance Y. Huff
SFC Charles Humphrey
CW4 Lawrence E. Ingold
SFC Jackson
LTC W. Gary Jewell
COL Jerry W. Jones
CW5 Raymond Kangas
LTC Michael Y. Kenneally
COL Daniel E. Kersey
CW4 Charles Kessler
Daniel King
LT Josh King
COL Thomas Kullman
Bryon Line
Steven Lowhurst
LTC Anthony T. Lupo
LTC Fred S. Lydick
CW4 Robert E. Lyons
COL Charles Macpherson
Tom Madden
CW4 John T. Maguire
MAJ Gerald Manley
CW2 Gerald R. Marker
LTC Robert H. McBride

Mervin G. McConnel
 CW3 David McCorkle
 SSG Joey McGee
 COL Thomas J. McHugh
 LTC Eugene R. Milhizer
 MAJ Albert H. Minnon
 LTC Francis I. Moulin
 Coy Mundy
 CW4 Wayne T. Nardolillo
 COL Howard E. O'Brien
 CW2 Stephen Okolovitch
 COL James P. O'Neal
 Dave Owens
 CPT Michael Parker
 Richard Patrick
 CW2 David Pauly
 Stan Payne
 COL William E. Peterson
 LTG Leo J. Pigaty
 MAJ James Pohl
 Jeffery Porter
 LTC Edward M. Proskie
 LTC Mark L. Reagan
 William Reibel
 COL James H. Reisenweber
 CPT Robert Reynolds
 Frank Ribich, Jr.
 Joseph M. Rothberg
 LTC Rudy Segaar
 LTG Henry H. Shelton
 Claudia A. Smith
 Joseph Smith
 LTC Merritt Smith
 Ron Smith
 COL Stephen D. Smith
 Ted Snediker
 SFC Russell Strand
 MAJ James Stuteville
 COL Michael L. Sullivan
 LTC Bill Taylor
 Thomas W. Taylor
 LT Elisa Tharps
 Robert J. Thayer
 Genevieve I. Thomas
 COL Thomas R. Turner II
 LTC Thomas G. Turning
 Wayne Tyne
 Joseph Veridy
 COL Jimmy L. Walters
 Tom Weems
 CW4 Dennis West
 Togo D. West Jr.
 SSG Eddie J. Williams
 Robin Wirtz

LTC Dennis Woeste
 COL Normund Wong
 CAPT Steven J. Woods
 Chris Zimmerman
 9 Anonymous USACIDC Agents
 10 Anonymous MIAgents

Department of the Navy

Lance Arnold
 Bernadine Ayer
 Jeff Baker
 Donald A. Ball
 Albert Banks
 Ron W. Benefield
 VADM David Bennett
 CDR William Bernacki
 Louis J. Beyer
 Beverly Bilger
 RADM Donald V. Boecker
 David L. Brant
 CAPT Stanley W. Bryant
 LT Gary Caldwell
 LCDR Elizabeth Carey
 CDR Philip D. Cave
 Stephen Corbin
 LT Paula Coughlin
 John H. Dalton
 RADM George W. Davis
 PO1 Michael Dempsey
 Timothy L. Donnelly
 CAPT Larry S. Doyle
 Milton R. Dutko
 CAPT C.E. Ellis
 CAPT Thomas H. Etter
 Joseph A. Fahey
 John M. Farenish
 Robert J. Finan
 LCDR Walter F. Fitzpatrick
 LCDR Tom Gallagher
 Pete Garza
 Debbie Gasse
 Michael G. Gelles
 Mary Goodman
 Donna C. Green
 William Griffin
 LCDR William C. Harmon
 William S. Heath
 Joseph J. Hefferon
 Meri Hefferon
 CDR Judith Holden
 RADM Frances K. Holian
 Steven S. Honigman

Charles W. Howgate
 Mary Jablonski
 Richard Jackson
 Michael B. Jones
 Carlton A. King
 Pat Kotzen
 LT Wally Latall
 LT Curtis O. Massey
 CAPT Gregory L. Maxwell
 Dale G. McCullers
 John F. McEleny
 CAPT James McFillin
 CDR James E. McPherson
 Victor H. McPherson
 LCDR Chip Meade
 Theodore A. Miller
 Gregory Mohr
 LCDR Chris Morin
 Richard Moye
 Gerald Nance
 Roy D. Nedrow
 James O'Hara
 Linda B. Oliver
 Margaret Olsen
 CAPT John O'Neill
 Frederick Pang
 LT Brent Pope
 CAPT Laurie S. Powell
 Harlan Rossman
 CDR Frank V. Russo
 CAPT Lindell G. Rutherford
 CAPT Richard B. Schiff
 Franz Schwarm
 Gregory A. Scovel
 Pete Segersten
 CAPT Ted Sexton
 RADM Edward D. Sheaffer, Jr.
 Dan Simas
 Ernest A. Simon
 Richard Skelton
 CDR Tom Taylor
 Patricia Thomas-Cross
 Doug Tomaso
 Jose Vega
 CAPT Clyde Villemez
 Walter Wallmark
 David E. Watson
 Ariane Whittemore
 MACS George Willis
 CAPT Donald Wright
 Alexander P. Zane
 9 Anonymous NCIS Agents

United States Marine Corps

Capt P. Shawn Becker
 LtCol Russell Brooks
 LtCol Dandridge S. Carter
 LtGen George R. Christmas
 Col Dennis E. Clancey
 Col Elijah Dane Clark
 Maj Robert B. Cronin
 LtCol Glenn K. Cunningham
 LtCol Billy D. Dunsmore
 Col Jan M. Durham
 Col Daniel R. Foley
 GySgt Balvin Garcia
 Col Theodore G. Hess
 Capt Tommy Hester
 Col Robert E. Hilton
 LtCol Carlos Hollifield
 Col Joseph R. Holzbauer
 Col Richard A. Huck
 Maj Brian E. Hulbert
 LtCol Robert A. Lackner
 Maj Thomas J. Langlois
 LtCol Charles Laughinghouse
 LtCol Robert W. Leas
 Sgt Maj Larry L. Lentzer
 LtCol Edward J. Lesnowicz
 Col Charles M. Lohman
 Col Michael E. Lowe
 Capt Hans Miller
 Maj Ralph F. Miller
 CWO-4 Kenneth Morris
 Col Wayne V. Morris
 LtCol Richard E. Motl
 Col Ralph E. Percy III
 MajGen R. L. Phillips
 CWO-3 Robert A. Russell II
 Maj Walter C. Simmons
 Maj Scott Street
 CWO-3 C.B. Swanson
 Col Dale S. Town
 LtCol Richard T. Tryon
 MgySgt Lawrence M. Wiederwax
 MajGen Charles E. Wilhelm
 Col Jim Williams
 LtCol John D. Winterstein
 Capt John R. Woodworth
 Col Joseph C. Yanessa

Department of the Air Force

Frank Albright
Lt Gen Marcus Anderson
Capt Scott C. Austin
Col Charles Azukas
Col Richard T. Banholzer
Frank H. Batten, Jr.
David G. Beavers
Richard C. Beltz
John M. Brantly
Maj Deborah Brown
Lt Col Stephen V. Brown
Mark P. Burwell
Gilbert F. Casellas
Janet C. Cook
Lt Col William H. Cox
Joseph Cunningham
Timothy F. Deerr
CMSgt James R. Desantis
SSgt Peter J. Duca
SSgt Valentine Eucare
Brig Gen Bobby O. Floyd
MSG Jeffery W. Fowler
Col Peter Garry
Col Robert E. Giovagnoni
Raymond E. Gressley
George D. Hagy
Lt Col John S. Heumann
Brig Gen Robert A. Hoffmann
Col Jeffery T. Infelise
Maj George E. Jordan
Lt Col Karl A. Kaszuba
Lt Col Ronald J. Kennedy
Col William Kraus
Col Robert L. Kuster
Col G. Michael Lane
Gen John M. Loh
Col Stephen R. Lorenz
Maj Gen Bruce Lotzbire
Col Robert P. Lukens
Florence Madden
Col J. Jeremiah Mahoney
Col Paul Malandrino
Brig Gen Stephen C. Mannell
Brig Gen Gregory S. Martin
Lewis R. Martin
Charles P. McDowell
Stephen F. Minger
Elman B. Myers IV
Col David L. Oles
Brig Gen Michael J. Peters
Maj Tom Ragland
Randall J. Redlinger

Col Robert E. Reed
Col Robert E. Reynolds
Maj Stephen W. Robinette
Lt Col Joseph Rogan
Col Mark S. Roman
Annie Savage
Maj Candy Schaeffer
Lt Col David Shutler
Col Stanley Sieg
Lt Col Nancy A. Slicner
Maj Craig A. Smith
Lt Col J. D. Spiller
Lt Col Frank J. Spinner
Capt Barbara Stroschein
Col Francis X. Taylor
Capt Don Tenhagen
Douglas D. Thomas
Lt Gen Dale Thompson
Col Charles M. Thrash
Cleve V. Tinsley III
Charles R. Torpy
Maj Dean O. Tow
Capt Tim Tysdale
Jeffrey A. Vance
Lt Col Robert Vaughn
Alva L. Veach II
Robert Walker
Sheila E. Widnall
9 Anonymous AFOSI Agents

Department of Justice

Steve Altman
Demetrius Bivens
Joyce Branda
Bruce Carter
Susan Chainer
Barbara Corprew
Bryan D. Daly
Honna Dembitshy
John Dion
John E. Douglas
Miriam Duke
Ron Eddins
Jeffrey C. Eglash
Michael W. Emmick
Johnny Frank
Richard J. Hankinson
John Hanley
Nicholas Harbist
Eric Havian
Jane Hein
Kurt Hermanns

Dane C. Hill
 David Howard
 Gordon Jones
 James Kalletta
 Christopher Kerr
 John Klein
 Alan Kleinburd
 Ihor Kotlarchuk
 Charles I. Kreindler
 Calvin Kurimai
 Daniel J. Larkin
 Thomas M. Martens
 James Martin
 John L. Martin
 Gregory E. Meacham
 James Metcalfe
 George Newhouse
 Gerald Orndorff
 Richard Poole
 Michael Rich
 Howard Shapiro
 Frederick A. Stremmel
 Ted Suchan
 Donald T. Sullivan, Jr.
 James A. Swanda
 Vincent Terlep, Jr.
 Richard B. Wade
 Jonathan P. Welch
 Gary White

Congress

Randy Climpson
 Richard L. Collins
 Richard D. DeBobs
 Donald Deline
 Congressman Norm Dicks
 Andrew S. Effron
 Muriel Gibson
 Donald Goldberg
 Senator Slade Gorton
 David Lewis
 Don Mitchell
 David H. Morrison
 Senator Patty Murray
 Warren Nelson
 Julie Pacquing
 Britt L. Snider
 Betty Ann Soiefer
 Barbara Strack
 James Schweiter
 Michael O. Thomas
 James C. Turner

Carin Wagner
 Greg Walters

Others

Larry Allen
 Joseph M. Battaglini
 Michelle M. Benecke
 Brig Gen (USAF, Ret) Richard S. Beyea, Jr.
 David G. Boutt
 Danielle Brian
 Charles E. Brisbin
 June Gibbs Brown
 Kathleen Buck
 Frank C. Carlucci
 Rich Carnes
 Pat Carr
 Robert P. Cesca
 David Collins
 Mario G. Conte
 James M. Cottos
 Joseph P. Covington
 Susan J. Crawford
 MG (USA, Ret) Eugene R. Cromartie
 Louis D'Amico
 Peggy Dixon
 Carolyn Dock
 Lt William Donnelly
 John C. Dooher
 Lt Gen (USAF, Ret) Eugene Fischer
 William J. Fleshman, Jr.
 David Foster
 Glorene Franco
 H. Lawrence Garrett III
 Capt (USN, Ret) Patricia M. Gbrmley
 William J. Haynes II
 SGT David S. Heering
 Lt Rich Henderson
 Dan Hyatt
 Dwight Ink
 John M. Kaheny
 Capt Dan Kalleta
 Capt Craig K. Kessler
 Rod Lane III
 James Lanier
 John Lehman
 Cuauhtemoc Leyva
 Kenneth R. Loudermilk
 William B. Lytton
 John W. Magaw
 John O. Marsh Jr
 J. Brian McKee
 R. J. Miller

Capt Kenneth E. Moller
Linda J. Novak
Suzanne Nyland
Robert W. Ogren
Sean O'Keefe
John Osborne
C. Dixon Osburn
Jack Pressler
Nicholas A. Procaccini
Donald Rice
Charles F. Rinkevich
Anthony Robinson
Henry S. Ruth, Jr.
A. Hugh Scott
Joseph Sherrick
Maj (USMC, Ret) Frank Short
Nancy Stagg
Dennis Staton
MG (USA, Ret) William K. Suter
Jerry Sullivan
Robert S. Terjesen
Bert G. Truxel
Fran Uteg
Caspar W. Weinberger
John W. West
John D. White
RADM (USN, Ret) Duvall M. Williams
Allen Yuspeh

APPENDIX E

DCIO and Army MI Workforce Statistics

COMMAND AND SUPERVISORY POSITIONS

	DCIS	USACIDC	NCIS	AFOSI
SAC/RAC/ASAC/ CMDR POSITIONS	49	104	146	124
MINORITY	4	11	15	12
FEMALE	5	9	4	16
REGIONAL/CMDR HQ DIRECTOR	7	23	7	17
MINORITY	0	2	0	1
FEMALE	1	1	0	0
GENERAL/COLONEL POSITIONS	0	8	1	22
MINORITY	0	1	0	2
FEMALE	0	1	0	0
SES POSITIONS	3	0	5	1
MINORITY	0	0	0	0
FEMALE	0	0	0	0
GM-15 POSITIONS	12	1	25	7
MINORITY	1	0	2	1
FEMALE	0	0	0	0
GM-14 POSITIONS	60	3	39	29
MINORITY	4	0	3	3
FEMALE	6	0	5	1

RANK/GRADE STRUCTURE

RANK/ GRADE	DCIS	USACIDC	NCIS	AFOSI	MI ¹
O-8	-	1	-	-	-
O-7	-	-	-	1	-
O-6	-	4	-	21	10
O-5	-	15	-	25	44
O-4	-	9	2	80	67
O-3	-	7	11	220	184
O-2	-	1	2	36	4 ²
O-1	-	0	-	43	-
TOTAL	0	37	15	426	309
W-5	-	5	-	-	1
W-4	-	55	-	-	26
W-3	-	122	1	-	49
W-2	-	176	-	-	205
W-1	-	60	2	-	38
TOTAL	0	418	3	0 ³	319
E-9	-	4	-	8	-
E-8	-	17	-	22	30
E-7	-	95	3	208	288
E-6	-	108	13	325	443
E-5	-	115	5	228	381
E-4	-	5	-	30	237
E-3	-	0	-	0	66
E-2	-	0	-	0	78
E-1	-	0	-	0	94
TOTAL	0	344	21	821	1617
SES	3	0	5	1	- ⁴
GS-15	12	1	25	7	7
GS-14	60	3	39	26	29

¹ All Army MI personnel figures include personnel conducting other MI duties besides counterintelligence operations and investigations.

² Army MI provided combined figures for O-1 and O-2 ranks.

³ The USAF has no Warrant Officer rank.

⁴ Army MI civilians are all Series 132 Intelligence Specialist, not 1811 Criminal Investigators as in all the other DCIOs.

RANK/ GRADE	DCIS	USACIDC	NCIS	AFOSI	MI
GS-13	176	30	311	94	123
GS-12	64	28	551	84	34
GS-11	12	20	49	14	15
GS-9	14	14	8	2	8
GS-8	0	0	0	0	0
GS-7	22	0	4	4	18
GS-6	0	0	0	0	10
GS-5	22	0	0	0	14
TOTAL	385	96	992	232	258
GRAND TOTAL	385	895	1031	1479	2503

GENDER/RACE PROFILE

	OFFICER		WARRANT OFFICER		CIVILIAN		ENLISTED	
	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
DCIS								
CAUC	-	-	-	-	268(75.3%)	51 (13.4%)	-	-
BLACK	-	-	-	-	18 (4.7%)	6 (1.6%)	-	-
HISP	-	-	-	-	5 (1.3%)	3 (.8%)	-	-
OTHER	-	-	-	-	9 (2.4%)	2 (.5%)	-	-
TOTAL	-	-	-	-	328(83.7%)	62 (16.3%)	-	-
USACIDC								
CAUC	30 (79%)	3 (7.9%)	319(79.3%)	28 (7%)	70 (87.5%)	4 (5%)	313(76.7%)	31 (7.6%)
BLACK	4 (10.5%)	-	28 (7%)	4 (1%)	5 (6.25%)	-	26 (6.4%)	9 (2.2%)
HISP	1 (2.6%)	-	10 (2.5%)	1 (.25%)	-	-	12 (3%)	-
OTHER	-	-	11 (3%)	1 (.25%)	1 (1.25%)	-	16 (4%)	1 (.2%)
TOTAL	35 (92.1%)	3 (7.9%)	368(91.5%)	34 (8.5%)	76 (95%)	4 (5%)	367 (90%)	41 (10%)
NCIS								
CAUC	9 (69.2%)	4 (30.8%)	3 (100%)	-	750(75.6%)	123(12.4%)	17 (85%)	-
BLACK	-	-	-	-	43 (4.3%)	14 (1.4%)	-	-
HISP	-	-	-	-	24 (2.4%)	7 (.7%)	3 (15%)	-
OTHER	-	-	-	-	25 (2.5%)	6 (.6%)	-	-
TOTAL	9 (69.2%)	4 (30.8%)	3 (100%)	0	842(84.8%)	150 (15.1%)	20 (100%)	0
AFOSI								
CAUC	346(81.4%)	36 (8.5%)	-	-	202(83.5%)	17 (7%)	623 (80%)	33 (4.3%)
BLACK	15 (3.5%)	6 (1.4%)	-	-	9 (3.7%)	1 (.4%)	61 (8%)	8 (1%)
HISP	11 (2.6%)	1 (.2%)	-	-	5 (2%)	-	39 (5%)	2 (.3%)
OTHER	8 (2%)	2 (.5%)	-	-	7 (2.9%)	1 (.4%)	9 (1%)	3 (.4%)
TOTAL	380(89.4%)	45 (10.6%)	-	-	223(92.2%)	19 (7.8%)	732 (94%)	46 (6%)

	OFFICER		WARRANT OFFICER		CIVILIAN		ENLISTED	
	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE	MALE	FEMALE
MI⁵	250 (81%)	59 (19%)	288 (90%)	31 (10%)	180 (70%)	78 (30%)	1348 (83%)	269 (17%)
CAUC	249 (80.5%)		250 (78.4%)		230 (89.1%)		1360 (84.1%)	
BLACK	37 (12%)		34 (10.6%)		17 (6.6%)		172 (10.6%)	
HISP	6 (2%)		20 (6.3%)		6 (2.3%)		UNKNOWN	
OTHER	17 (5.5%)		15 (4.7%)		5 (1.9%)		85 (5.3%)	

⁵ Army MI was unable to provide gender and race information in the same format as the other DCIOs.

GENDER/RACE PROFILE

	RESERVISTS	
	MALE	FEMALE
USACIDC		
CAUC	307 (78.3%)	21 (5.3%)
BLACK	17 (4.3%)	3 (.8%)
HISPANIC	33 (8.4%)	0
OTHER	11 (2.8%)	0
TOTAL	368 (93.9%)	24 (6.1%)
NCIS		
CAUC	217 (88.2%)	21 (8.5%)
BLACK	2 (.8%)	1 (.4%)
HISPANIC	5 (2%)	0
OTHER	0	0
TOTAL	224 (91%)	22 (8.9%)
AFOSI		
CAUC	297 (82.7%)	30 (8.3%)
BLACK	15 (4.2%)	7 (2%)
HISPANIC	0	1 (.3%)
OTHER	8 (2.2%)	1 (.3%)
TOTAL	320 (89.1%)	39 (10.9%)
MI⁶	904 (85%)	162 (15%)
CAUC	934 (87.6%)	
BLACK	65 (6.1%)	
OTHER	67 (6.3%)	

⁶ Army MI was unable to provide gender and race information in the same format as the other DCIO's.

INVESTIGATOR EDUCATION LEVELS⁷

	ACTIVE DUTY	CIVILIANS	RESERVISTS
DCIS⁸			
< BACHELOR'S	-	0	-
BACHELOR'S	-	77%	-
MASTER'S	-	19%	-
DOCTORATE/OTHER	-	4%	-
USACIDC			
HIGH SCHOOL	11.3%	11.25%	0
ASSOCIATE'S	45.4%	27.50%	21.7%
BACHELOR'S	32.4%	43.75%	71.5%
MASTER'S	10.8%	16.25%	6.2%
DOCTORATE/OTHER	.1%	1.25%	.6%
NCIS⁹			
BACHELOR'S	-	86.2%	-
MASTER'S	-	13%	-
DOCTORATE/OTHER	-	.8%	-
AFOSI			
HIGH SCHOOL	37.1%	33%	17%
ASSOCIATE'S	15.5%	9.5%	10%
BACHELOR'S	27.1%	35%	39.7%
MASTER'S	19.8%	21.8%	28.2%
DOCTORATE/OTHER	.4%	.8%	5.1%
MI			
< HIGH SCHOOL	.14%	- ¹⁰	.7%
HIGH SCHOOL	58.8%	-	58.2%
ASSOCIATE'S	10%	-	UNKNOWN
BACHELOR'S	25.8%	-	28.3%
MASTER'S	4.8%	-	10.2%
DOCTORATE/OTHER	.46%	-	2.6%

⁷ Highest level of civilian educational achievement.

⁸ DCIS has no active duty or reserve personnel assigned.

⁹ NCIS is unable to retrieve this information on its active duty and reserve personnel.

¹⁰ Army MI is unable to provide this information.

TOTAL LAW ENFORCEMENT EXPERIENCE

EXPERIENCE	DCIS	USACIDC	NCIS	AFOSI	MI ¹¹
0-3 YEARS	5%	3%	3%	27%	-
4-6 YEARS	10%	8%	21%	24%	-
7-9 YEARS	9%	13%	22%	22%	-
10-12 YEARS	14%	22%	17%	12%	-
13-15 YEARS	14%	3%	11%	10%	-
16-18 YEARS	11%	9%	8%	2%	-
19+ YEARS	36%	42%	18%	3%	-
				CIVILIANS	
< 2 YEARS				3%	
2-5 YEARS				14%	
> 5 YEARS				83%	

PRIOR MILITARY EXPERIENCE OF CIVILIANS

	DCIS	USACIDC	NCIS	AFOSI	MI ¹²
US ARMY	22%	-	13%	-	-
US NAVY	5%	-	17%	-	-
USAF	13%	-	3.5%	-	-
USMC	6%	-	13%	-	-
COAST GUARD	2%	-	.5%	-	-
NAT'L GUARD	2%	-	0	-	-
TOTAL	50%	82.5% ¹³	47%	84% ¹⁴	-

¹¹ Army MI is unable to provide this information.

¹² Army MI is unable to track this information.

¹³ USACIDC is unable to track the specific military service in which their civilians have experience.

¹⁴ AFOSI is unable to track the specific military service in which their civilians have experience.

APPENDIX F

RECOMMENDATIONS

I. Oversight and Policy

1. Appoint an Inspector General Immediately (p. 14)
2. Establish the Secretary's Board on Investigations (p. 14)

II. Investigation of Procurement Fraud

3. Consolidate Procurement Fraud Investigations Under the DoD IG (p. 22)
4. Create a Better System for Rewarding Agents (p. 29)
5. Emphasize Non-Criminal Remedies (p. 29)

III. Investigation of General Crime

6. Do Not Consolidate the General Crimes Missions of the DCIOs (p. 54)
7. MCIOs Should Investigate Service-Related General Crimes (p. 56)
8. The Department of Defense Must Provide Resources for USACIDC's Protective Services Mission (p. 56)
9. NCIS Should Adopt Measures to Increase Responsiveness (p. 56)
 - a. Establish Guidance for Informing Commanders of Investigations
 - b. Increase the Number of Military Agents
 - c. Increase Focus on General Crimes
10. Develop Guidance for Delayed Reporting to Commanders (p. 57)
11. The Navy Should Examine the Need for Restrictions on Use of Informants (p. 57)
12. Adopt Added Protections for Independence in Criminal Investigations of Senior Officials (p. 57)
13. Take Disciplinary Action Against Agents who Infringe Subjects' Rights (p. 57)
14. Examine the Use of Defense Investigators (p. 58)
15. Change the DCII System (p. 58)
 - a. Establish Procedures for Information Related to Open Investigations
 - b. Establish Prompt, Effective Procedures for Individuals to Appeal Titling and Indexing Decisions

c. Limit Online Access to Criminal Investigation Indices

d. Establish a Preponderance of the Evidence Standard for Other than Law Enforcement or National Security Purposes

16. Train All Police Investigators (p. 59)

17. Train Police Investigators at Army's MPI Course (p. 59)

18. Improve Supervision of Police Investigators by: (p. 59)

a. Collocation of Police Investigators and MCIO Units

b. Civilian Investigator Supervisors

c. Rotation of MCIO Special Agents as Supervisors

19. The Navy Should Adopt Additional Measures to Strengthen Police Investigations (p. 60)

20. Increase Coordination of Police Investigators with MCIOs (p. 61)

21. Improve Records Maintenance by Police Investigators (p. 61)

22. Develop and Implement Policy for DCII Entry of Police Investigation Information (p. 61)

23. Study Other Possible Organizational Structures for Police Investigators (p. 61)

24. Establish DoD Standards for Selection and Training of GS-083 Series Civil Service Employees (p. 62)

25. Increase Investigative Responsibilities of Marine Corps CID (p. 62)

IV. Counterintelligence

26. Do Not Reorganize DoD Counterintelligence Organizations (p. 74)

27. Reorient Counterintelligence Doctrine (p. 75)

28. Reorient Counterintelligence Training (p. 75)

29. Standardize Counterintelligence Automated Data Processing Systems and Report Writing (p. 76)

30. Coordinate Early with National Security Crimes Prosecutors (p. 76)

31. Implement a Better Management System to Account for and Justify Army MI Counterintelligence Budget Execution (p. 76)

V. Non-Criminal Investigations

32. Improve Training of Departmental Inquiries Investigators (p. 98)

33. Inform Subjects of Departmental Inquiries Reports of Tentative Conclusions (p. 98)

34. Allow Subjects Facing Adverse Action on the Basis of Departmental Inquiries Reports Access to Underlying Materials (p. 98)
35. Require Civilian Departmental Inquiries Investigators to Provide Article 31 Warnings to Servicemembers (p. 98)
36. Identify the Criteria Applied and Analyze the Applicable Standard in Departmental Inquiries Reports (p. 99)
37. Develop and Apply More Rigorous Standards for Accuracy and Tone of Departmental Inquiries Reports (p. 99)
38. The Assistant IG for Departmental Inquiries Should Not Conduct Investigations Personally (p. 99)
39. Departmental Inquiries Reports Should Not Make Recommendations About Disciplinary Action (p. 99)
40. Provide Departmental Inquiries Investigative Files to Management When It Requests Them for Consideration of Discipline (p. 99)
41. Do Not Increase Departmental Inquiries' Role in Initial Investigation of Senior Officials (p. 99)
42. Increase IGs at Lower Echelons of Navy (p. 100)
43. Increase Service IG Training (p. 100)
44. Consolidate Service IG Training at Army IG Course (p. 100)
45. Provide Manuals to All Service IG Personnel and Investigators (p. 101)
46. Refer Some Sensitive Investigations to a Higher Level in the IG System (p. 101)
47. Develop a Method to Track IG Data in the Navy and Marine Corps (p. 101)
48. Consider Measures to Strengthen Service IG System (p. 101)
49. Adopt Measures to Increase Communication Among Service IG Personnel (p. 101)
50. Coordinate with Judge Advocate or Legal Officer on Commander-Directed Investigations (p. 101)
51. Strengthen Requirements for Selection of Investigating Officers in Commander-Directed Investigations (p. 102)
52. Improve Guidance to Investigating Officers in Commander-Directed Investigations (p. 102)
53. Allow Subjects of Commander-Directed Investigations Access to Counsel (p. 102)
54. Examine Methods to Increase Accountability for Flawed Commander-Directed Investigations (p. 103)
55. Examine Methods of Collecting Data on Commander-Directed Investigations (p. 103)

VI. Administrative Versus Criminal Investigations

- 56. Have One Senior Official Responsible for Advising the Secretary of the Navy on Investigations (p. 106)
- 57. Adopt Procedures for Coordinating Criminal and Administrative Investigations in the Army and Air Force (p. 106)
- 58. Determine Whether DoD IG Investigations Are Administrative or Criminal (p. 107)

VII. The Proper Role of the Attorney in Investigations

- 59. Establish Procedures in the Services for Close Coordination Between Judge Advocates and Investigators (p. 114)
- 60. Designate One Judge Advocate General Office as Executive Agency for Training on National Security Crimes (p. 114)
- 61. Create a National Security Crimes Handbook (p. 114)
- 62. Increase Role of Air Force General Counsel in Investigations (p. 114)
- 63. Navy General Counsel Should Not Be the Reporting Senior of NCIS (p. 114)
- 64. The DoD IG Should Continue to Obtain Its Legal Services from the DoD General Counsel (p. 114)
- 65. The DoD General Counsel's Office Should Review DCIS Coordination with Service Prosecutors (p. 115)
- 66. The DoD General Counsel's Office Should Assist Departmental Inquiries in Implementing the Recommendations in this Report (p. 115)

VIII. DCIO and Army MI Workforce

- 67. Recruit More Women and Minorities (p. 129)
- 68. Require at Least an Associate's Degree for Investigators (p. 130)
- 69. Enforce Higher Educational Standards for Procurement Fraud Agents (p. 130)
- 70. Develop Degree-Granting Programs for Investigative Personnel (p. 130)
- 71. DCIS Should Formalize Its Recruiting and Hiring Practices (p. 130)
- 72. Consolidate Basic Training (p. 131)
- 73. Improve NCIS Training for General Crimes Investigations (p. 131)
- 74. Require DCIS Probationary Agents to Complete Three Basic Courses Within One Year (p. 131)
- 75. Require DCIS Agents to Attend Service and DoD Contracting Courses and Make Greater Use of Service Experts (p. 132)

- 76. Examine Consolidated Advanced and Specialty Training (p. 132)
- 77. Increase Training for Army MI Investigators (p. 132)
- 78. Increase Training in Interview and Financial Tracking Techniques for Procurement Fraud Agents (p. 132)
- 79. Emphasize Stringent Probationary Programs (p. 133)
- 80. Increase DCIS and Army MI In-Service Training (p. 133)
- 81. Increase DCIO Commitment to Formal Management Training of Supervisors (p. 133)
- 82. Field Supervisors Should Conduct Regular Case Review (p. 133)
- 83. Make Prior Service in USACIDC a Significant Qualification Criterion for Later Selection to Senior Command and Senior Staff Positions in USACIDC (p. 134)
- 84. Maintain High Performance Standards (p. 134)
- 85. Promote Diversity in the DCIO Agent Corps (p. 134)
- 86. NCIS Should Promote Agents Afloat (p. 135)

IX. Investigative Tools and Techniques

- 87. Integrate DoD Automated Data Processing and Report Writing (p. 144)
- 88. Study Consolidation of Laboratories (p. 144)
- 89. Maintain Independent Polygraph Capabilities (p. 144)
- 90. Avoid Overuse of Polygraph (p. 144)
- 91. Grant Arrest Authority over Civilians to DCIO Agents Under Certain Circumstances (p. 145)
- 92. Adopt a DoD-Wide Consensual Monitoring Policy (p. 145)
- 93. Encourage Appropriate Use of Electronic Surveillance (p. 145)
- 94. Examine the Need for Legislation Giving All DCIOs Authority to Conduct Storefront Operations (p. 145)
- 95. Establish DoD Standards for Psychological Autopsies (p. 145)

X. Antideficiency Act

- 96. Permit DoD IG and DoD Comptroller to Complete Review Before any Congressional Action (p. 149)
- 97. Propose Removal of Antideficiency Act Criminal Sanctions (p. 149)

XI. Sexual Harassment

- 98. Increase the Staff of the Deputy Assistant Secretary of Defense (Equal Opportunity) (p. 153)
- 99. Create a Complete, Uniform DoD Discrimination and Harassment Database (p. 153)
- 100. Improve Affirmative Action Reporting (p. 153)