### Collateral Misconduct and Unsubstantiated Reports

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#### Collateral Misconduct - How handled by Investigators (RFI 64)

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<td>a. Investigators: If the allegation of collateral misconduct (e.g., underage drinking, adultery) supports or contradicts the allegation of sexual assault, then the allegation of misconduct will be investigated only to the extent necessary to develop the primary offense of sexual assault. The misconduct will not be listed in the subject/suspect and/or victim blocks of the ROI, unless approved by the CG, USACICD. Collateral misconduct will be referred to the commander, in writing, for action deemed appropriate. This policy is codified in Chapter 15, CIDR 195-1, which was previously provided. In accordance with Article 31 of the Uniform Code of Military Justice, a Soldier must be advised of his/her rights if he/she is suspected of committing an</td>
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<td>SECNAVINST 5430.107 “Mission and Function of the Naval Criminal Investigative Service” sets forth NCIS’ authority and responsibilities. Specifically, SECNAVINST 5430.107 establishes NCIS responsibility to investigate major criminal offenses within the DON. Major criminal offenses are generally defined as offenses punishable under the UCMJ, or similarly framed federal, state, or local statute, by confinement for a term of more than one year – commonly referred to as felonies. In the majority of NCIS sexual assault investigations, the victim’s collateral misconduct does not rise to the felony level. Often, the misconduct is a status offense such as underage drinking or adultery or other minor UCMJ violation. However, if misconduct is uncovered by the investigator during the course of the investigation, that information will be included in the NCIS investigative report and available for a commander to decide a course of action. In the event the collateral misconduct is a felony level offense, NCIS has the responsibility to investigate. However, the focus of the investigation would be directed at the most serious offense known to the investigator.</td>
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|  | Investigators document any collateral misconduct in the report of investigation. The decision as to whether to take disciplinary or administrative action against such a service member would be made by the affected command. Investigators would neither make that decision nor make any recommendations in that regard.

#### Collateral Misconduct - How

|  | First, the disposition of victim collateral misconduct is reserved to senior, experienced officers. Victim collateral misconduct arising from the |
|  | AFI 36-6001, Sexual Assault Prevention and Response Program, para. 6.3 provides guidance for how commanders handle a victim’s |
|  | Under new policy implemented 28 June 2012 (NAVADMIN 195/12), the Sexual Assault-Initial Disposition Authority (SA-IDA), in Commanders: See answer to question 55 |
|  | (question 55 and USMC response) |
|  | 25 June 2012, the Commandant of the Coast Guard announced that he had withheld initial disposition authority from all commanders in |

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05_CollateralMisconduct_Unsubstantiated_Chart 1
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**Collateral Misconduct:**

For each fiscal year from 2007 to 2013, how many instances has the service member who made a report of sexual assault been subjected to disciplinary actions?

The U.S. Army does not track the requested data; however, the following policies address concerns regarding victim collateral misconduct:

- DODI 6495.02
- DODI 6495.02, Para. 6.r.
- DODI 6495.02, Enclosure 5, Para. 3.I.

This information is not formally tracked in a way that JA can run a query in AMIAMS to retrieve results that would tie a victim making a report of sexual assault to disciplinary action for the victim’s collateral misconduct. In addition, AMIAMS does not track administrative actions such as letters of reprimand, admonishment, and counseling, and administrative separation. AF/JA has had preliminary discussions and have made basic plans for a new data system that will enable us to track military justice cases, to include sexual assault offenses.

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The Marine Corps does not currently track this information. However, as a result of recent policy changes, only a colonel (SCPCMCA or higher) can make a disposition decision on covered sex offenses and the collateral misconduct in that same case once the law enforcement investigation is complete. On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O-7, and above.

The Coast Guard is developing the response to this question but will need additional time to provide the answer.

**Collateral Misconduct:**

The U.S. Navy handles sexual assault cases, including collateral misconduct, to include sexual assault until and unless the SA-IDA withholds an initial disposition. When the SA-IDA is complete. On April 20, 2012 the Secretary of Defense (SecDef) issued a memorandum withholding initial disposition authority (IDA) in certain sexual assault offenses to the colonel, O-7, and above.

**Special Court-Martial Convening Authority (SCMCA):**

The U.S. Navy handles sexual assault cases, including collateral misconduct, to include sexual assault until and unless the SA-IDA withholds an initial disposition. When the SA-IDA has achieved the rank of captain (O-6); and (3) have an assigned staff judge advocate. The practical effect of this withholding is that only flag officers (O-7 and above) and a few senior captains may dispose of sexual assault cases within the Coast Guard. Those officers who may dispose of sexual assault offenses are referred to as Sexual Assault Initial Disposition Authorities (SA-IDA). The Commandant also withheld to the SA-IDA the authority to act on collateral misconduct of the alleged victim. Therefore, as of June 2012, the subordinate commander is prohibited from taking disciplinary action against an alleged victim for collateral misconduct related to the sexual assault until and unless the SA-IDA authorizes the subordinate command to do so.

**Commandant:**

As a general practice at the US Naval Academy, collateral misconduct charges are deferred until after the sexual assault charges are adjudicated.

**Authority:**

The U.S. Navy handles sexual assault cases, including collateral misconduct, to include sexual assault until and unless the SA-IDA withholds an initial disposition. When the SA-IDA has achieved the rank of captain (O-6); and (3) have an assigned staff judge advocate. The practical effect of this withholding is that only flag officers (O-7 and above) and a few senior captains may dispose of sexual assault cases within the Coast Guard. Those officers who may dispose of sexual assault offenses are referred to as Sexual Assault Initial Disposition Authorities (SA-IDA). The Commandant also withheld to the SA-IDA the authority to act on collateral misconduct of the alleged victim. Therefore, as of June 2012, the subordinate commander is prohibited from taking disciplinary action against an alleged victim for collateral misconduct related to the sexual assault until and unless the SA-IDA authorizes the subordinate command to do so.

**Commander:**

As a general practice at the US Naval Academy, collateral misconduct charges are deferred until after the sexual assault charges are adjudicated.

**Misconduct:**

For each fiscal year from 2007 to 2013, how many instances has the service member who made a report of sexual assault been subjected to disciplinary actions?

The U.S. Army does not track the requested data; however, the following policies address concerns regarding victim collateral misconduct:

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**Collateral Misconduct and Unsubstantiated Reports**

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**Substantiation – Ramifications for Unfounded Reports**

**(RFI 65)**

- Generally, there is no ramification to a service member who made a report of sexual assault that is later unfounded. The only exception is a situation when Soldiers and/or civilians who are found to have knowingly and willfully provided a false report to CID are indexed as subjects for False Swearing, False Official Statement or Title 18 US Code Section 1001 (False Statements).
- Any disciplinary action or lack thereof is decided by the commander once the investigation is closed. If the false statement was used to obtain a transfer from one installation to another, then additional offenses, such as larceny or fraud could also be reported. There are occasions where investigations are unfounded and CID does not list the victim as a subject for False Swearing.

- This occurs when victims report an incident in which they believe they were sexually assaulted, but the
- Assaulsts, in a more synergistic manner from the time the incident is reported through final disposition of the case.
- A database designed to incorporate input and information from investigators, sexual assault response coordinators and judge advocates simultaneously will enhance our ability to both monitor and inform victims and address their interest in the case from the outset. Ultimately, such a system would give more reliable information to those involved in the case, as well as to commanders and senior leaders. This will allow more accurate targeting of concerns within the trial system and an ability to correct such issues rapidly and more appropriately. AF/A1Q does not keep or maintain records of sexual assault, only data on sexual harassment.
- As to whether a report is unfounded, AFOSI does not determine whether a case is "unfounded." In every investigation that AFOSI opens, a Report of Investigation is provided to the Commander for action. The Initial Disposition Authority Commander is the one who would make a determination that a report is unfounded.
- If the Initial Disposition Authority Commander determined that a case was "baseless," there would be no ramification for the victim who made the report because the victim did not do anything wrong (i.e. this is not a false report) in reporting conduct that after thorough investigation was found not to be a crime.
- If the Commander determined that a case was "false" and the Air Force had an important note is that AFOSI does not determine whether a case is "unfounded." In every investigation that AFOSI opens, a Report of Investigation is provided to the Commander for action. The Initial Disposition Authority Commander is the one who would make a determination that a report is unfounded.
- A product of a crime, made in good faith, is never the subject of negative ramifications for a service member. However, under circumstances in which an allegation was apparently made with malicious intent so as to raise suspicion of a violation of the UCMJ, those allegations would be investigated in the same manner as any other similar, suspected offense. Offenses could include violations of Article 107, false official statement, Article 131, perjury, Article 134, obstructing justice. In cases involving an allegation of sexual assault, due consideration is always given to the neuro-biological effects of trauma which may make memory formation and recovery complex and lead to the neuro-biological effects of trauma which may make memory formation and recovery complex and lead to
- The Marine Corps does not have a policy for determining if an allegation is "unfounded" or what the Marine Corps does to a person who made the unfounded report. The commander has discretion to prosecute someone who makes a false report if the false official statement charge is supported by the evidence.
- The Coast Guard is developing the response to this question but will need additional time to provide the answer.

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**On June 20, 2012, the Commandant expanded the SecDef's SA-IDA withholding to include not just penetration and forcible sodomy offenses, but all contact sex offenses, child sex offenses, and any attempts to commit those offenses. The result is that the USMC now has a smaller group of more senior and experienced officers making disposition decisions for all sexual offense allegations and any related misconduct.**
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**Collateral Misconduct and Unsubstantiated Reports**

Investigation, and supported prosecutor review, finds the act did not meet the elements of proof for a sexual assault offense.

Jurisdiction over the victim who made the false report, the Commander would have the full range of administrative, nonjudicial, and judicial remedies at his/her disposal to take action in the case. Not every case that is determined to be "false" by a Commander includes misconduct on the part of the victim. Upon the advice of the Staff Judge Advocate, the Commander would make a decision on a case-by-case basis how to handle the false report.

Honest yet inconsistent statements.

Once an NCIS investigation is complete, the case is forwarded to the accused’s Commander. In accordance with Secretary of Defense policy, the initial disposition decision for reports of rape, sexual assault, forcible sodomy, and attempts to commit these offenses must be made by Sexual Assault Initial Disposition Authorities (SA-IDAs), who are Navy Captains (pay grade O-6) or above designated as Special Court-Martial Convening Authorities. If the accused’s commander is not an SA-IDA, the commander must forward the case to the appropriate SA-IDA in the chain of command for the initial disposition decision.

**Substantiation - Is it policy to have commander or MCIO determine whether SA allegations are substantiated or founded? Why?**

(RFI 66)

It is not a CID investigator’s responsibility to determine whether a sexual assault is founded or unfounded. The decision as to whether an offense is founded or not, and whether the accused should be indexed as having committed a founded offense belongs to the supported prosecutor. The CID report merely reflects the opinion or decision of the supported prosecutor as to the founding or unfounding of an offense. This is basically the same process that all civilian law enforcement agencies in the United States employ with their District Attorneys or prosecutors when founding offenses and effecting arrest warrants.

In the Air Force, only commanders may conclude that a sexual assault allegation is unfounded. Once AFOSI receives a sexual assault allegation, and investigators complete their investigation, AFOSI forwards the investigation to the accused Airman’s commander in a report that evaluates the evidence and makes a recommendation as to disposition. The commander, with the advice of his/her SJA, then determines whether the allegation is founded, and proceeds to whatever disposition of the case is deemed appropriate.

AFOSI does not determine whether sexual assault allegations are considered substantiated or founded. It is AFOSI’s position that having AFOSI personnel render such an opinion presents an inappropriate conflict with NCIS investigators do not make determinations regarding substantiated or unfounded allegations, regardless of the type of case (sexual assault, robbery, domestic violence, etc.). NCIS investigators obtain facts and evidence and present those findings to the appropriate convening authority. As NCIS fills the role of a neutral fact-finding and investigative body, placing the determination decision on them could compromise their mission, impede the case investigation or raise questions of partiality.

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Sexual Assault Initial Disposition Authorities (SA-IDAs) determine whether sexual assault allegations are considered substantiated or founded. SA-IDAs are commanders in pay-grade O-6 or above who are Special Court-Martial Convening Authorities (SPCMCA). The SA-IDAs consult with staff judge advocates (SJA) and receive advice from them.

The Coast Guard is developing the response to this question but will need additional time to provide the answer.
the requirement to conduct objective and impartial investigations. AFOSI’s Standards of Professional Conduct specifically require agents to remain objective and unbiased in their investigation and reporting of investigative information.

AFOSI further believes having criminal investigators render an opinion regarding substantiated/founded or unsubstantiated/unfounded is contrary to the guidance prescribed by the Council of the Inspectors General on Integrity and Efficiency, Quality Standards for Investigations. These Standards specifically call for investigators to “…not allow conjecture, unsubstantiated opinion, bias, or personal observations or conclusions …”

Finally, in an August 6, 2013 Memorandum to senior DoD and Services’ senior leaders, the Secretary of Defense emphasized commanders must “…base their decision [in matters of military justice] on their independent judgment.” Having AFOSI investigators convey judgment as to whether an allegation is substantiated/founded or unsubstantiated/unfounded could be prejudicial to a commander forming his or her independent judgment and, as such, at variance with SECDEF’s direction.

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based on the nature of the offenses and an analysis of the evidence available, including special court-martial, summary court-martial, non-judicial punishment, or administrative separation processing.