

From: [Smith Maj Matthew T](#)
To: [WHS Pentagon EM Mailbox Judicial Panel](#)
Subject: Supplemental Materials for the February 24 JPP on Sexual Assault in the Military
Date: Friday, February 17, 2017 10:47:05 AM
Attachments: [CURB Investigator Package \(Final\).pdf](#)

Good morning Ms. Carson,

Members of the Marine Corps Defense Services Organization (DSO) participated in several of the site visits conducted by the JPP Subcommittee from July to September of 2016. The JPP Subcommittee incorporated information gathered from those meetings into the December 2016 "Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases." The Marine Corps DSO concurs with the four recommendations contained in that report. I wanted to provide some supplemental information in support of the comments provided by our counsel during the site visits with respect to recommendations 1 of the JPP Subcommittee. I hope that these materials might be considered during the panel deliberations on military defense counsel resources.

Recommendation 1: That military Services provide independent and deployable defense investigators

The DSO concurs with this recommendation. The DSO has pursued the hiring of investigators. Attached please find a request package submitted in 2015 which includes due process arguments, staffing comparisons between trial and defense counsel, and a numerical analysis of investigator staffing in Federal Public Defender offices across the country. This request was submitted to the Marine Corps, but was ultimately disapproved.

Thank you to the Subcommittee for the time and effort taken in investigating and preparing the December 2016 report. It is apparent from their recommendations that they understand and appreciate that resource equality is a fundamental concern for our clients and our counsel.

Very respectfully,
Matthew Smith
Major, USMC
Officer-in-Charge, Defense Counsel Assistance Program
Defense Services Organization
"Marines Defending Marines"
(703) [REDACTED]



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In Reply Refer To:
5800
DSO/mts
15 Sep 15

From: Chief Defense Counsel of the Marine Corps
To: Deputy Commandant, Combat Development and Integration
Via: Staff Judge Advocate to the Commandant of the Marine Corps

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Ref: (a) MARADMIN 408/15
(b) American Bar Association Standards for Criminal
Justice Prosecution Function and Defense Function
(Third Edition)
(c) FY14 Annual Report Submitted to the Committees on
Armed Forces Pursuant to the UCMJ

Encl: (1) Response Systems Panel Report: Recommendation 81
(2) Federal Public Defender Attorney to Investigator
Staffing Ratio
(3) Navy Defense Investigators Classified Position
Description
(4) 2014 - 2015 NDAA SAPR Changes
(5) United States Department of Justice, Statement of
Interest, Case No. 8866-07
(6) Secretary of Defense Memorandum, "Department of
Defense Implementation of the Recommendations of the
Response Systems to Adult Sexual Assault Crimes
Panel" of 13 Dec 14
(7) DSO Investigator OPT Slide Deck

1. I submit this package to you in accordance with reference (a) in order to address a critical, emerging, and enduring civilian manpower requirement for the Defense Services Organization (DSO). I respectfully request that you convene a Civilian Uncompensated Review Board (CURB) to recommend sourcing options to support the creation of eight GS-13 civilian defense special investigator billets, full-time employment (FTE), and funding for the DSO.

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2. Orientation - Provision of Defense Legal Services

a. Our mission in the Marine Corps Defense Services Organization is to zealously defend Marines and Sailors facing disciplinary action in order to safeguard the Rights of those who safeguard our nation. We do this by providing zealous, ethical, and effective defense counsel services to Marines and Sailors who are facing administrative, non-judicial, and judicial actions. Having an effective DSO as part of a robust military justice process protects and promotes due process and preserves the Constitutional and statutory integrity of the system by striving to ensure the military justice system is both fair and just.

b. Organization. The DSO is a global law firm staffed across four regions, National Capitol Region (NCR), East, West and Pacific.

(1) The number of criminal defense attorneys in the DSO ranges from a low of 65 to a high of 77, depending on manpower models, orders, and staffing. These attorneys range in experience from new law school graduates to seasoned attorneys with experience defending complex cases.

(2) The DSO is also supported by 20 to 25 enlisted Marines ranging in grade from PFC to Gunnery Sergeant. While the DSO is projected to have four degree completion program Paralegal Specialists in the future, we presently have only one.

(3) Additionally, the DSO is supported by two civilian litigation support attorneys, one located in the Western Region and one located in the Eastern Region. While these two attorneys have had a dramatic and important impact on the quality of our litigation training programs in the DSO, the prosecution team is supported by four litigation support attorneys, one in direct support of each Legal Services Support Section (please see the parallel CURB package requesting additional litigation support expertise for the DSO to bring us more on par with the services provided to the prosecution).

c. Duty To Investigate. Reference (b) says at Standard 4-4.1, Duty to Investigate, that all defense counsel have an obligation to "conduct a prompt investigation of the circumstances of the case and explore all avenues leading to

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facts relevant to the merits of the case and the penalty in the event of conviction.” But where a defense counsel personally conducts an investigation he or she is disadvantaged in that (a) he or she potentially becomes a witness in the case; or (b) he or she performs this investigative function at the expense of his or her duties as an attorney—given the increased complexity of our practice and the concomitant increase in the number of contested trials, there simply is not enough time in the day to be both an investigator and an attorney. The fact that the Government has at least two trained, credentialed CID investigators embedded within each of their four Complex Trial Teams is tacit admission of this fact. More importantly, Recommendation 37 from Comparative Systems Subcommittee of the Congressionally-appointed Response Systems Panel advised:

Recommendation 37: The Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice.

This subcommittee recommendation was adopted by the full Response Systems Panel and endorsed by the Secretary of Defense as Recommendation 81. Enclosure (1) pertains. So the question is no longer whether investigators are important to the process. Neither is the question whether or not we should procure Defense Special Investigators. The question is in what number.

(1) Just as Marine Corps Prosecutors liken themselves to Assistant United States Attorneys, the closest federal parallel to the DSO is the Federal Public Defender’s Office. Federal Public Defenders exercise their obligation under ABA Standard 4-4.1 by hiring trained investigators and paralegals. Their current staffing model may be found at enclosure (2), but in sum the national standard is roughly one investigator for every three Defense Counsel.

(2) Similarly, the Navy has elected to satisfy RSP Recommendation 81 and ABA Standard 4-4.1 by hiring 8 investigators (known colloquially as “Defense Litigation Support Specialists”). The Navy DSO has roughly 40 attorneys, meaning that once the hiring process is complete they will have approximately one investigator for every five defense counsel.

(3) As noted above, the Government has at least eight trained, credentialed Criminal Investigation Division

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investigators assigned within their Complex Trial Teams. Currently the United States has 77 trained prosecutors worldwide. Ignoring for the moment the vast resources the Government has at its disposal in the Naval Criminal Investigation Services and the fact that through the Convening Authority the Government retains the power of the military justice purse string; in the macro this means that there is at least one investigator for every nine prosecutors. But in the micro, consider the National Capitol Region where there are two investigators supporting nine attorneys, leading to a one investigator for every 4.5 attorneys. In Gideon v. Wainwright, the Supreme Court put the value of how the Government chooses to expend its resources in these terms, albeit in the context of attorneys:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime... . That government (sic) hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. Gideon v. Wainwright, 372 U.S. 335, 334 (1963).

So the mere fact that the Government chooses to expend valuable resources on something necessarily informs its value to the process. Similarly, that the Government assigns criminal investigators to their Complex Trial Teams is the strongest indication that criminal investigators are necessities, not luxuries.

(4) Finally, the Military Commissions Defense Services Organization, an organization established to represent individuals accused of terrorism and/or battlefield crimes, also has its own investigators assigned to defense representation teams. The Commissions is notionally staffed with 72 attorneys and 18 investigators, meaning there is roughly one investigator for every four defense counsel.

d. In light of the foregoing, the complete absence of Defense Special Investigators in the United States Marine Corps creates an obvious delta between the quality of services provided to Marines over that provided to Federal criminal defendants, servicemembers in our sister service, the prosecution team, and even those accused of terrorism or battlefield atrocities. It creates a noticeable and significant

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deficiency in our continued ability to ensure the fairness of the process, and to provide quality criminal defense services in an era of increasingly complex trials and Congressional scrutiny. To receive some modicum of investigative assistance defense counsel must lay out the plans for their defense case in a written request submitted through military prosecutors—the very same persons dedicated to convicting the accused—in an attempt to elicit assistance from Marine Corps Criminal Investigation Division (CID) or Naval Criminal Investigative Service (NCIS)—the very same agencies that investigate charges against our clients. The conflict of interest between the mission of the DSO and that of both law enforcement and the prosecution team is self-evident. The current system creates a natural imbalance both in fact and in appearance—an imbalance noted by the RSP—affecting the quality of legal representation provided to our Marines. Furthermore it unnecessarily exposes the Marine Corps to potential adversity from either the media, the appellate courts, or both, when these deficiencies ultimately infringe on the rights of our Marines and manifest themselves in claims of systemic ineffective assistance of counsel.

3. Catalysts for Change

a. Both Fiscal Year 2014 and 2015 bore witness to a multitude of changes within the military justice system. These changes are depicted visually at enclosure (4). With the exception of the repeal of the prohibition on consensual sodomy, all of these changes inure to the benefit of parties other than the accused. Clearly these changes are intended to do two things: (1) Make it easier to obtain convictions in cases of sexual assault; and (2) Establish a new category of entitlements for those who bring allegations sexual assault. In recent years for example the FY14 NDAA incorporated 21 changes to the military justice system; the Marine Corps stood up its Victim's Legal Counsel Organization (VLCO); and services increased sexual assault awareness and prevention programs. The result was an increase in the reporting of sexual assault allegations. This, in turn, contributed to the continued uptrend in complex litigation across the Marine Corps. This uptrend in complex litigation is most clearly displayed by the significant increase in the percentage of those complex cases that are contested fully at trial. In FY11, 25% of general courts-martial were contested; in FY14 that number rose to over 56%. In addition, 40% of special courts-martial were contested in FY14. Between

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FY12 and FY14, the number of sexual assault prosecutions increased 200% (reference (c)).

b. The increase in sexual assault and other complex case prosecutions means that for many Marines and Sailors the stakes have never been higher. Unfortunately, the increase in case complexities also means the limited resources of defense attorneys, especially in light of application of increased resources and statutory authority for both the Victims Legal Counsel and Complex Litigation Teams, have correspondingly stretched to their limits. As noted above, the lack of defense investigative resources is an issue specifically addressed by the Response Systems Panel (RSP), an independent panel established by the Secretary of Defense as directed by the 2013 National Defense Authorization Act to review and assess systems used to investigate, prosecute, and adjudicate crimes involving adult sexual assault and related offenses in the military. The RSP recognized that military defense counsel need independent, deployable defense investigators in order to, "...zealously represent their clients and correct an obvious imbalance of resources" (enclosure (1)). A similarly obvious imbalance of resources led the United States Department of Justice to file a Statement of Interest in the Supreme Court of New York on 25 September 2014 (enclosure (5)). In that statement, the DOJ cautioned that imbalances like these detract from the "traditional markers of representation" which should be accorded the accused in a criminal trial, and lead to unnecessary litigation through constructive denial of counsel. In other words, Marines being prosecuted by a Government attributing vast dollars and resources to the prosecution team while denying the defense those "traditional markers of representation" intended to meaningfully test the Government's case creates a systemically deficient system. This occurs when the defense operates under substantial structural limitations such as a lack of resources, understaffing, or denial of access to those traditional markers of representation such as appropriate investigation and meaningful testing of the prosecution's case (page 1, enclosure (5)). The absence of defense special investigators in the Marine Corps Defense Services Organization is exactly what the DOJ cautioned against.

c. As mentioned above, the RSP recommendations have not gone unnoticed and the Navy has begun to act. Earlier this year, the Navy's Defense Services Organization began hiring eight GS-13 Defense Litigation Support Specialists to be located at various naval installations across the globe. Enclosure (3)

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is the approved, classified position description for those positions.

d. As a result of the legal community reorganization in 2012, each LSSS now hosts a Complex Litigation Team to prosecute complex cases. No concomitant complex litigation capacity was created for the DSO. More importantly, and expressed more clearly above, creators of this Complex Litigation Team construct recognized the value of having investigators assigned in direct support of ongoing, complex litigation. These Complex Litigation Teams were each assigned their own investigators, typically senior noncommissioned officers with a 5821 CID MOS.

e. On 2 May 2014, NCIS special agents executed a search of the entire Defense Service Organization's office spaces aboard Camp Pendleton while looking for a cell phone. This search garnered national media attention, resulted in the reassignment of the senior prosecutor aboard Camp Pendleton, and led to multiple unlawful command influence rulings in cases ongoing at the time. An experienced and professional defense investigator very likely would have identified a more appropriate way to maintain and preserve this physical evidence, thereby preventing the entire ordeal.

4. Normal Staffing Process Timeline

a. Importantly, the DSO and Judge Advocate Division attempted to navigate the normal staffing process and identify non-CURB alternatives. Specifically the DSO, in coordination with JAD, HQMC, PMO and CID, took the following alternative actions:

1. On 3 September 2014, DSO, JAD, PMO, and CID met at JAD to discuss how to best satisfy the RSP recommendation for independent defense investigators. This meeting resulted in RFIs for each section related to three proposed COAs: Source investigators from PMO/CID; Hire civilians as investigators (long term positions); or Hire investigators on an ad hoc basis from a funding source controlled by the CDC.

2. On 1 October 2014, the Chief Defense Counsel of the Marine Corps (CDC) briefed the Staff Judge Advocate to the Commandant of the Marine Corps (SJA to CMC) regarding the aforementioned 3 September meeting. The SJA to CMC provided additional guidance and requested further development of each COA.

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3. On 21 January 2015, DSO, JAD, and CID met again at JAD for further COA development. CID stated emphatically that they were unable to source defense investigators, citing critical manning shortfalls and operational impacts associated with both introducing CID Marines into positions adversarial to other CID Marines and the loss of law enforcement credentials for CID Marines assigned to defense investigator positions.

4. On 30 March 2015, the CDC briefed the SJA to CMC on the revised defense investigator COAs. The SJA to CMC requested additional information regarding the administration and logistics associated with hiring either civilian investigators or adding more enlisted litigation support specialists. Specifically, he sought information regarding the credentialing process, minimum acceptable standards, and required capabilities of the investigators.

5. From 9-10 April 2015, the CDC, along with his Regional Defense Counsels, Highly Qualified Experts, and OIC Defense Counsel Assistance Program met aboard MCB Quantico as a Defense Investigator Operational Planning Team. That OPT framed the requirements and recommended COAs consistent with SJA to CMC's previous guidance. The product of that OPT is attached as enclosure (7).

6. Subsequently the CDC delivered a hard copy of enclosure (7) to the SJA to CMC. After giving him time to review and digest the materials, on 27 August 2015 the SJA to CMC and the CDC met on the subject. During this meeting the SJA to CMC deferred any decision to a later date.

5. Uncompensated Structure Request. In order to provide the core legal services required to meet the RSP's intent, maintain continuity of operations, acquire skill sets outside those maintained by our enlisted legal services support specialists, and relieve the enlisted support strain on the LSSS, I request that the following civilian uncompensated GS-13 1810 structure, FTE, and funding be added at the following locations:

MAGTF ELEMENT	UIC	GEOGRAPHIC LOCATION	UNIT NAME	BILLET DESCRIPTION	GS CODE
SE	M02213	Camp Lejeune	MCI East	Investigator	13
SE	M02214	Camp Pendleton	MCI West	Investigator	13
SE	M02215 (MF)	MCB Quantico	LSSS NCR	Investigator	13
SE	M02213 (MF)	MCAS Cherry Point	LSST Cherry Point	Investigator	13

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SE	M02216	MCB Kaneohe Bay	LSST Kaneohe Bay	Investigator	13
SE	M02213 (MF)	MCRD Parris Island	LSST Parris Island	Investigator	13
SE	M02214 (MF)	MCAS Miramar	LSST Miramar	Investigator	13
SE	M02214 (MF)	MCAGCC 29 Palms	LSST 29 Palms	Investigator	13

6. Strategic Total Force Planning

a. Strategic Planning. The development of an independent defense investigator program as recommended by the RSP is currently undergoing review by the Joint Services Committee as directed by the Secretary of Defense and General Counsel of the Department of Defense (enclosures (1) and (4)). As it currently stands, Marine Corps defense counsel and defense clerks are forced to conduct defense investigations themselves. This current construct is untenable. The long-term provision of enlisted support via Marine Corps CID is untenable because that community does not possess sufficient inventory and fears the long-term, negative operational ramifications associated with such a construct. The enlisted support to the DSO does not possess the training, experience, or investigative resources of a GS-13 investigator. Additionally, civilian investigators can provide continuity to cases that can last several years from investigation to final resolution. The transient nature of Marines would create a revolving door of experience as attorneys and support staff execute permanent change of station orders.

b. Assessment of Current Organizational Structure. As the current organizational structure lacks the required skill set and is therefore incapable of performing the duties required by the Sixth Amendment of the Constitution, we did no assessment of current organizational structure.

(1) Defense clerks (4421) have not received law enforcement investigation training, do not have qualifications, credentials, or training requisite to access government and private law enforcement database, have no prior investigation experience, and are staffed in insufficient numbers (sometimes one 4421 clerk in support of entire DSO branch office) to perform both 4421-related duties and those duties required of an investigator. Furthermore, the Government retains authority to assign duties to both 4402 (Judge Advocates) and 4421 (Legal Support Personnel) and can reassign them to non-DSO duties on short notice.

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(2) Similarly we have not conducted an assessment of the current CID 5821 structure. The resistance presented by the CID leadership to fielding 5821s as defense investigators, well-founded both in principle and manpower shortfalls of their own, makes the idea a non-starter. Operational issues associated with the automatic de-credentialing of a 5821 assigned to the DSO, exposure of the DSO to CID tactics, techniques and procedures (TTPs), not to mention the mistrust which is likely to develop between agents when forced to operate as adversaries against other agents makes the idea less than ideal. Similarly, the Marine Corps DSO believes that utilizing 5821s creates perception issues for the client, the counsel, and the public at large. One need look no further than the Camp Pendleton. The shortfalls and conflicts identified by both the judge advocate and law enforcement communities effectively prohibit any current MOS from working in a defense investigator capacity.

c. Assess and Analyze Future Organizational Structure. There are no programmed changes for the DSO, uniform or civilian, from the current FY through the next 20 years. There are no technological changes or process improvements that can be leveraged that will impact future total force requirements.

d. Gap Analysis. Gap analysis is not required because there are no programmed changes for the DSO, uniform or civilian, from the current FY through the next 20 years. The current gap is in the RSP addressed structure for the DSO that is without defense investigator support.

e. Total Force Action Plan. The approved Navy defense investigator position description is attached as enclosure (3) and a similar position description for Marine Defense Special Investigator will follow shortly. The defense special investigator positions are inherently governmental and an enduring requirement per the RSP recommendation and its adoption by the Secretary of Defense. Please see enclosures (1) and (6). The civilians serving in these positions will perform tasks related to the Uniform Code of Military Justice and Title 10 of the United States Code, including providing investigative support to servicemembers charged with offenses under the Uniform Code of Military Justice. The civilians hired for these positions will prepare investigation documents and assist in litigation in accordance with federal laws, service regulations, and military rules of the court. Additionally, strict compliance with confidentiality rules will be required; these prohibit the "dual-hatting" of DSO defense special investigators

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to conduct other LSSS, law enforcement, or installation
services.

7. The point of contact regarding this matter is Major Matthew
T. Smith, at [REDACTED] (703) [REDACTED]

Very Respectfully



STEPHEN C. NEWMAN
Colonel, U.S. Marine Corps