Investigations—Part II: Why Official Inquiries Are Needed

By Captain Daniel D. Maurer

Part I of this discussion (Engineer, September–December 2010) reviewed some of the legal and practical justifications for the command's inherent authority to initiate inquiries into cases of suspected misconduct; systemic failures in leadership, training, or maintenance; or any event or issue that alarms the unit's leadership. The second part of the discussion focuses on methodology. If the goal is to foster minimally intrusive but productive and reasonable inquiries, then it is important to reflect on what kinds of questions to ask, what subjects are appropriate, and how to draw conclusions and recommendations from the answers.

How We Investigate

Command-initiated investigations and inquiries are often plagued by three significant but related problems:

- They are usually conducted by officers with little or no training or experience with investigations.
- They typically lack sufficient objectivity and neutrality.
- They are not sufficiently thorough or comprehensive.

Any of these ailments can lead to serious unintended consequences, the worst of which might be the prosecution of a Soldier for a crime that someone else committed or the prosecution of a Soldier when the matter could reasonably have been disposed of differently.[1] Prosecution also may become more challenging, perhaps as a result of evidentiary problems or because the commander finds that making a disposition decision that is "warranted, appropriate, and fair" is problematic.[2]

For the lay officer, playing detective is hard—as is making a fair, thoughtful, evidence-based recommendation to the commander about how to dispose of a case.[3] Discussion of the following topics may ease that task:

- How the commander can define the scope of the investigation for the benefit of the investigating officer (IO)
- How the IO can plan the investigation, given the commander's scope
- How the IO can use critical thinking to execute a thorough, timely, unbiased, and useful investigation

Defining the Scope of the Investigation

A commander about to launch a fact-finding mission must be clear about the scope of the inquiry or investigation. A proper "scope" instruction in an appointment memorandum (or any other directive to investigate) marks the left and right bounds of what should be investigated. The commander's intent should drive the IO's "concept of the operation"—the sequential, collaborative efforts used to accomplish the underlying goal.[4] The scope is further defined by the particular Army regulation (AR) that drives the investigation. For example, AR 735-5, *Policies and Procedures for Property Accountability*, identifies specific requirements for financial liability investigations of property loss (FLIPL), while AR 600-8-4, *Line of Duty Policy, Procedures, and Investigations*, guides line-of-duty investigations.

Consider the facts involved in an escalation-of-force (EOF) incident. The machine gunner with a crew-served weapon in the trail vehicle of a route clearance patrol alleges that the aggressive driving of a pickup truck demonstrated potential "hostile intent," and that its subsequent attempt to pass the patrol—ignoring visual warnings to back away—constituted a "hostile act." Consequently, the gunner opened fire on the passing truck—hitting the radiator, tires, and windshield—causing the truck to skid to a stop and roll to the side of the road. In this example, if the commander's intent is to confirm that the EOF was justifiable rather than a negligent discharge (ND) during a show of force with the weapon, the scope would likely include questions about the gunner's specific observations, his training, and the information he shared with his crewmates before or after he fired his weapon. A clearly expressed intent will help the IO develop appropriate questions to ask witnesses.

These three fields of inquiry include numerous questions that will eventually add precision to the fact-finding process. Like "mission analysis" in the military decision-making process, defining the scope is the first analytical step toward ensuring that IOs receive enough relevant information to make a deliberate and considered strategy for investigating.

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For some incidents, the scope may be relatively obvious. If a female specialist raises an informal complaint of gender-based harassment against a male staff sergeant, the scope will naturally configure itself around the statements or actions of the two individuals, observations made by others, and the impact of that conduct on the purported victim. But other cases are more ambiguous and deserve a thoughtful plan, as the previous EOF example demonstrates. A proper scope will force the investigating officer to ask questions and think about context from multiple perspectives. This is not always an easy or straightforward task. The servicing judge advocate (JA) advisor, after learning the intent of an investigation and the basic facts of an event, can help design an inquiry with a reasonable scope. The advisor will look at the event from an even more detached and neutral point of view, with an eye toward collecting evidence and fitting the facts to a plausible explanation.[5]

Depending on the nature of the incident, the time and personnel resources available to the commander, and the advice of a servicing JA advisor, the inquiry can be as informal as a verbal directive to a platoon leader to "look into" certain allegations or concerns. Or the inquiry can be as formal as a direct written appointment of an IO with a specified scope and deadline, requirement for a legal in-brief and legal review, and the formal due process protecting procedures of AR 15-6, *Procedures for Investigating Officers and Boards of Officers*.[6] There may be instances, however, when the wide-ranging authority granted by military law and custom should not be employed.[7] When cases involve sexual assault, domestic abuse, violence resulting in medical treatment or hospitalization of a victim, or off-post interviews of civilians not affiliated with the military, the complexities and logistical burden on the command are too great. The evidence may be forensically challenging; the issues may be too sensitive to be handled by a lay officer; or the expertise needed to understand the crime scene may exceed the command's resources, knowledge, and time. In these cases, it is always better to quickly open the doors to the professional criminal investigators of the Criminal Investigation Division. The best advice to commanders is to seek advice from their servicing JA advisor for an opinion on the form the inquiry should take. That advisor can help develop a plan that will guide the IO in the right direction.

The IO's To-Do List

Each IO may prepare and attack an investigation differently, and each legal advisor may suggest a different approach, depending on whether it is a generic commander's inquiry, an AR 15-6 investigation, a FLIPL, or a line-of-duty investigation. However, several successful best practices are recommended.

Preparation. IOs should prepare by reading their appointment memorandum or discussing it with their commander. The appointment should be viewed as a mission from higher headquarters and the appointment memo should be considered the initial mission analysis. It is the IO's job to figure out how to answer the commander's questions, paint a clear picture of what occurred, explain why it happened, and give the commander maximum freedom and flexibility to decide on a just and appropriate course of action.

Consultation. IOs should consult the proper legal advisor. A well-drafted appointment memo should direct the IO to seek advice immediately from a JA advisor. To avoid potential or perceived conflicts of interest, the IO should contact an attorney other than the serving trial counsel, who acts as prosecutor. (At the brigade level, there are usually two JA officers, thereby reducing the risk of conflicts.) Advice on best practices and legal requirements should come from a source as neutral and independent as possible. In our brigade, for instance, all IOs are advised by the command judge advocate at the beginning, end, and throughout their investigations, while the brigade's trial counsel is screened out. This way, should the investigation uncover misconduct, the commander can seek an unbiased perspective from the attorney charged with adding in the administration of military justice.

Besides offering counsel on general best practices, the legal advisor can explain how, where, and when to take sworn statements (always, if possible); when Article 31 rights protection against self-incrimination advice must be given (whenever an IO seeks written or verbal evidence that may incriminate the person providing the evidence); how to determine whom to interview and in what order; and the form or type of questions to ask.

To illustrate how not to frame questions for interviewees, consider Example No. 1, drawn from a real sworn statement:

Example No. 1

Q: Have you ever consumed alcohol with, done illegal drugs with, or visited SPC Jones in her CHU alone, or kissed SPC Jones in your CHU on 24 May 2009 or at some point between 26 May and 4 April 2009?

A: Yes.

Q: Have you had an inappropriate relationship with SPC Jones?

A: No.

//NOTHING FOLLOWS//

Legend:

CHU - containerized housing unit
SPC - specialist

This example clearly depicts an IO who never received (or failed to pay attention to) legal counsel during the investigation. The first question is a compound query, embedding multiple subjects under one roof, which can only serve to confuse the interviewee. As a result, it is unclear to what the first answer is referring. What specific act did the interviewee just admit to—or did he admit to anything at all? And on what date did the act or acts happen? Next,

the answer to the second question does not make any sense in relation to the first answer, and the interview certainly should not have concluded on that note. Perhaps the interviewee was confused by the barrage of questions. Or perhaps the IO simply failed to read, digest, and prepare for an ambiguous answer. Had the IO consulted with a legal advisor first, together they could have developed lines of clear, simple, direct questions. IOs should prepare for each interview with the goal in mind of acquiring specific information and should always clear up ambiguous responses. By failing on these fronts, the IO adds a substantial constraint on the appointing authority—the commander—who must now try to make a fair and appropriate choice based on incomplete or confusing data.

Organization. IOs must keep track of evidence. There is no doctrinal method to adopt, just a best practice of organizing and identifying the documents, statements, or physical evidence that is collected or being sought. Since these items will form the nucleus for the IO's findings and recommendation, it is imperative to develop and adhere to an organized system of record-keeping. This system may also help frame further lines of inquiry. Example No. 2, below, is a very basic sample.

Categorization. IOs should practice knowledge management to capture the facts of the investigation, to account for their own biases and assumptions, and to mitigate possible damage caused by erroneous logic.[8] Reference points can be categorized in Example No. 3 (page 37).

This methodology could be useful at the outset of an investigation, referenced periodically throughout the process, or tailored for each interview. The point is to be conscious of common investigative blunders which, if left unchecked, could taint the process and limit the commander's options. For instance, assuming that the discharge of an M240 machine gun round was negligent—merely because it was unintended—risks ignoring other environmental, human, or mechanical factors that might suggest the incident was more accidental than negligent. Consequently, the Soldier might join the deep ranks of fellow Servicemembers quietly and presumptively punished for the common ND instead of the command making efforts to improve training for M240B gunners, confirm proper preventive maintenance and servicing of weapon systems, or identify mechanical failures in a particular weapon.

Often—especially when working under the stresses of time, the watchful eye of the commander, or a desire to get back to normal duties—there is a tendency to draw conclusions based on assumed facts rather than the evidence. This can lead to a faulty cause-and-effect analysis. An IO's background and experience may make him well suited to investigate certain matters, but that familiarity also carries the risk of a certain myopia or narrowness of inquiry. It is important for the IO to self-identify initial presumptions of what he knows or thinks he knows.

Conclusion

This article has captured some key lessons learned from watching successful investigations help the command make sound, reasonable choices regarding misconduct or other issues. Some of these tips, on the other hand, were gleaned while watching faulty investigations unravel and therefore thwart a command's ability to act appropriately. For the commander trying to design the proper scope of an inquiry—or for the new IO unsure of the first, second, or eighteenth step to take—this article may make the process a little easier to grasp. Besides the IO's

Example No. 2

Evidence	Collected By	Collected On	Issues
Sworn statement from eyewitness #1	DA Form 2823	During witness interview on 14 Aug 09	Witness is reluctant to get involved because he works for suspect
Potential admission by suspect	Email from suspect to company 1SG	Forwarded from 1SG to me on 15 Aug 09	Why didn't 1SG come forward earlier?
Sworn statement from eyewitness #2, potential accomplice	DA Form 2823	During witness interview on 16 Aug 09	Forgot to do Rights Warning and Waiver on DA Form 3881
Company POW log, signed by suspect, IDing serial number and model of weapon	Excel® spreadsheet, maintained by BN S-2	Requested from BN on 8 Aug 09; received via email on 13 Aug 09	Spreadsheet is 6 months old

Legend:

1SG - first sergeant
Aug - August
BN - battalion
DA - Department of the Army
IDing - identifying
POW - privately owned weapon

Example No. 3

Knowledge Management					
What facts do I already know?	What's my source?	What assumptions am I making?	Assumptions based on what?	What do I want to know?	Why?

servicing JA advisor and senior officers or peers with past experience as investigators, following are more resources to use:

- AR 15-6, *Procedures for Investigating Officers and Boards of Officers*, 2 October 2006.
- Field Manual (FM) 3-19.13, *Law Enforcement Investigations*, 10 January 2005.
- AR 195-2, *Criminal Investigative Activities*, 15 May 2009.
- AR 27-10, *Military Justice*, 16 November 2005.
- *Manual for Courts-Martial (MCM) United States*, 2008 edition.

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Endnotes

[1]This article will not go into great depth regarding the myriad disposition choices available to a commander. These generally range from the administrative reprimand, counseling, extra training, rehabilitative transfer, administrative reduction, administrative separation, or nonjudicial punishment to the preferral of charges leading to a court-martial. There are also any number of other corrective actions that a creative first sergeant can conjure up.

[2]MCM United States, 2008, Rule 306(b) discussion.

[3]Ibid. The military justice system requires that the commander consider myriad factors when making that initial decision, to include what kind of punishment fits the crime, the background and service of the suspect, the nature of the offense or misconduct and the extent of harm caused, the available evidence, the reluctance of the victim or others to testify, and the motives of the accuser or other witnesses.

[4]See FM 5-0, *The Operations Process*, 26 March 2010, paragraph 2-92.

[5]Misconduct is not the only cause of an investigation. For example, having a JA help in designing the scope of an inquiry into widespread suicide ideations across several subordinate commands may reveal the need to consider family, rank, finances, deployments, operational tempo, drug dependencies, and command climate as factors.

[6]For example, see AR 15-6, paragraphs 3-10 and 3-11, which define both "facts" and "recommendations," as well as the regulation's requirement for sworn statements on Department of the Army (DA) Form 2823 and Article 31 rights "waivers" on DA Form 3881.

[7]See MCM, Rule for Court-Martial 303: "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."

[8]A "false cause" is an example of a logical fallacy. It is a conclusion that some event must have been caused by a particular initiating act because the two occurred close in time or location, without identifying other intervening causes or factors influencing the eventual outcome.