

**ADMINISTRATIVE INVESTIGATIONS IN AN ERA OF  
INCREASED GOVERNMENT SCRUTINY: AN ANALYSIS OF  
ARMY REGULATION 15-6 AND ITS PERCEIVED LACK OF  
INDEPENDENCE**

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I. Introduction

The death of Corporal (CPL) Pat Tillman, the Abu Ghraib detainee scandal, and the Doctors Without Borders<sup>1</sup> hospital strike are only a few examples of controversial and heavily criticized Army administrative investigations that drew widespread attention.<sup>2</sup> The public perception that these internal investigations lacked impartiality contributed to some going

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<sup>1</sup> Doctors Without Borders is also known by its French name: Médecins Sans Frontières. *Founding of MSF, MÉDECINS SANS FRONTIÈRES—DOCTORS WITHOUT BORDERS*, <http://www.doctorswithoutborders.org/founding-msf>, (last visited Mar. 14, 2017).

<sup>2</sup> See Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 PENN ST. INT'L L. REV. 1 (2009) (analyzing the deficiencies of the Abu Ghraib detainee abuse investigations); Mick Brown, *Betrayal of an American Hero*, THE TELEGRAPH (Oct. 7, 2010, 3:00 PM), <http://www.telegraph.co.uk/culture/8046658/Betrayal-of-an-all-American-hero.html>; Jessica Schulberg, *U.S. Military Investigates And Finds Itself Not Guilty Of War Crimes In Afghan Hospital Bombing*, HUFFINGTON POST (Apr. 29, 2016, 1:53 PM), [http://www.huffingtonpost.com/entry/us-not-guilty-war-crimes-kunduz-hospital\\_us\\_57236ddf4b0b49df6ab0ada](http://www.huffingtonpost.com/entry/us-not-guilty-war-crimes-kunduz-hospital_us_57236ddf4b0b49df6ab0ada); Kunduz hospital attack.

as far as to call these investigations “cover ups.”<sup>3</sup> Similar perceptions are not limited to high profile investigations. A typical installation legal office may encounter public criticism of seemingly routine administrative investigations concerning topics such as allegations of toxic command climate, suspected suicide, or poor treatment of wounded warriors.<sup>4</sup>

This article analyzes the public’s attacks on Army administrative investigations and whether the newly revised Army Regulation (AR) 15-6 sufficiently accounts for perceived shortfalls in impartiality. Army administrative investigations suffer from outside criticism because internal investigations inherently lack a level of independence that would otherwise exist if an outside organization were responsible for its execution. Poorly executed high-profile investigations simply spotlight this lack of independence. However, the Army’s most recent updates to AR 15-6 sufficiently address many of these concerns. The updates strike the right balance between providing commanders an effective fact-finding tool and maintaining public trust in the Army by ensuring investigations are fair and impartial.<sup>5</sup>

Part II of this article provides a brief overview of AR 15-6 and a commander’s authority to investigate. The second half of Part II also provides notable examples of substantially scrutinized AR 15-6 investigations. Part III discusses specific criticism of AR 15-6 related to perceived lack of independence. It also analyzes the sufficiency of the AR 15-6 updates in addressing the criticism and discusses the feasibility of measures intended to minimize lingering independence concerns.

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<sup>3</sup> Brown, *supra* note 2; HUMAN RIGHTS WATCH, DARFUR AND ABU GHRAIB: COVER-UP AND SELF-INVESTIGATION (Jan. 2005), <https://www.hrw.org/legacy/wr2k5/darfurandabughraib/4.htm> [hereinafter *Darfur and Abu Ghraib*].

<sup>4</sup> This assertion is based on the author’s past professional experiences as an Administrative Law Attorney, Office of the Staff Judge Advocate, 4th Infantry Division and Fort Carson, from June 2014 to July 2015 and December 2015 to July 2016 [hereinafter *Professional Experiences*]. For example, in 2015, National Public Radio (NPR) took aim at an Office of the Surgeon General (OTSG) directed investigation into allegations that behavioral healthcare providers at Fort Carson were failing to treat patients with dignity and respect. Daniel Zwerdling, *Missed Treatment: Soldiers with Mental Health Issues Dismissed for Misconduct*, NAT’L PUB. RADIO (Oct. 28, 2015, 3:53 PM), <http://www.npr.org/2015/10/28/451146230/missed-treatment-soldiers-with-mental-health-issues-dismissed-for-misconduct> [hereinafter *Missed Treatment*].

<sup>5</sup> See Colonel Charles D. Allen (USA Retired) & Colonel William G. Braun III (USA Retired), *TRUST Implications for the Army Profession*, MIL. REV., September-October 2013, at 73 (“Maintenance of trust between the Army profession and the American public is critical to its legitimacy within our democratic society.”).

## II. Background

### A. Command Authority to Investigate and an Overview of AR 15-6

Army commanders possess a wide range of authorities and responsibilities<sup>6</sup> which are vital for exercising “primary command authority over” their assigned units or “territorial area.”<sup>7</sup> The successes and failures of a command fall squarely on the shoulders of its commander. Commanders have a duty and responsibility to maintain good order and discipline, and ensure members of their command abide by all Department of Defense (DoD), Department of the Army (DA), and command policies.<sup>8</sup> It logically follows that the commander has inherent authority to investigate matters within his or her organization.<sup>9</sup>

The Army has a variety of investigative organizations<sup>10</sup> and investigative methods;<sup>11</sup> however, the default administrative investigation procedure is codified in AR 15-6.<sup>12</sup> This regulation is applicable to all

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<sup>6</sup> See generally U.S. DEP’T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (6 Nov. 2014) [hereinafter AR 600-20] (prescribing “the policy and responsibility of command, which includes readiness and resiliency of the force, military and personal discipline and conduct, the Army Equal Opportunity Program, Prevention of Sexual Harassment, and the Army Sexual Assault Prevention and Response Program and the Sexual Harassment/Assault Response and Prevention Program . . .”).

<sup>7</sup> *Id.* para. 1-5.a.

<sup>8</sup> *Id.* paras 2-1.b, 4-1.c, 1-4.g.

<sup>9</sup> See also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 303 (2012) [hereinafter MCM] (“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.”).

<sup>10</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES (29 Nov. 2010) [hereinafter AR 20-1] (prescribing “the responsibility and policy for the selection and duties of inspectors general throughout the Army”); U.S. DEP’T OF ARMY, REG. 190-30, MILITARY POLICE INVESTIGATIONS (1 Nov. 2005) [hereinafter AR 190-30] (establishing “operational procedures” for the conduct of military police investigations); U.S. DEP’T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES (9 Jun. 2014) [hereinafter AR 195-2] (delineating “responsibility and authority between Military Police and U.S. Army Criminal Investigation Command.”).

<sup>11</sup> See, e.g., U.S. DEP’T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICIES, PROCEDURES AND INVESTIGATIONS ch. 3 (4 Sept. 2008) (prescribing procedures for administrative investigations into the cause of Soldier injuries); U.S. DEP’T OF ARMY, REG. 735-5, PROPERTY ACCOUNTABILITY POLICES ch. 13 (9 Nov. 2016) (providing procedures for investigations surrounding the loss, damage, or destruction of Army property).

<sup>12</sup> U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR ADMINISTRATIVE INVESTIGATIONS AND BOARDS OF OFFICERS para. 1-1 (1 Apr. 2016) [hereinafter AR 15-6].

levels of command<sup>13</sup> and establishes the procedural framework for the initiation and conduct of “preliminary inquiries, administrative investigations, and boards of officers when such procedures are not established by other regulations or directives.”<sup>14</sup> The purpose of these procedures is to determine facts, “document and preserve evidence,” and report the results to the approval authority.<sup>15</sup> AR 15-6 investigating officers (IO) are required to “thoroughly and impartially” determine and consider the facts from all relevant perspectives.<sup>16</sup> The end result should be a comprehensive and unbiased investigation which provides the commander a better perspective of an issue or set of circumstances so they can make an informed decision on how to dispose of the matter.<sup>17</sup>

In the past five decades, AR 15-6 has gone through a number of revisions, to include the most recent update from 1 April 2016.<sup>18</sup> The latest version is a substantial revision nearly doubling the page count.<sup>19</sup> While the original framework of AR 15-6 remains intact, the newest version builds on that framework to provide more clarity. The 2016 version restructures the types of fact-finding inquiries that may be conducted.<sup>20</sup> It also provides revisions and more detailed instructions in a number of areas concerning appointing authority qualifications and

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<sup>13</sup> *Id.* para. 2-1*b* (stating that “[a] commander at any level” may appoint a preliminary inquiry or administrative investigation pursuant to AR 15-6); *contra id.* para. 2-1*a* (limiting the level of appointing authority for boards to higher level commands).

<sup>14</sup> *Id.* para. 1-1.

<sup>15</sup> *Id.* para. 1-8. The approval authority is the person designated by AR 15-6 to take “action on an administrative investigation or board . . .” *Id.* para 2-8*a*. In most cases the appointing authority also acts as the approval authority. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> THE JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., U.S. ARMY, COMMANDER’S LEGAL HANDBOOK at 100 (2015) [hereinafter COMMANDER’S LEGAL HANDBOOK] (stating reasons for conducting an investigation are “[t]o discover information upon which to make decisions” and “[t]o learn lessons, sustain success and correct mistakes.”); Professional Experiences, *supra* note 4.

<sup>18</sup> *See, e.g.*, AR 15-6, *supra* note 14; U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) (RAR 2 Oct. 2006) [hereinafter AR 15-6 dtd 2006]; U.S. DEP’T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS CONDUCTING INVESTIGATIONS (12 Aug. 1966).

<sup>19</sup> *See* AR 15-6, *supra* note 14.

<sup>20</sup> *Id.* para. 1-6 (stating “[t]here are three types of fact-finding or evidence-gathering procedures under this regulation: preliminary inquiries, administrative investigations, and boards of officers.”).

authorities,<sup>21</sup> IO qualifications and responsibilities,<sup>22</sup> and the role of the legal advisors and legal reviewer.<sup>23</sup>

## B. Criticism of AR 15-6 Investigations

While AR 15-6 is an invaluable fact-finding mechanism for commanders,<sup>24</sup> high profile Army administrative investigations tend to be intensely scrutinized and criticized by outside observers.<sup>25</sup> One of the biggest post-9/11 Army controversies involved the Army's mishandling of the reporting and investigation into the friendly fire death of CPL Patrick Tillman.<sup>26</sup> A 2007 DoD Inspector General (DoD IG) report determined multiple levels of command errors in assigning administrative investigative jurisdiction and determined the first two of three AR 15-6 investigations were "tainted by the failure to preserve evidence, a lack of thoroughness, the failure to pursue logical investigative leads, and conclusions that were open to challenge based on the evidence provided."<sup>27</sup> The mishandling of these investigations greatly contributed to the perception that the Army covered up the cause of CPL Tillman's death.<sup>28</sup>

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<sup>21</sup> *Id.* para. 2-1.

<sup>22</sup> *Id.* para. 2-3.

<sup>23</sup> *Id.* sec. II.

<sup>24</sup> See COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 100 (listing reasons the Army conducts AR 15-6 investigations).

<sup>25</sup> See, e.g., Inspector Gen., U.S. Dep't of Def., No. 06-INTEL-10, Review of DoD-Directed Investigations of Detainee Abuse (25 Aug. 2006) [hereinafter DoD IG Abu Ghraib Report] (providing a detailed review of all the Department of the Army (DA) and Department of Defense (DoD) investigations into the Abu Ghraib detainee scandal); Inspector Gen., U.S. Dep't of Def., No. IPO2007E001, Review of Matters Related to the Death of Corporal Patrick Tillman (26 Mar. 2007) [hereinafter DoD IG Tillman Report] (providing a detailed review of the circumstances surrounding the deficiencies in reporting and investigating the death of Corporal (CPL) Patrick Tillman).

<sup>26</sup> See Tom Bowman, *Committee Traces Army's Handling of Tillman Death*, NAT'L PUB. RADIO (Aug. 1, 2007, 4:00 PM),

<http://www.npr.org/templates/story/story.php?storyId=12430130>; Lawrence Donegan, *The Footballer who Became a War Hero who Became a Scandal*, GUARDIAN (Mar. 8, 2006, 9:21 PM), <https://www.theguardian.com/sport/2006/mar/09/comment.gdn-sport3>; Josh White, *Army Withheld Details About Tillman's Death*, WASH. POST (May 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/03/AR2005050301502.html?noredirect=on>.

<sup>27</sup> DoD IG Tillman Report, *supra* note 27, at 2.

<sup>28</sup> *Id.* "Several Members of Congress also questioned the series of events that led to Corporal Tillman's death, subsequent investigations, the need to establish accountability in matters concerning the death and its aftermath, and the possibility of an Army cover-

The CPL Tillman scandal was a public relations disaster not only for the Army, but also for the Bush Administration, which was simultaneously managing the fallout from the Abu Ghraib detainee scandal.<sup>29</sup> Much of the criticism surrounding the Abu Ghraib scandal included the U.S. government's investigatory efforts into detainee abuse in Iraq.<sup>30</sup> Fourteen separate Army and DoD level investigations looked into the allegations of detainee abuse, yet the public believed the investigations failed to uncover the complete truth.<sup>31</sup>

Another AR 15-6 investigation that drew worldwide criticism was a U.S. Central Command (CENTCOM) investigation into the accidental strike on the Doctors Without Borders hospital in Kunduz City, Afghanistan, in October 2015.<sup>32</sup> Despite a thorough and timely investigation amassing over 700 pages, there was, significant international concerns about the investigation's finding that war crimes were not committed.<sup>33</sup> While numerous personnel, including one general officer,

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up." *Id.* at foreword; *see also*, Donegan, *supra* note 28; *Soldier: Army Ordered Me Not to Tell Truth About Tillman*, CNN (Apr. 25, 2007, 10:39 AM), <http://www.cnn.com/2007/POLITICS/04/24/tillman.hearing>.

<sup>29</sup> *See* HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE? COMMAND RESPONSIBILITY FOR THE U.S. ABUSE OF DETAINEES (2005), <https://www.hrw.org/reports/2005/us0405/us0405.pdf> [hereinafter GETTING AWAY WITH TORTURE] (providing an example of the vocal and harsh criticism the Bush Administration encountered with the Abu Ghraib detainee scandal); Brown, *supra* note 2; *Darfur and Abu Ghraib*, *supra* note 3; Donegan, *supra* note 27.

<sup>30</sup> *See* GETTING AWAY WITH TORTURE, *supra* note 30; Brown, *supra* note 2; *Darfur and Abu Ghraib*, *supra* note 3 (explaining that the IOs "lacked the authority to scrutinize senior Pentagon officials" who many thought were complicit); Donegan, *supra* note 28.

<sup>31</sup> Rohman, *supra* note 2, at 2, 8-9; *see Darfur and Abu Ghraib*, *supra* note 3.

<sup>32</sup> *See* Press Release, Amnesty International, Kunduz Bombing Needs Independent Investigation (Apr. 28, 2016), <http://www.amnestyusa.org/news/press-releases/kunduz-bombing-needs-independent-investigation> [hereinafter Amnesty International Press Release]; Press Release, Médecins Sans Frontières/Doctors Without Borders, Initial Reaction to Public Release of U.S. Military Investigative Report on the Attack on MSF Trauma Hospital (Apr. 29, 2016), <https://www.msf.org/kunduz-initial-reaction-public-release-us-military-investigative-report-attack-msf-trauma-hospital> [hereinafter MSF Press Release]; *see generally* Major General William Hickman, Army Regulation 15-6 Report of Investigation on the Airstrike on the Médecins Sans Frontières (MSF)/Doctors Without Borders Trauma Center, Kunduz City, Afghanistan, on 3 October 2015 (21 Nov. 2015) [hereinafter Major General Hickman, AR 15-6 Investigation].

<sup>33</sup> Schulberg, *supra* note 2; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34. The investigation determined that some personnel failed to abide by the rules of engagement and the law of armed conflict; however, no war crimes were committed because those involved thought they were attacking an insurgent-controlled compound and did not know it was a medical facility. Memorandum from Commander, U.S. Central Command, subject: Summary of the Airstrike on the MSF

were issued a variety of potentially career-ending administrative and disciplinary actions for their involvement in the strike,<sup>34</sup> many in the international community demanded an independent investigation and expressed skepticism of the U.S. Army's ability to impartially investigate itself on the matter.<sup>35</sup>

### III. Analysis

#### A. Independence Concerns Within AR 15-6

Public or media criticism of Army administrative investigations is usually for lack of independence in the investigative process.<sup>36</sup> AR 15-6 contains significant procedural requirements outwardly conveying legitimacy in the process.<sup>37</sup> However, internal investigations in any organization are still self-policing mechanisms that draw suspicion among a public that values transparency and accountability.<sup>38</sup> When done well, Army administrative investigations can be an effective fact-gathering tool,

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Trauma Center in Kunduz, Afghanistan on October 3, 2015, Investigation and Follow-on Actions (n.d.) [hereinafter CENTCOM Kunduz Memo].

<sup>34</sup> CENTCOM Kunduz Memo, *supra* note 35; General John F. Campbell, Department of Defense Press Briefing by General Campbell via teleconference from Afghanistan (Nov. 25, 2015), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/631359/departement-of-defense-press-briefing-by-general-campbell-via-teleconference-fro> [hereinafter General Campbell Press Briefing].

<sup>35</sup> Schulberg, *supra* note 2; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34.

<sup>36</sup> See Rohman, *supra* note 2, at 5; Amnesty International Press Release, *supra* note 34 (expressing concern about the "Department of Defense's questionable track record of policing itself" and stating "[t]he decision to prosecute members of the armed forces for criminal conduct should be made by an independent prosecutor to avoid the conflict of interest inherent in allowing commanders to make such decisions.").

<sup>37</sup> See generally AR 15-6, *supra* note 14 (outlining several procedural and substantive requirements such as appointment procedures, "[r]ules of evidence and proof of facts," and due process afforded to subjects or respondents); see also Rohman, *supra* note 2, at 4.

<sup>38</sup> See Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 26, 2009); Freedom of Information Act, 74 Fed. Reg. 4,683 (Jan. 21, 2009) [hereinafter President Obama's FOIA Memorandum] (stating that "[a] democracy requires accountability, and accountability requires transparency" and implementing a presumption that, when in doubt, openness prevails when administering FOIA); Attorney General Eric Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 51,879 (Oct. 8, 2009) [hereinafter Attorney General Holder's FOIA Memorandum] (reiterating President Obama's presumption for openness and providing more detailed instructions on implementation).

which assist commanders in taking appropriate action within their ranks and answer questions from outside sources.<sup>39</sup> Nonetheless, the lack of complete independence in the process is susceptible to criticism when the subject matter draws scrutiny and procedures are not followed.<sup>40</sup>

Such criticism is not unique to the Army.<sup>41</sup> Corporations<sup>42</sup> and local government,<sup>43</sup> similarly receive harsh criticism for conducting their internal investigations. Common to all internal investigations is the potential failure to uncover the full truth.<sup>44</sup>

Investigations that are purely internal to the military, however competent, cannot examine the whole picture . . . Internal investigations, by their nature, also suffer from a critical lack of independence. Americans have never thought it wise or fair for one branch of government to

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<sup>39</sup> The stated primary function of investigations under AR 15-6 is to “ascertain facts, document and preserve evidence, and then report the facts and evidence to the approval authority.” AR 15-6, *supra* note 14, para. 1-8. AR 15-6 investigations are commonly used by commanders to answer questions from the media and public. Professional Experiences, *supra* note 4. This use is clearly contemplated by AR 15-6 which acknowledges the investigation may be used in various ways to include release to “the general public via a FOIA [Freedom of Information Act] request.” AR 15-6, *supra* note 14, para. C-4d. Furthermore, the regulation requires legal reviewers to conduct a comprehensive review that “anticipates future uses of the investigation.” *Id.* para. 2-7b. *See, e.g.*, Kyle Jahner, *Fort Stewart Commander Fired for Giving Medical Care to Unauthorized Civilians*, ARMY TIMES (June 6, 2016), <https://www.armytimes.com/story/military/2016/06/06/fort-stewart-commander-fired-giving-medical-care-unauthorized-civilians/85522860/>; Michelle Tan, *Investigation: Fort Carson Soldier Rightly Pulled from Promotion List*, ARMY TIMES, (Aug. 4, 2016), <https://www.armytimes.com/story/military/careers/army/enlisted/2016/08/04/investigation-n-fort-carson-soldiers-rightly-pulled-promotion-list/88179930/>.

<sup>40</sup> *See generally*, Rohman, *supra* note 2 (addressing the failures of the Abu Ghraib investigations and the scrutiny those investigations drew from the public); DoD IG Tillman Report, *supra* note 27 (discussing the various procedural and substantive failures in the reporting and investigating of CPL Tillman’s death which contributed to a public perception of an Army cover-up).

<sup>41</sup> Rohman, *supra* note 2, at 3-4.

<sup>42</sup> *Id.* at 3; Kathleen Day & Ben White, *When Companies Investigate Themselves*, WASH. POST, Dec. 31, 2004, at E01.

<sup>43</sup> *See, e.g.*, Erwin Chemerinsky, *An Independent Analysis of the Los Angeles Police Department’s Board of Inquiry Report on the Rampart Scandal*, 34 Loy. L. Rev. 545 (2001); Rohman, *supra* note 2, at 3-4; Stephen M. Katz, *Following Police Shootings, Experts and Departments Differ on How to Investigate*, THE VIRGINIAN-PILOT (Mar. 26, 2016), [http://pilotonline.com/news/local/crime/following-police-shootings-experts-and-departments-differ-on-how-to/article\\_132f231f-349a-5864-82c2-5ef4eed523d3.html](http://pilotonline.com/news/local/crime/following-police-shootings-experts-and-departments-differ-on-how-to/article_132f231f-349a-5864-82c2-5ef4eed523d3.html).

<sup>44</sup> Rohman, *supra* note 2, at 1-3.



police itself. But that has been exactly the case in many of the abuse inquiries to date.<sup>45</sup>

The primary concerns related to lack of independence in AR 15-6 investigations include the following: (1) the appointing authority's power to define the scope of the investigation, (2) the appointing authority's power to select the IO, and (3) the effect of Army organizational culture on the conduct of the investigation.

### 1. *Scope of the Investigation*

One of the first and most critical steps in an investigation is properly defining the scope of the investigation.<sup>46</sup> A well-defined scope is imperative because it charts the course of the investigation for the IO.<sup>47</sup> The scope drives evidence gathering and analysis, and the ultimate findings and recommendations provided to the appointing authority.<sup>48</sup> The appropriate scope of an investigation should be defined after the appointing authority receives legal counsel,<sup>49</sup> however, the power to make the final decision on the scope remains with the appointing authority.<sup>50</sup>

Furthermore, these investigations are frequently used to respond to outside inquiries, especially into controversial matters; therefore, the scope educates the public on the investigation's goal and may be one of the first yardsticks the public uses to measure the relative success of the investigation.<sup>51</sup> A poorly defined scope may create a perception that the appointing authority is attempting to shape the outcome by limiting the

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<sup>45</sup> *Id.* at 15 (quoting retired generals and admirals calling for President Bush to appoint an independent commission to investigate U.S. detention and interrogation practices at Abu Ghraib).

<sup>46</sup> AR 15-6, *supra* note 14, para. 2-2, 2-6a.; Rohman, *supra* note 2, at 12.

<sup>47</sup> Rohman, *supra* note 2, at 12. The scope is so critical that AR 15-6 expressly requires the legal advisor to provide the appointing authority advice on the scope of the investigation. *See* AR 15-6, *supra* note 14, para. 2-6a.

<sup>48</sup> Rohman, *supra* note 2, at 12. "The IO or board normally will not exceed the scope of the investigation authorized by the appointing authority without approval[], but should address issues encountered during the investigation that are related to policies, procedures, resources, or leadership, if the IO or board determines that those issues are relevant to the matters under investigation[]. It might be appropriate for the IO or board to recommend additional inquiry into issues that are outside the scope of the investigation." AR 15-6, *supra* note 14, para.3-10.

<sup>49</sup> AR 15-6, *supra* note 14, para. 2-6.

<sup>50</sup> *See id.* para 2-2.

<sup>51</sup> Rohman, *supra* note 2, at 12; *see also* Jahner, *supra* note 41; Tan, *supra* note 41.

subject matter or shielding certain people from the investigation.<sup>52</sup> Such circumstances have the potential to undermine the legitimacy of the investigation.

For example with respect to Abu Ghraib, Lieutenant General (LTG) Ricardo Sanchez, the commander of Combined Joint Task Force 7 (CJTF-7),<sup>53</sup> requested that the CENTCOM Commander appoint an IO to investigate allegations of detainee abuse.<sup>54</sup> LTG Sanchez appointed Major General (MG) Antonio Taguba<sup>55</sup> to conduct an investigation solely limited to the 800th Military Police Brigade.<sup>56</sup> No other adjacent units were to be investigated despite the fact that special operations units and a military intelligence brigade were also involved with detainee operations at the prison.<sup>57</sup> The narrow scope created an appearance that the Army was trying to hide unfavorable information, especially when the public discovered LTG Sanchez may have approved policies that led to widespread and systemic abuse.<sup>58</sup>

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<sup>52</sup> See DoD IG Abu Ghraib Report, *supra* note 27, at 38 (acknowledging the scope of Major General (MG) Antonio Taguba's investigation was limited to "detainee-related issues only within the 800th MP Brigade."); Rohman, *supra* note 2, at 12-13 (noting that MG Taguba's investigation was a good example of how an organization can limit the scope to "control a report's outcome.").

<sup>53</sup> Rohman, *supra* note 2, at 13. As the Commander of Combined Joint Task Force 7 (CJTF-7), Lieutenant General (LTG) Sanchez served as the coalition's senior commander in Iraq. DONALD P. WRIGHT & TIMOTHY R. REESE, ON POINT II: TRANSITION TO THE NEW CAMPAIGN 147 (2008).

<sup>54</sup> Major General Antonio Taguba, Army Regulation 15-6 Report of Investigation of the 800th Military Police Brigade (n.d.) [hereinafter Major General Taguba, AR 15-6 Investigation] (on file with author).

<sup>55</sup> When appointed, MG Taguba was serving as the Deputy Commanding General (Support), Coalition Forces Land Component Command (CFLCC), Operation Iraqi Freedom. Major General Antonio Taguba Resume (Aug. 11, 2009), <http://www.gomo.army.mil> (on file with author).

<sup>56</sup> Rohman, *supra* note 2, at 7, 12-13.

<sup>57</sup> Seymour M. Hersh, *The General's Report: How Antonio Taguba, Who Investigated the Abu Ghraib Scandal, Became one of its Casualties*, THE NEW YORKER (June 25, 2007), <http://www.newyorker.com/magazine/2007/06/25/the-generals-report>.

<sup>58</sup> *Id.* Major General Taguba's "orders were clear . . . he was to investigate only the military police at Abu Ghraib, and not those above them in the chain of command." *Id.* While conducting the investigation, Major General "Taguba came to believe that Lieutenant General Sanchez . . . and some of the generals assigned to the military headquarters in Baghdad had extensive knowledge of the abuse of prisoners in Abu Ghraib even before Joseph Darby came forward with the CD. Taguba was aware that in the fall of 2003—when much of the abuse took place—Sanchez routinely visited the prison, and witnessed at least one interrogation. According to Taguba, 'Sanchez knew exactly what was going on.'" *Id.*

## 2. Selection of the Investigating Officer

The next potential area of concern is the appointing authority's selection of the IO. Army administrative investigations require IOs "be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service, demonstrated sound judgment and temperament."<sup>59</sup> The importance of IO selection is emphasized by the fact that this language closely mirrors the language found in Article 25, Uniform Code of Military Justice (UCMJ), which provides the criteria convening authorities must consider when selecting panel members for courts-martial.<sup>60</sup>

AR 15-6 further requires that the IOs are "impartial, unbiased, [and] objective."<sup>61</sup> Yet, despite this mandate, legitimate concerns from an independence standpoint may still remain. The public may be concerned that an appointing authority will seek to control the results of an investigation by selecting a sympathetic IO. This perception existed with various DA and DoD investigations into the Abu Ghraib scandal.<sup>62</sup> It was also present in the third AR 15-6 investigation into CPL Tillman's death when the IO<sup>63</sup> returned findings that clearly diminished the culpability of various commanders, including the appointing authority, despite logical leads that suggested otherwise.<sup>64</sup>

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<sup>59</sup> AR 15-6, *supra* note 14, para. 2-3.

<sup>60</sup> "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best-qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ, art. 25(c)(2) (2012).

<sup>61</sup> AR 15-6, *supra* note 14, para. 2-3.

<sup>62</sup> *See Rohman, supra* note 2, at 14. The "appointment of Lieutenant General (Anthony Jones) was a direct statement that his investigation would go no higher on the chain of command than another Lieutenant General . . .". *Id.* One DoD investigation that used civilian investigators comprised of former senior level members of the armed forces management structure and while they were "technically independent," their "collective histories with DoD raised significant questions about their functional independence." *Id.*

<sup>63</sup> At the time of the investigation, the IO, Brigadier General (BG) Gary Jones, was the Commander, U.S. Army Special Forces Command (Airborne) and was a subordinate commander of Lieutenant General (LTG) Philip Kensinger who commanded U.S. Army Special Operations Command (Airborne). DoD IG Tillman Report, *supra* note 27, at 3.

<sup>64</sup> *Id.* at 43 (stating BG Jones failed to follow appropriate investigative leads despite evidence possibly implicating LTG Kensinger); David S. Cloud, 9

3. *The Effect of the Army's Organizational Culture on the Conduct of the Investigation*

The Army's unique organizational culture<sup>65</sup> is another perceived obstacle to achieving unbiased administrative investigations. The Army's strict and disciplined hierarchical structure is seen as a hindrance to an IO's ability to be candid if doing so would jeopardize the IO's professional advancement.<sup>66</sup> This structure may inhibit IOs from pursuing logical leads when the chain of command is implicated.<sup>67</sup> Furthermore, those outside the military have argued the IO's indoctrination within the Army is an implicit and pervasive bias that could affect the outcome of an investigation.<sup>68</sup>

Implied in hierarchical organizations are power relationships that are "absolute and autocratic."<sup>69</sup> As a result, this organizational culture has a tendency to "suppress subordinates from questioning, disagreeing, or raising alternative points of view" which in turn "has the potential to squash conflict and disallow dissent."<sup>70</sup> This potential danger is addressed in AR 15-6's requirement that IOs outrank subjects of investigations;<sup>71</sup>

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*Officers Faulted for Aftermath of Tillman Death*, N.Y. TIMES, at A15, Mar. 27, 2007.

<sup>65</sup> "Organizational culture refers to 'the taken-for-granted values, underlying assumptions, expectations, collective memories, and definitions present in an organization.'" Stephen J. Gerras, Leonard Wong, & Charles D. Allen, *Organizational Culture: Applying a Hybrid Model to the U.S. Army* at 2 (November 2008) (unpublished, U.S. Army War College) <https://ssl.armywarcollege.edu/dclm/pubs/Organizational%20Culture%20Applying%20a%20Hybrid%20Model%20to%20the%20U.S.%20Army%20Nov%202008.pdf>.

<sup>66</sup> STEPHEN J. GERRAS & LEONARD WONG, *CHANGING MINDS IN THE ARMY: WHY IT IS SO DIFFICULT AND WHAT TO DO ABOUT IT* 21 (2013); Rohman, *supra* note 2, at 13, 15.

<sup>67</sup> See DoD IG Tillman Report, *supra* note 27, at 38 (stating BG Jones failed to clarify misstatements made by his direct supervisor and the appointing authority, LTG Kensinger); Hersh, *supra* note 60 (explaining that MG Taguba considered himself "legally prevented from investigating into higher authority").

<sup>68</sup> See GERRAS & WONG, *supra* note 68, at 6 (explaining that "frames of reference" are developed early in a career and shattering one's frame of reference is much easier said than done); Rohman, *supra* note 2, at 15 (discussing the fact that the civilian investigators appointed by Secretary Rumsfeld were not functionally independent of DoD when their collective histories were with DoD which colored their perspectives).

<sup>69</sup> *Id.* at 21.

<sup>70</sup> *Id.* 21-22.

<sup>71</sup> AR 15-6, *supra* note 14, para. 2-3f.

however, within a hierarchical organization problems still arise when an IO may be hesitant to express candor to the appointing authority when unfavorable or displeasing information about higher levels of command are uncovered.<sup>72</sup> Honest feedback could have a negative effect on an IO's career and may discourage a thorough investigation. MG Taguba experienced this firsthand when he opined he was "forced into retirement" by senior Pentagon officials due to his honest yet scathing report on detainee abuse.<sup>73</sup> Given these concerns, there is always danger that an IO, especially a less mature and confident one, will only deliver the news he thinks his commander wants to hear. This is particularly risky when the subject matter is controversial and has the potential to embarrass the command.

An additional concern in past investigations was the perception that the hierarchical structure may effectively prevent the IO from pursuing logical leads when the chain of command is implicated in wrongdoing.<sup>74</sup> In the first Abu Ghraib AR 15-6 investigation, MG Taguba quickly realized senior level officials, including the appointing authority, had knowledge of the abuse or were involved in the development and approval of policies that led to the abuse.<sup>75</sup> Other DA and DoD investigations into the Abu Ghraib scandal also failed to follow the leads up the chain of command despite evidence pointing to senior leader involvement.<sup>76</sup> In the third AR 15-6 investigation conducted into the Tillman scandal, the IO

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<sup>72</sup> Such circumstances may arise when a favored commander or officer is under investigation. An example of this perception is seen in recent reporting that General (GEN) Martin Dempsey disapproved a finding of adultery for a subordinate commander, Major General (MG) John Custer, in an AR 15-6 investigation conducted by the Department of the Army (DA) Inspector General (IG). Tom Vanden Brook, *Army Brass, Led by Future Joint Chiefs Head Martin Dempsey, Gave Amorous General a Pass*, USA TODAY (Mar. 9, 2017, 12:30 PM), <http://www.usatoday.com/story/news/politics/2017/03/09/general-martin-dempsey-major-general-john-custer-military-sexual-harassment-abuse/98686906/>. While it appears this investigation was forthright about MG Custer's behavior, there are instances where more junior IOs could be tempted to minimize misconduct of a favored commander or officer who is under investigation. Professional Experiences, *supra* note 4.

<sup>73</sup> David S. Cloud, *General Says Prison Inquiry Led to His Forced Retirement*, N.Y. TIMES, June 17, 2007, <http://www.nytimes.com/2007/06/17/washington/17ghraib.html> ("'They always shoot the messenger,' General Taguba said. 'To be accused of being overzealous and disloyal – that cuts deep into me. I was ostracized for doing what I was asked to do.'").

<sup>74</sup> See Rohman, *supra* note 2, at 14, 25-30.

<sup>75</sup> *Id.* at 13; Hersh, *supra* note 59.

<sup>76</sup> Rohman, *supra* note 2, at 17-18.

failed to appropriately pursue a logical lead that implicated the appointing authority<sup>77</sup> in his misrepresentations concerning next-of-kin notifications to the Tillman family.<sup>78</sup>

Finally, the fact that the IO works for the same institutional organization he is investigating raises suspicions on his impartiality because the Army very likely shaped his “frame of reference” early on in his career.<sup>79</sup> Based on this, an IO’s frame of reference will very likely affect the conduct of the investigation and the findings and recommendations made to the appointing authority. While there is certainly a benefit for an IO to have familiarity with the organization he or she is investigating,<sup>80</sup> there may be instances where an IO’s frame of reference may be difficult to overcome,<sup>81</sup> especially if the IO is a more senior officer and the investigation involves new policies that may be controversial among an older generation of service members.<sup>82</sup>

#### B. The New AR 15-6 and Its Sufficiency in Addressing Independence Concerns

Absent replacing the current AR 15-6 framework with a completely independent investigator, it is nearly impossible to eradicate all perceptions of a lack of independence in internally conducted investigations.<sup>83</sup> However, the latest revision of AR 15-6 appropriately addresses and mitigates many concerns discussed in the preceding section. Specific language was added to AR 15-6 that provides disqualifying

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<sup>77</sup> DoD IG Tillman Report, *supra* note 27, at 43.

<sup>78</sup> *Id.*

<sup>79</sup> GERRAS & WONG, *supra* note 68, at 10-11. A frame of reference is the “complex knowledge structure” that one develops through “personal and professional experiences that influence” and often limit the way one approaches a problem. *Id.* at 6.

<sup>80</sup> Rohman, *supra* note 2, at 16.

<sup>81</sup> GERRAS & WONG, *supra* note 68, at 6 (“Unfortunately, shattering or unlearning our frames of reference is an action that is easy to espouse, yet incredibly difficult to execute.”).

<sup>82</sup> See e.g., Terri Moon Cronk, Def. Media Activity, *Officials Describe Plans to Integrate Women into Combat Roles*, U.S. DEP’T OF DEF., Feb. 2, 2016, <https://www.defense.gov/News/Article/Article/648766/officials-describe-plans-to-integrate-women-into-combat-roles>; DEPARTMENT OF DEFENSE TRANSGENDER POLICY, [https://www.defense.gov/News/Special-Reports/0616\\_transgender-policy](https://www.defense.gov/News/Special-Reports/0616_transgender-policy) (last visited Mar. 15, 2017).

<sup>83</sup> Rohman, *supra* note 2, at 15, 16, 36; see also Katz, *supra* note 45 (expressing the public’s sentiment that an “outside agency will be impartial, while an internal criminal investigation will not.”).

criteria for appointing authorities who appear to be biased or have a conflict of interest<sup>84</sup> and the required legal support during all stages of the investigation is vastly improved.<sup>85</sup>

### 1. Addressing Appointing Authority Bias and Conflict of Interest

Under the previous version of AR 15-6, the only qualifying criteria for an appointment authority concerned the officer's grade and whether they were in command.<sup>86</sup> Nowhere did the regulation comment on conflict of interest or bias as disqualifying factors.<sup>87</sup>

Contrast this with the latest version of AR 15-6, which retains similar guidance, but expressly forbids any "individual who is reasonably likely to become a witness to an inquiry, investigation, or board" from appointing one.<sup>88</sup> The regulation further states any "individual who has an actual or perceived bias for or against a potential subject of the investigation, or an actual or perceived conflict of interest in the outcome of the investigation, should not appoint an inquiry, investigation, or board."<sup>89</sup> When bias or a conflict exists the "potential appointing authority" is required to forward the subject matter to the "next superior commander or appointing authority" who will decide whether the subject matter needs to be investigated.<sup>90</sup> The regulation provides a couple examples of actual or perceived bias and conflicts of interest.<sup>91</sup>

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<sup>84</sup> AR 15-6, *supra* note 14, para. 2-1f.

<sup>85</sup> *Id.* para. 2-6, 2-7.

<sup>86</sup> AR 15-6 dtd 2006, *supra* note 20, ch. 2.

<sup>87</sup> *See generally, id.*

<sup>88</sup> AR 15-6, *supra* note 14, para. 2-1f.

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

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* para. 2-1f.(1)-(2).

(1) A potential appointing authority may have an actual or perceived bias for or against a potential subject of an investigation if the potential subject is on the potential appointing authority's principal, special, or personal staff. (2) A potential appointing authority may have an actual or perceived conflict of interest in the outcome of an investigation if the investigation will examine the potential appointing authority's policies or decisions. Identifying an actual or perceived conflict of interest, however, does not necessarily mean that the potential appointing authority is a subject of the investigation. *Id.*

The revised AR 15-6 also includes new language expressly requiring immediate forwarding of allegations of “senior official”<sup>92</sup> misconduct to the Investigations Branch of the DA Inspector General (DAIG) and that the authority to appoint an investigation into senior officials is retained at the highest levels of the Army.<sup>93</sup> While this is not a change in policy,<sup>94</sup> the restatement of reporting requirements per DoD Directive vastly reduces the potential for errors in assigning investigative jurisdiction for senior official misconduct,<sup>95</sup> bolstering public confidence in the investigatory process.

The extent of these revisions makes it reasonable to conclude the drafters intended to address the independence concerns raised in high profile investigations of the past decade. While an honest and self-aware appointing authority may preemptively recuse himself after identifying his own biases and conflicts of interest, the responsibility to identify these issues and enforce the regulatory standards falls on the command’s legal advisor.<sup>96</sup> The new AR 15-6 includes more guidance and a vastly expanded role for those providing legal support.<sup>97</sup>

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<sup>92</sup> *Id.* para. 1-7. Senior officials is defined as “general officers, promotable colonels, members of the civilian Senior Executive Service (SES), and other DA civilian employees of comparable grade or position.” *Id.*

<sup>93</sup> *Id.* (stating “only the Secretary of the Army, Under Secretary of the Army, Chief of Staff of the Army, Vice Chief of Staff of the Army, and The Inspector General of the Army may authorize or direct an investigation into allegations or incidents of improprieties or misconduct” by senior officials).

<sup>94</sup> U.S. DEP’T OF DEF., DIR. 5505.06, INVESTIGATION OF ALLEGATIONS AGAINST SENIOR DOD OFFICIALS para. 3 (6 June 2013) [hereinafter DoDD 5505.06].

<sup>95</sup> The potential for even experienced judge advocates to overlook requirements located in various regulations and directives exists. During the CPL Tillman investigations, field grade judge advocates failed to realize that Army policy required notification of friendly fire deaths through the chain of command and the Army Safety Center. DoD IG Tillman Report, *supra* note 27, at 2. They were also unaware of the fact that DoD guidance required Commander, CENTCOM, to appoint a legal investigation. *Id.* With the exception of the requirement that only a General Court-Martial Convening Authority (GCMCA) has the authority to appoint investigations into the death of a Soldier, all of the remaining reporting and investigative requirements were located in a variety of DA and DoD regulations and instructions, but not discussed directly in AR 15-6. *Id.* at 6-12 (outlining the various DA and DoD policy and regulatory requirements for reporting and investigating suspected friendly fire deaths); *see* AR 15-6 dtd 2006, *supra* note 20.

<sup>96</sup> *See* AR 15-6, *supra* note 14, para. 2-6, 2-7; *see also id.* at i (stating The Judge Advocate General is the proponent of AR 15-6).

<sup>97</sup> *Id.* para. 2-6, 2-7.



## 2. Increased Role for Judge Advocates

In practice, legal advisors always played an important role in administrative investigations;<sup>98</sup> however, the previous version of the regulation provided substantially less guidance and a less defined role for attorneys.<sup>99</sup> For instance, it was standard practice to formally assign legal advisors for informal investigations,<sup>100</sup> yet the prior version of AR 15-6 did not require a formally appointed legal advisor.<sup>101</sup> Furthermore, while legal reviews were done for nearly all administrative investigations,<sup>102</sup> the previous version of AR 15-6 did not make this a blanket requirement.<sup>103</sup>

The latest AR 15-6 enhances the judge advocate's role. Not only is the regulation filled with instructions requiring the appointing authority<sup>104</sup> and IO<sup>105</sup> consult with the servicing staff judge advocate or assigned legal advisor, there is also an entire section in Chapter 2 devoted to outlining the scope and stages of legal support.<sup>106</sup> In particular, paragraph 2-6, emphasizes judge advocate involvement at all stages of the investigation to include pre-appointment, conduct of the investigation, and the legal review of the completed investigation.<sup>107</sup>

During pre-appointment, the servicing legal advisor is required to advise the appointing authority on selecting the investigatory method, regulatory requirements, selecting the IO, scope of the investigation, and any other necessary "preparatory guidance."<sup>108</sup>

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<sup>98</sup> See COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 106-07 (describing the investigatory process and emphasizing the important role legal advisors play).

<sup>99</sup> See AR 15-6 dtd 2006, *supra* note 20, Ch. 2.

<sup>100</sup> COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 106.

<sup>101</sup> See AR 15-6 dtd 2006, *supra* note 20, para. 4-1 (explaining for informal investigations "[a]ppointment of advisory members or a legal advisor is unnecessary because persons with special expertise may be consulted informally whenever desired.").

<sup>102</sup> Professional Experiences, *supra* note 4; see COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 108.

<sup>103</sup> AR 15-6 dtd 2006, *supra* note 20, para. 2-3*b*. Legal reviews were required when dictated by "[o]ther directives that authorize investigations or boards," or when the cases involved "serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action (see para. 1-9), or will be relied upon in actions by higher headquarters." *Id.*

<sup>104</sup> See, e.g., AR 15-6, *supra* note 14, para. 1-5, 1-6c(3), 2-6.

<sup>105</sup> See, e.g., *id.* app. C-2*a*.

<sup>106</sup> *Id.* ch 2.

<sup>107</sup> *Id.* para. 2-6.

<sup>108</sup> *Id.* para. 2-6*a*.

Additionally, every IO is required to have a legal advisor who will provide advice on any issue the IO is concerned with for the duration of the investigation.<sup>109</sup> The legal advisor shall help the IO “develop an investigative plan,” identify relevant witnesses, generate witness questions, ensure the rights of subjects are protected, verify all appointment requirements are met, and “ensure the evidence supports the findings” and the “recommendations are logically related to the findings.”<sup>110</sup> The legal advisor should review the final product before it is submitted to another attorney for legal review.<sup>111</sup>

Finally, the legal review’s scope expanded. It includes the prior requirements<sup>112</sup> and adds that the reviewing attorney ensures “the investigation does not raise questions that it leaves unanswered; anticipates future uses of the investigation; resolves internal inconsistencies; makes appropriate findings; and make recommendations that are feasible, acceptable, and suitable.”<sup>113</sup>

This widely expanded role for judge advocates in AR 15-6 reflects the importance of an overseer or protector of the administrative investigation process. The Judge Advocate General (TJAG) is the proponent of AR 15-6, and therefore it is only natural for the official oversight responsibility to fall on judge advocates.<sup>114</sup> Yet, aside from this formal designation, as a practical matter, judge advocates are the officers best positioned to navigate such a task. As a member of the commander’s personal and special staff, the servicing judge advocate has a direct line of communication to the commander.<sup>115</sup> The legal advisor is traditionally one of the few staff officers able to speak more candidly with the

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<sup>109</sup> *Id.* para. 2-6*b*.

<sup>110</sup> AR 15-6, *supra* note 14, para. 2-6*b*.

<sup>111</sup> *Id.* para. 2-7*b*.

<sup>112</sup> Compare AR 15-6 dtd 2006, *supra* note 20, para. 2-3*b*. (requiring a judge advocate’s legal review to determine “[w]hether the proceedings comply with legal requirements . . . [w]hat effects any errors would have . . . [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority . . . [w]hether the recommendations are consistent with the findings.”), with AR 15-6, *supra* note 14, para. 2-7 (requiring the aforementioned determinations but with more detail and additional requirements).

<sup>113</sup> AR 15-6, *supra* note 14, para. 2-7*b*.

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

<sup>115</sup> JOINT CHIEFS OF STAFF, JOINT PUB. 1-04, LEGAL SUPPORT TO MILITARY OPERATIONS I-7 (17 Aug. 2011) [hereinafter JP 1-04]; U.S. DEP’T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO THE OPERATIONAL ARMY para. 4-9 (18 Mar. 2013) [hereinafter FM 1-04].

commander despite the Army's hierarchical structure.<sup>116</sup> Therefore, the judge advocate should have the access and rapport to appropriately advise the commander on the requirements of AR 15-6 to include the second and third order effects of failing to abide by bias and conflicts of interest disqualifiers.<sup>117</sup>

If a commander refuses to follow AR 15-6 requirements, the judge advocate has a variety of tools at their disposal to rectify this issue and protect the best interests of the Army.<sup>118</sup> First, judge advocates are subject to technical supervision by a supervisory judge advocate outside the traditional chain of command.<sup>119</sup> In the event they cannot affect the necessary change within the traditional chain of command, the unit's legal advisor has support from other judge advocates who may provide advice on how to proceed with the commander or, if absolutely necessary, may even go as far as addressing the issue with the next superior level of command.<sup>120</sup>

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<sup>116</sup> See U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS, rule 2.1 [hereinafter AR 27-26].

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation, but not in conflict with the law. *Id.* rule 2.1.

<sup>117</sup> See AR 15-6, *supra* note 14, para. 2-1f, 2-6.

<sup>118</sup> See AR 27-26, *supra* note 119, rule 1.13.

If a lawyer for the Army knows that an officer . . . is engaged in action, intends to act or refuses to act in a matter related to the representation that is either a violation of a legal obligation to the Army or a violation of law which reasonably might be imputed to the Army the lawyer shall proceed as is reasonably necessary in the best interest of the Army. *Id.* rule 1.13(c).

<sup>119</sup> U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-2 [hereinafter AR 27-1] ("JA officers perform their duties under commanders of their assigned or attached commands . . . . JA officers receive technical legal supervision from TJAG and from the SJAs of superior commands."); Policy Memorandum 14-04, Office of the Judge Advocate General, U.S. Army, subject: Use of Technical Channel of Communications (22 Jan 2014).

<sup>120</sup> See Renn Gade, *The U.S. Judge Advocate in Contemporary Military Operations: Counsel, Conscience, Advocate, Consigliere, or All of the Above?*, in U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE 10 (Geoffrey S. Corn et als. eds., 2016) [hereinafter Gade].

Additionally, unlike other staff officers, the judge advocate is beholden to both Army professional responsibility regulations and civilian professional conduct requirements.<sup>121</sup> The judge advocate's client is the Army, as officially represented by the commander.<sup>122</sup> When a commander decides to do something that may substantially injure the Army, the judge advocate must remind the commander that they should reconsider their decision.<sup>123</sup> If that does not work, they may be obliged to consult their technical chain of supervision in order to preserve the interest of the Army.<sup>124</sup> These ethical obligations are another reason why the judge advocate is the best-positioned officer on the staff to hold the command accountable to the requirements of AR 15-6.

In addition to advising the appointing authority, another critical area of judge advocate involvement is providing legal advice to the IO. The IO's legal advisor can positively influence an investigation by providing the IO perspective and guidance when independence concerns emerge.<sup>125</sup> If an IO discovers the appointing authority is implicated in the investigation, the legal advisor can pass this information to their supervisory judge advocate who may address it with the appointing authority's next superior commander.<sup>126</sup> This provides the IO an outlet to be candid and reveal critical information affecting the independence of the investigation without the fear of directly confronting the appointing authority and jeopardizing their career.

Moreover, as an objective party, the legal advisor may be able to combat an IO's frame of reference that is improperly shaping or affecting the investigation by providing another perspective. For example,

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The major at the brigade level can and should seek out the SJA at the division level, and the SJA at the division level can and should seek out the SJA at the corps level for support and assistance on professional areas of interest. Unlike the formal chain of command applicable to everyone in every unit, the technical chain seeks to facilitate assistance among the JAs in the unit hierarchy. The nature of the legal profession often requires a stronger technical chain of supervision along JAGC channels than in other branches or communities of interest. *Id.*

<sup>121</sup> AR 27-26, *supra* note 119, at i; *see* AR 27-1, *supra* note 122, para. 3-3b(2).

<sup>122</sup> AR 27-26, *supra* note 119, rule 1.13.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; Gade, *supra* note 123, at 10.

<sup>125</sup> *See* AR 15-6, *supra* note 14, para. 2-6b.

<sup>126</sup> *See* AR 15-6, *supra* note 14, para. 1-7; AR 27-26, *supra* note 119, rule 1.13(c)(5); Gade, *supra* note 123, at 10.

educating an IO on future use and disclosure of the investigation pursuant to the Freedom of Information Act (FOIA) should help the investigator stay within his scope and write to a specific audience by limiting redacted material.<sup>127</sup> If the IO's frame of reference is distorting the investigation to a point where it constitutes actual or implied bias, the legal advisor can immediately identify this and address it with the appointing authority and technical supervision to determine if another IO needs to be appointed.<sup>128</sup> This expanded role affirmatively empowers the legal advisor to be a proactive referee making the hard calls on sensitive issues.

Finally, it is important to note that AR 15-6 provides an additional check on the process by requiring a legal review of all investigations conducted pursuant to the regulation and strongly encouraging the review to be done by an attorney who has not already provided legal support to the investigation.<sup>129</sup> This provides a second set of legally trained eyes to review the investigation and look for any deficiencies or concerns that may affect the future use of the investigation.<sup>130</sup>

The value judge advocate oversight provides to the process is contingent upon one thing: well-trained and competent attorneys who are up to the task of making hard calls. Given the increasing responsibilities attorneys have in the AR 15-6 process, it is essential that all judge advocates are properly trained on their roles in the process and that they have strong support from the technical supervision chain.

### 3. Additional Considerations

Despite the positive changes in AR 15-6, there are people who will never be satisfied with Army administrative investigations because they inherently lack total independence.<sup>131</sup> For these skeptics, the only way to

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<sup>127</sup> See Freedom of Information Act, 5 U.S.C. § 552 (2016) (providing the public full or partial access to information within the control of the federal government); AR 15-6, *supra* note 14, at para. 2-6b, 2-7b.

<sup>128</sup> See AR 15-6, *supra* note 14, para. 2-3, 2-6.

<sup>129</sup> *Id.* para. 2-7 (stating "[w]henever possible, the legal advisor designated to support the investigation or board will not conduct the legal review.").

<sup>130</sup> *Id.* para. 2-7.

<sup>131</sup> Doctors Without Borders continues to be unsatisfied with the results of the Army's investigation into the Kunduz hospital strike despite the fact that the investigation was very comprehensive and generally well done. Their primary complaint is based on the belief that an internal Army investigation is never truly independent. See Amnesty

gain their confidence is to use an investigatory body functionally independent of the organization that is under investigation.<sup>132</sup> However, it is not in the interest of the Army to remove the AR 15-6 process from command authority, nor would it be prudent. While much consideration is given to public perception of the administrative investigation process, it is critical to keep in mind the primary purpose of AR 15-6: to provide commanders an efficient fact-finding method so they can make informed decisions on how to address matters within their commands and maintain good order and discipline.<sup>133</sup> Command authority should not be minimized merely to gain a modicum of public confidence, especially when the process is sound. Highly sensitive investigations or ones likely to draw national media scrutiny are already withheld to higher levels to minimize the risk of mishandling by less experienced commanders and IOs.<sup>134</sup> As it stands, the latest version of AR 15-6 is more than sufficient for achieving its purpose.

In Keith Rohman's case study of the flaws in the Abu Ghraib investigation, he suggests hiring subject matter consultants as members of the investigative team, which is similar to corporate practice when conducting internal investigations into employee misconduct.<sup>135</sup> While this may provide an outside perspective,<sup>136</sup> any gains in public perception of credibility in the process may only be incremental and the fact that the consultant is paid by the Army may undercut any desired appearance of independence.

An effective way to mitigate public misperception is by synchronizing efforts between judge advocates and public affairs offices (PAO) to ensure accurate messaging and expectations to the public.<sup>137</sup> As seen with the Doctors Without Borders incident, mixed messages may breed

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International Press Release, *supra* note 34; MSF Press Release, *supra* note 34; Schulberg, *supra* note 2.

<sup>132</sup> See Rohman, *supra* note 2, at 36; Amnesty International Press Release, *supra* note 34; MSF Press Release, *supra* note 34; Schulberg, *supra* note 2.

<sup>133</sup> AR 15-6, *supra* note 14, para. 1-8; COMMANDER'S LEGAL HANDBOOK, *supra* note 19, at 99-100.

<sup>134</sup> AR 15-6, *supra* note 14, paras. 1-7, 2-1c.

<sup>135</sup> Rohman, *supra* note 2, at 37-38; see Mark Oakes & Tara Tune, *Effective Corporate Investigations*, 45 THE BRIEF (Winter 2016) (discussing corporations hiring firms to conduct internal investigations into employee misconduct).

<sup>136</sup> Rohman, *supra* note 2, at 37-38.

<sup>137</sup> Professional Experiences, *supra* note 4.

skepticism.<sup>138</sup> Judge advocates must be proactive and work with commanders and PAOs to ensure expectations are appropriately set and managed throughout an investigation.<sup>139</sup>

#### IV. Conclusion

While the Army suffered embarrassment from a variety of administrative investigations, it also learned from these mistakes and took valuable steps forward, namely, addressing the fundamental independence concerns in AR 15-6. Although it is impossible to eradicate all perceptions of a lack of independence, the latest regulatory update is better equipped to mitigate perceptions of bias, conflicts of interest, and other issues inherent to internally conducted investigations. Ultimately, the judge advocate is the key to combatting public misperceptions.

The updates, however, are only as effective as the judge advocates shepherding the process. The JAG Corps must ensure its attorneys are adequately trained to fully understand their vital roles throughout the investigatory process. Judge advocates must know the regulation, anticipate second and third order effects that may arise from the investigation, have the fortitude to provide candid advice, and actively ensure accurate information is disseminated. With these regulatory updates, the Army is in a better position to prevent the mistakes of the past and maintain the trust of the American people.

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<sup>138</sup> Jethro Mullen & Ashley Fantz, *Civilians 'Accidentally Struck' in Afghan Hospital Bombing*, CNN (Oct. 6, 2015), <http://www.cnn.com/2015/10/05/asia/afghanistan-doctors-without-borders-hospital/index.html> ("Today the U.S. government has admitted that it was their airstrike that hit our hospital in Kunduz . . . . Their description of the attack keeps changing -- from collateral damage, to a tragic incident, to now attempting to pass responsibility to the Afghanistan government.").

<sup>139</sup> See JP 1-04, *supra* note 118, I-15.