

ARTICLE: Whistleblower Protection for Military Members

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LexisNexis Summary

... The plight of SPC Darby following the abuse scandal at Abu Ghraib, highlights the need for commanders, supervisory officials, and Judge Advocates (JAs) to better understand the protections afforded servicemembers under the Military Whistleblower Protection Act (MWPA), as well as the need for changes to the statute to further protect servicemembers from retaliatory personnel actions. ... Second, members of the armed forces are protected from retaliatory personnel actions when making or preparing a communication that alleges illegal conduct to statutorily recognized recipients of protected communications, e.g., a member of Congress; an IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any designated person or organization. ... Investigating Reprisal Allegations--Department of Defense Inspector General Responsibilities The DoDIG oversees all reprisal investigations and has the authority to delegate responsibility for the reprisal investigation to an appropriate IG within a military department. ... The ABCMR shall consider applications for corrections of military records at the request of a servicemember or former servicemember who alleged reprisal for making or preparing a protected communication.

Highlight

Department of the Army Pamphlet 27-50-427

Text

[*58] Introduction

You Cannot Choose Your Battlefield, God Does That for You; But You Can Plant a Standard Where a Standard Never Flew. ²

In January 2004, Specialist (SPC) Joseph M. Darby, a military police officer, 372nd Military Police Company, triggered an investigation into prisoner abuse at Abu Ghraib Prison in Iraq. ³ Specialist Darby provided

¹ Judge Advocate, U.S. Army. Presently assigned as Professor, The Judge Advocate General's Legal Ctr. & Sch. (TJAGLCS), U.S. Army, Charlottesville, Va. LL.M., 2007, TJAGCLS, Charlottesville, Va.; J.D., 1998, St. Louis University School of Law; B.S., 1992, Vanderbilt University, Tenn. Previous assignments include International Law Attorney, Headquarters, First Army, Fort Gillem, Ga., 2005-2006; Senior Defense Counsel, U.S. Army Trial Defense Service, Balad, Iraq, 2005; Chief, Military Justice, Headquarters, First Army, Fort Gillem, Ga., 2002-2005; Trial Counsel, Legal Assistance Attorney, and International Law Attorney, U.S. Army Field Artillery Ctr. & Sch., Fort Sill, Ok., 1999-2002. Member of the bars of the, Court of Appeals for the Armed Forces, Missouri, and Georgia and the Supreme Court of the United States.

² LIEUTENANT GENERAL HAROLD G. MOORE (RET.) & JOSEPH L. GALLOWAY, *WE WERE SOLDIERS ONCE . . . AND YOUNG* 3 (Harper Perennial ed. 1992).

³ *60 Minutes: Exposing the Truth About Abu Ghraib: Anderson Cooper Interviews Whistleblower Joe Darby* (CBS television broadcast 24 June 2007), <http://www.cbsnews.com/stories/2006/12/07/60minutes/main2238188.shtml> [hereinafter *60 Minutes*].

incriminating photographs of the prisoner abuse to the U.S. Criminal Investigation Command.⁴ Despite his desire to remain anonymous, Secretary of Defense Donald Rumsfeld publicly named SPC Darby as the whistleblower during a U.S. congressional hearing televised worldwide by cable news networks.⁵ Labeled a traitor by some members of his National Guard military unit and hometown community, SPC Darby feared retaliation and reprisal⁶ and he was quickly taken out of Iraq.⁷ Specialist Darby and his wife were placed under military protection, moved to an undisclosed location, and assumed new identities.⁸ Two years after the scandal, in an interview with the *Associated Press*, SPC Darby declared "that if presented with the same circumstances at Abu Ghraib today, he would do the same thing."⁹

In most cases, blowing the whistle is a painstaking choice that entails enormous professional and personal risk for the servicemember. It should not be the sound of career suicide for the whistleblower. The plight of SPC Darby following the abuse scandal at Abu Ghraib, highlights the need for commanders, supervisory officials, and Judge Advocates (JAs) to better understand the protections afforded servicemembers under the Military Whistleblower Protection Act (MWPA),¹⁰ as well as the need for changes to the statute to further protect servicemembers from retaliatory personnel actions.

The MWPA precludes responsible management officials (RMOs)¹¹ from restricting a military servicemember's lawful communication to a member of Congress, an inspector general (IG), or certain investigating agencies and personnel.¹² Further, the MWPA prohibits retaliatory personnel actions as reprisal against a servicemember for making or preparing a protected communication.¹³ As an enforcement mechanism, Congress has made a violation of the MWPA a punitive offense.¹⁴

[*59] Like SPC Darby, legitimate whistleblowers are an invaluable resource for the oversight of government operations. Judge Advocates must understand the MWPA in order to advise commanders about this issue. A thorough understanding of the MWPA will help JAs avoid liability. A JA who improperly recommends a retaliatory personnel action, such as a letter of reprimand against a servicemember, will be considered a RMO and may be held liable for a substantiated reprisal allegation along with the commander taking the action.

⁴ *Id.*

⁵ *Id.*

⁶ Hanna Rosin, *When Joseph Comes Marching Home* (17 May 2004), http://www.washingtonpost.com/wp-dyn/articles/A32048-2004May16_2.html (last visited Dec. 26, 2008).

⁷ Richard Pyle, *GI Who Exposed Abu Ghraib Feared Revenge*, ASSOC. PRESS ONLINE, Aug. 10, 2006.

⁸ *60 Minutes*, *supra* note 3.

⁹ Pyle, *supra* note 7 ("At least eleven soldiers have been convicted in the scandal. Specialist Charles Garner and Private First Class Lynndie England who were depicted in the photos are serving 10 years and three years in prison respectively.").

¹⁰ U.S.C. § 1034 (2000).

¹¹ U.S. DEP'T OF DEFENSE, INSPECTOR GENERAL GUIDE 7050.6, GUIDE TO INVESTIGATING REPRISAL AND IMPROPER REFERRALS FOR MENTAL HEALTH EVALUATIONS para. 2.5 (6 Feb. 1996) [hereinafter IG GUIDE 7050.6]. Responsible management officials are the official(s) who influence or recommend to the deciding official that he or she take, withhold, or threaten action; the official(s) who decide to take, withhold, or threaten the personnel action; and any other official(s) who approve, reviewed, or indorsed the actions.

¹² Military Whistleblower Protection Act, [10 U.S.C. § 1034](#).

¹³ *Id.*

¹⁴ *Id.* § 1034(f)(6). "If the Board [for Correction of Military Records] determines that a personnel action prohibited by subsection (b) has occurred, the Board may recommend to the Secretary concerned that the Secretary take appropriate disciplinary action against the individual who committed such personnel action." Violations by persons subject to the Uniform Code of Military Justice (UCMJ) are punishable as a violation of Article 92 of the UCMJ. *Id.*; see [10 U.S.C. § 892](#).

In the capacity of a trial defense service (TDS) attorney or legal assistance attorney, JAs must also be prepared to represent and advise servicemembers who are the subject of a retaliatory personnel action imposed as reprisal for making a lawful communication to a statutorily designated official. According to the U.S. Army Trial Defense Service's (USATDS) policy, if a Soldier's alleged reprisal complaint is related to pending or recently completed criminal proceedings, non-judicial punishment, or administrative separation actions, the TDS attorney may advise and represent the Soldier with respect to the complaint.¹⁵ Legal assistance attorneys may provide servicemembers advice on pending IG investigations as part of their regular duties.¹⁶ Judge Advocates and commanders must fully understand the standards under the MWPA, adhere to the statute, and protect the due process rights of servicemembers.

This article provides an analysis of the MWPA to serve as the basic framework for JAs who are analyzing questions involving the statute. First, it examines the history, purpose, and current provisions of the MWPA. Second, it discusses the types of lawful communications granted protection under the statute. Third, it examines the prohibition on retaliatory personnel actions, investigation of reprisal actions, and administrative remedies. Finally, it provides practical guidance to JAs on advising commanders, other supervisory officials, and clients on MWPA cases.

The Enactment of the Military Whistleblower Protection Act

History, Purpose, and Amendments to the MWPA

Legitimate protection for military whistleblowers began in 1951 when Congress amended the Universal Military Training and Service Act¹⁷ with the inclusion of the Byrnes Amendment.¹⁸ The Byrnes Amendment granted military personnel the authority to have direct and unrestricted lawful communications with members of Congress.¹⁹ For nearly forty years, the provisions of the Byrnes Amendment remained unchanged until Congress enacted the Military Whistleblower Protection Act of 1988 (MWPA of 1988).²⁰ The MWPA of 1988 bolstered protections for servicemembers by prohibiting any RMO from retaliating or taking reprisal actions against a member of the armed forces who discloses information regarding government fraud, waste, and abuse to a member of Congress or an

¹⁵ If a USATDS counsel represents a servicemember during a criminal proceeding, and the alleged reprisal is related to that proceeding, the USATDS counsel may assist the servicemembers in challenging reprisal. Telephone Interview with Lieutenant Colonel Patricia Harris, Deputy, and Captain Yolanda McCray, Training Officer, Headquarters, U.S. Army Trial Defense Service, Falls Church, Va. (24 Dec. 2008) [hereinafter Harris Telephone Interview].

¹⁶ U.S. DEP'T OF ARMY, REG. 27-3, THE ARMY LEGAL ASSISTANCE PROGRAM para. 3-6g(4)(k), (1), (m) (21 Feb. 1996) [hereinafter AR 27-3].

¹⁷ Universal Military Training and Service Act, [50 U.S.C. § 451](#)(a) (1951).

¹⁸ See [Brown v. Glines](#), [444 U.S. 348, 359 \(1980\)](#).

Congressman Byrnes' purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." The entire legislative history of the measure focuses on providing an avenue for the communication of individual grievances. The Chairman of the Armed Services Committee succinctly summarized the legislative understanding. The amendment, he said, was intended "to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter." It therefore is clear that Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels.

Id. (citations omitted).

¹⁹ 1951 Amendment to the Universal Military Training and Service Act, 82 Pub. L. No. 51, ch. 144, [65 Stat. 75](#).

²⁰ National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846, [102 Stat. 1918, 2027-30 \(1988\)](#).

IG.²¹ Congress further amended the MWPA [*60] from 1989 to 1994 by widening the class of persons (i.e. the Coast Guard, when operating under the Navy) that could make²² and receive protected communications;²³ by making violations of the MWPA punitive;²⁴ and by expanding the classifications of protected communications that a servicemember can make.²⁵ In the 1994 amendment, Congress authorized the Department of Defense IG (DoDIG) to delegate reprisal investigations to impartial service IGs.²⁶ In 1999, the Strom Thurmond National Defense Authorization Act²⁷ extended authority to IGs within the military departments to provide whistleblower protection for reprisal allegations submitted directly to them by members of the armed forces.²⁸

Current Provisions of the Military Whistleblower Protection Act--The Protected Right to Communicate Allegations of Improprieties

The language of the MWPA is straightforward. Under the provisions of the MWPA, no person may restrict a member of the armed forces from making or preparing a lawful communication with a member of Congress or an IG.²⁹ Furthermore, no person may initiate or threaten to take an unfavorable personnel action, or preclude (or threaten to withhold) a favorable personnel action, as a form of reprisal against a member of the armed forces for making or preparing such lawful communication.³⁰ The purpose of the MWPA is to provide sufficient protections to military personnel who come forward and report information on improper or illegal activities by other members of the armed forces.³¹

Types of Protected Communications

Lawful Communications to Congress or an IG

The MWPA establishes two categories of protected communications. First, the MWPA protects lawful communications between a member of the armed forces³² and a member of Congress or an IG.³³ No person may restrict a member of the armed forces in communicating with a member of Congress or an IG, unless the

²¹ *Id.* § 846(b) ("No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing a communication to a Member of Congress or an Inspector General that (under subsection (a)) may not be restricted.").

²² Coast Guard Authorization Act of 1989, Pub. L. No. 101-225, § 202, **103 Stat. 1908, 1910-11.**

²³ National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 531(a)(2)(B)(iv), **108 Stat. 2663, 2756 (1994).** The Act was amended to expand the class of persons that can receive protected communications to, "any other person or organization (including any person or organization in the chain of command) designated pursuant to regulations or other established administrative procedures for such communications." *Id.*

²⁴ National Defense Authorization Act of Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 843(b), **105 Stat. 1290, 1449 (1991).**

²⁵ National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 531(b)(2), **108 Stat. 2663, 2756 (1994).**

²⁶ *Id.* § 531(b)(1).

²⁷ Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 933(a), **112 Stat. 1920 (1998).**

²⁸ U.S. DEPT OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 8-10(c)(1) (1 Feb. 2007).

²⁹ [10 U.S.C. § 1034\(a\)](#) (2000).

³⁰ *Id.* § 1034(b).

³¹ [Hernandez v. United States, 38 Fed. Cl. 532, 535 \(1997\).](#)

³² The MWPA does not define the term "armed forces," however, DoD Directive 7050.06 defined member or former member of the armed forces as:

communication is unlawful³⁴ or violates a regulation necessary to the security of the United States.³⁵ "An example of an unlawful communication is a false statement (Article 107, Uniform Code of Military Justice (UCMJ)) [submitted by a servicemember to an IG]." ³⁶ Judge Advocates should be aware that a lawful communication made to a member of Congress or an IG will not always disclose information [*61] or evidence of illegal conduct.³⁷ For example, a Soldier may disclose information to the IG regarding unfair labor practices imposed by management against civilian employees who are members of a union. If a servicemember contacts a member of Congress or an IG, but fails to disclose any specific wrongdoing, the IG will treat the communication as protected and proceed with an investigation.³⁸ The IG will have the Soldier complete a Department of the Army (DA) Form 1559, Inspector General Action Request, and a follow-on interview of the servicemember will be conducted.³⁹

Second, members of the armed forces are protected from retaliatory personnel actions when making or preparing a communication that alleges illegal conduct⁴⁰ to statutorily recognized recipients of protected communications, e.g., a member of Congress; an IG; a member of a DoD audit, inspection, investigation, or law enforcement organization; any person or organization in the chain of command; or any designated person or organization.⁴¹ These violations may include unlawful discrimination, sexual harassment, fraud,⁴² gross waste of government

All Regular and Reserve component officers (commissioned and warrant) and enlisted members of the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a Military Service in the Navy) on active duty; and Reserve component officers (commissioned and warrant) and enlisted members in any duty or training status (includes officers and enlisted members of the National Guard).

U.S. DEP'T OF DEFENSE, DIR. 7050.06, MILITARY WHISTLEBLOWER PROTECTION sec. E.2.7 (23 July 2007) [hereinafter DoDD 7050.06].

³³ [10 U.S.C. § 1034](#)(a)(1).

³⁴ See AR 20-1, *supra* note 28 para. 1-11(c).

³⁵ [10 U.S.C. § 1034](#)(a)(1).

³⁶ AR 20-1, *supra* note 28, para. 1-11(c).

³⁷ IG GUIDE 7050.6, *supra* note 11, para. 2.3.

³⁸ *Id.*

³⁹ Telephone Interview with Lieutenant Colonel Quincy Norman, Deputy Inspector General, Office of the Inspector General, Headquarters, USARCENT, in Fort McPherson, Ga. (Jan. 5, 2009).

⁴⁰ See [10 U.S.C. § 1034](#)(c)(2).

A communication described in this paragraph is a communication in which a member of the armed forces complains of, or discloses information that the member reasonably believes constitutes evidence of, any of the following: (A) A violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination. (B) Gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Id.

⁴¹ *Id.* § 1034(b)(1)(B).

⁴² See AR 20-1, *supra* note 28, sec. II, Terms, at 103.

Fraud. Any intentional deception designed to deprive the United States unlawfully of something of value or to secure from the United States for an individual a benefit, privilege, allowance, or consideration to which he or she is not entitled. Such practices include, but are not limited to, the offer, payment, or acceptance of bribes or gratuities; making false statements; submitting false claims; using false weights or measures; evading or corrupting inspectors or other officials; deceit either by suppressing the truth or misrepresenting material fact;

resources, abuse of authority, or significant and specific danger to public health or safety.⁴³ The scope of protected communications has been expanded to include those made by a third party, e.g., spouse, relative, or co-worker of a servicemember, to a member of Congress, an IG, or another designated official so long as the RMO believes that the communication was made on behalf of the servicemember.⁴⁴

The right to communicate to a statutorily recognized recipient is not absolute. The MWPA does not apply to a communication that is unlawful.⁴⁵ For instance, if the servicemember discloses information that involves national security or its disclosure would violate national security or other laws, the MWPA would not protect the servicemember.⁴⁶ Having considered the various types of protected communications this article now examines the prohibition on adverse personnel actions taken against a servicemember who makes or prepares a protected communication to a statutorily recognized recipient.

Prohibition of Retaliatory Personnel Actions

Adverse Personnel Actions and Reprisals Defined

An adverse personnel action may not be utilized as a form of reprisal against a member of the armed forces who lawfully communicates to a member of Congress or an IG a report of a violation of law or regulations. Reprisal is defined as "[t]aking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, [*62] for making or preparing to make a protected communication" to a member of Congress or an IG.⁴⁷ Although the MWPA fails to define the term "personnel action," the DoD follows a broad interpretation of the term which includes "[a]ny action taken on a member of the armed forces that affects, or has the potential to affect, that military member's current position or career."⁴⁸ Personnel actions may include, among other things, a reduction in military grade, reassignment, disciplinary action or referral for a mental health evaluation, and "any other significant change in duties or responsibilities inconsistent with the military member's grade."⁴⁹

Investigating Reprisal Allegations--Department of Defense Inspector General Responsibilities

The DoDIG oversees all reprisal investigations and has the authority to delegate responsibility for the reprisal investigation to an appropriate IG within a military department.⁵⁰ The IG conducting the reprisal investigation must be neutral and outside the immediate chain of command of the complainant and the RMO alleged to have taken the retaliatory action.⁵¹ If the IG conducting the preliminary investigation (PI) determines that the servicemember's allegation meets the criteria for coverage under the MWPA, a whistleblower reprisal investigation will be initiated.

adulterating or substituting materials; falsifying records and books or accounts; arranging for secret profits, kickbacks, or commissions; and conspiring to use any of these devices. The term also includes conflict of interest cases, criminal irregularities, and the unauthorized disclosure of official information relating to procurement and disposal matters.

Id.

⁴³ Lieutenant Colonel Craig A. Meredith, *The Inspector General System*, ARMY LAW., July/Aug. 2003, at 20, 21.

⁴⁴ IG GUIDE 7050.6, *supra* note 11, para. 2.3.

⁴⁵ [10 U.S.C. § 1034\(a\)\(2\)](#).

⁴⁶ National Defense Authorization Act, Fiscal Year 1989, Pub. L. No. 100-456, § 846(a)(2), **102 Stat. 1918 (1988)**.

⁴⁷ DoDD 7050.06, *supra* note 32, sec. E2.10.

⁴⁸ *Id.* sec. E2.8.

⁴⁹ *Id.*

⁵⁰ [10 U.S.C. § 1034\(c\)\(3\)\(D\)](#).

⁵¹ *Id.* § 1034(c)(3)(E)(5).

⁵² Regardless of whether the reprisal investigation itself is conducted by the DoDIG or by an appropriate delegated IG within a military department, the results of the investigation shall be determined or approved by the DoDIG. ⁵³

The IG is not required to consider allegations of reprisal when a servicemember submits a complaint more than sixty days after the date the servicemember became aware of the adverse personnel action. ⁵⁴ The IG will submit a declination memorandum with the PI in cases that fail to meet the criteria for whistleblower reprisal. ⁵⁵ For example, in the Army, the declination memorandum and PI will be forwarded through the Army Command/Army Service Component Command/Direct Reporting Unit and the DAIG Assistance Division to the DoDIG for approval. ⁵⁶

Allegations that warrant investigation will be addressed expeditiously. ⁵⁷ The DoDIG will review and approve the results of the investigation. ⁵⁸ If the review determines that the investigation was adequate, the DoDIG will issue a report of investigation (ROI) within 180 days of the receipt of the allegation of reprisal. ⁵⁹ The DoDIG will notify the Deputy Undersecretary of Defense for Program Integration of the results of the investigation and forward a copy of the ROI to the complainant. ⁶⁰ The servicemember will be advised of his right to have the matter reviewed by the Army Board of Corrections of Military Records (ABCMR). ⁶¹ This will conclude the DoDIG action on the reprisal allegation unless the [*63] complainant requests review of the matter by the ABCMR. If the complainant seeks redress from the ABCMR, DoDIG will submit a copy of the ROI to the ABCMR and gather further evidence if necessary. ⁶²

What Questions Must an Investigator Examine Before Conducting a Reprisal Investigation?

The primary challenge of investigating reprisal allegations is collecting the evidence required to answer four threshold questions found in the DoDIG guide covering reprisal investigations. ⁶³ First, did the servicemember make or prepare a communication protected by the statute? ⁶⁴ Second, was an adverse personnel action taken or

⁵² See AR 20-1, *supra* note 28, para. 8-10(c)(4) ("[T]he DAIG Assistance Division will direct the IG receiving the complaint to forward the case to either the [Army Command/Army Service Component Command/Direct Reporting Unit] IG or to the DAIG Assistance Division for IG [action process] action or further tasking.").

⁵³ [10 U.S.C. § 1034\(c\)\(3\)\(E\)](#); see also AR 20-1, *supra* note 28, para. 8-10(c)(5).

⁵⁴ See [10 U.S.C. § 1034\(c\)\(4\)](#) ("Neither an initial determination under paragraph (3)(A) nor an investigation under paragraph (3)(D) is required in the case of an allegation made more than 60 days after the date on which the member becomes aware of the personnel action that is the subject of the allegation."). See also AR 20-1, *supra* note 28, para. 8-10(c)(2).

⁵⁵ See AR 20-1, *supra* note 28, para. 8-10(c)(4). Examples of allegations that fail to meet the criteria for whistleblower reprisal include untimely allegations (more than sixty days after the servicemember became aware of the personnel action that is believed to have been taken in reprisal) or no unfavorable personnel action was taken.

⁵⁶ *Id.* para. 8-10(c)(5).

⁵⁷ DoDD 7050.06, *supra* note 32, subpara. 5.1.4.

⁵⁸ *Id.* subpara. 5.1.5.

⁵⁹ *Id.* subpara. 5.1.6.

⁶⁰ *Id.* subparas. 5.1.6, 5.1.7.

⁶¹ *Id.* subpara. 5.1.8.

⁶² *Id.* subpara. 5.1.9.

⁶³ IG GUIDE 7050.6, *supra* note 11, paras. 2.3-2.6.

⁶⁴ *Id.* para. 2.3.

[A] communication made to a Member of Congress or an IG **does not necessarily have to disclose information that evidence wrongdoing**, it simply has to be a lawful communication. If the complainant contacted a Member

threatened, or was the servicemember deprived of a favorable personnel action following the protected communication?⁶⁵ Third, did the RMO know about the protected communication before taking or threatening an unfavorable personnel action or withholding a favorable personnel action?⁶⁶ Fourth, is there sufficient evidence to establish that the RMO would have taken or threatened the unfavorable personnel action, or withheld a favorable personnel action, if the protected communication had not been made?⁶⁷ When the four questions are answered the investigation is complete.⁶⁸ If the answer to any of the four questions is "no," the investigator will state in the report of investigation why the allegation of reprisal is unsubstantiated.⁶⁹ The investigator will recommend corrective action if the allegation of reprisal is substantiated.⁷⁰

Administrative Remedies

The provisions of the MWPA only provide servicemembers with administrative remedies and not private causes of action.⁷¹ There are several possible administrative remedies that a servicemember may request.

A servicemember may submit a request to the ABCMR to correct his records. Based on the IG final report of investigation, it may be necessary to grant corrective action including providing assistance to servicemembers preparing an application to the ABCMR.⁷² The ABCMR shall consider applications for corrections of military records at the request of a servicemember or former servicemember who alleged reprisal for making or preparing a protected communication.⁷³ If the [*64] ABCMR finds that an adverse personnel action prohibited under the MWPA has occurred, the ABCMR may recommend that appropriate disciplinary action be taken against the RMO.⁷⁴

of Congress or an IG, but did not disclose any specific wrongdoing, treat the contact as a protected communication and proceed with the investigation.

Id.

⁶⁵ *Id.* para. 2.4 ("A personnel action is: Any action taken on a member of the Armed Forces that affects or has the potential to affect that member's current position or career.").

⁶⁶ *Id.* para. 2.5. For example, a RMO knew that the servicemember filed an Article 138, Complaint of Wrongs, but was unaware that the member also made a protected communication to an IG.

⁶⁷ *Id.* para. 2.6. The burden is initially on the servicemember to establish that he made or prepared a protected communication and thereafter suffered a personnel action. *Id.* The burden then shifts to the RMO to establish that the same personnel action would have been taken, withheld or threatened if the protected communication had not been made. *Id.* In answering the fourth question, the IG investigator will analyze the actions of the RMOs, as well as their motive. *Id.* para. 2.1.

⁶⁸ *Id.* para. 2.7. At this point the investigator should have established the answers to the first three questions, yet will delay answering the fourth question until a review and analysis of the evidence is completed. *Id.* In addition to reviewing the evidence, the investigator will prepare a chronology of events and written summaries of all witness testimony. *Id.* para. 2.8.

⁶⁹ *Id.* para. 2.9. The investigator will base his conclusion on the administrative evidentiary standard of a "preponderance of the evidence," i.e., give greater weight to the evidence found most credible and that which demonstrates that it is more probable than not that the facts and circumstances occurred as set forth in the report. *Id.*

⁷⁰ *Id.* ("The recommendation for corrective action may be general or specific, and may address disciplinary options. Corrective action should be sufficient to make the complainant 'whole' and restore the complainant to the same or equal status he or she would have attained if the reprisal had not occurred.").

⁷¹ [Alasevich v. USAF Reserve, 1997 U.S. Dist. LEXIS 3861](#) (E.D. Pa. Mar. 26, 1997); see [Acquisto v. United States, 70 F.3d 1010, 1011 \(8th Cir. 1995\)](#).

⁷² DoDD 7050.06, *supra* note 32, subpara. 5.3.3.

⁷³ *Id.* subpara. 5.3.4.1.

⁷⁴ [10 U.S.C. § 1034\(f\)\(6\)](#) (2000).

Substantiated reprisal imposed by a military RMO is punishable under Article 92 (Failure to Obey Order or Regulation) of the Uniform Code of Military Justice.⁷⁵ Substantiated reprisal actions imposed by a civilian RMO are punishable under DoD regulations governing disciplinary or adverse actions for civilian employees.⁷⁶ The Heads of the DoD components shall ensure that any violation of a servicemembers right to lawful communicate with a member of Congress or IG, or reprisal against a servicemember for such communication by a civilian employee constitutes a basis of disciplinary action under regulations governing civilian employees.⁷⁷

Further, if a servicemember's military record is corrected by the ABCMR, the Secretary of the Army may financially compensate the member's claim for the loss of pay, allowances, or other compensation.⁷⁸ In addition, if "necessary to correct an error or remove an injustice" for purposes of clemency, the Secretary of the Army may correct records of courts-martial and related administrative records for an Army servicemember related to an MWPA report.⁷⁹

No Private Cause of Action Authorized

The MWPA does not provide any private cause of action, express or implied.⁸⁰ In *Acquisto v. United States*, the U.S. Court of Appeals for the Eighth Circuit vacated the summary judgment for the Government and remanded with directions to dismiss for lack of subject matter jurisdiction servicemember's action to correct his records, which alleged a conspiracy to tarnish his record in retaliation for his complaint against his commander.⁸¹ The court reasoned that Congress designed the MWPA to provide military channels through which servicemembers could bring their grievances.⁸² Therefore, the court concluded that the MWPA provides an administrative process for handling complaints of improper retaliatory personnel actions.⁸³ Accordingly, the court found that the MWPA provides strictly administrative remedies and therefore does not afford servicemembers a private cause of action.⁸⁴

Practical Guidance on the MWPA

The IGs from all services investigate reprisal allegations under delegated authority from DoD. Judge Advocates should review the detailed guidance DoD has provided in its implementation directives and applicable Army regulations on the MWPA. The Army has recently issued an updated AR 600-20 that reflects its implementation of the MWPA.⁸⁵ Judge Advocates must be familiar with these documents in order to assist RMOs and clients in navigating the applicable provisions of the statute. The TDS attorney should review the USATDS policy which

⁷⁵ IG GUIDE 7050.6, *supra* note 11, para. 1.2(a)(2).

⁷⁶ *Id.* para. 1.2(a)(2).

⁷⁷ DoDD 7050.06, *supra* note 32, para. 4.6.

⁷⁸ [10 U.S.C. § 1552\(c\)](#) ("The Secretary concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record . . .").

⁷⁹ See *id.* § 1552(a). "The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice." *Id.* § (a)(1). Such action may be extended to records of courts-martial and related administrative records pertaining to court-martial cases for purposes of clemency. *Id.* § 1552(f).

⁸⁰ See [Acquisto v. United States, 70 F.3d 1010 \(8th Cir. 1995\)](#).

⁸¹ [Id. at 1011](#).

⁸² *Id.*

⁸³ *Id.*; see also [Hernandez v. United States, 38 Fed. Cl. 532 \(1997\)](#).

⁸⁴ [Acquisto, 70 F.3d at 1011](#); see also [Hernandez, 38 Fed. Cl. 532](#).

⁸⁵ U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY (18 Mar. 2008).

reflects how and under what circumstances its TDS attorneys will represent complainants and RMOs.⁸⁶ Legal assistance attorneys should be familiar with the requirements [*65] under Army Regulation 27-3, Army Legal Assistance Program, to provide clients representation in all other cases of reprisal actions.⁸⁷

Conclusion

This paper provides JAs with a comprehensive analysis of the MWPA by examining its history, purpose, and current law. The MWPA attempts to encourage servicemembers to blow the whistle on government fraud, waste, and abuse. In exchange, the statute attempts to protect whistleblowers from reprisal and provides an avenue of redress to servicemembers to correct a reprisal.

As evident from this article, the MWPA is a complicated statute. The MWPA demands that JAs be prepared to serve as legal advisors and advocates. Judge Advocates must be prepared to provide competent advice to commanders and other supervisory officials to ensure their compliance with the MWPA. In addition, attorneys in TDS and legal assistance must be ready to provide advice to clients who allege reprisal actions.

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⁸⁶ See Harris Telephone Interview, *supra* note 15.

⁸⁷ AR 27-3, *supra* note 16, para. 3-6g(4)(1).