Whistleblowers and the Law
April 30, 2005

An Analysis of 10 U.S.C. § 1034: The Military Whistleblower Protection Act

Whistleblowers, and the patchwork of laws that protect them, have become exceptionally important in the current social, business, and political climate. Time magazine, in the wake of scandals at Enron, WorldCom, and the FBI, went so far as to name three whistleblowers as "Persons of the Year" in 2002.[1] Despite the attention on business and national security whistleblowers, there is perhaps no more relevant institution currently dealing with the ramifications of whistleblower law than the military. The military has a long history, almost forty years since the beginnings of Vietnam and the release of the Pentagon Papers, of leaving whistleblowers unprotected. With military operations underway in Iraq and Afghanistan, and the lessons of Vietnam still fresh, protecting whistleblowers in a bureaucracy as large as the United States military has never been more important. This paper will focus on the most important piece of legislation enacted for the protection of military whistleblowers, the Military Whistleblower Protection Act (MWPA). The MWPA provides legal protection and remedies to military service members who are the victims of reprisal or retaliation for making a protected communication. It protects men like Joseph Darby, a Specialist in the United States Army Reserve, and also the brave soldier who tipped off superiors to the abuses at Baghdad's Abu Ghraib prison. While many people in both the national and international news media have praised Darby for his actions, there are others who have been less than willing to call him a hero. Instead, he has been called everything from a "rat" to a traitor, and has been forced into protective custody because of threats against

[1] Richard Lacayo and Amanda Ripley, *The Whistleblowers*, Time, Dec. 22, 2002.

his life. Nevertheless, while the Darby story is certainly tragic, it has illustrated the continued importance of protecting military whistleblowers from reprisal for their actions.

Joseph Darby and the Abuse at Abu Ghraib Prison

On January 13th, 2004, Army Specialist Joseph Darby, a 24 year-old from Corriganville, Maryland, serving with the 372nd Military Police Company at Abu Ghraib prison, opened an email thinking that he was going to see pictures of a travelogue: a history of the performance of a particular unit.[2] Instead, the email contained digital photographs depicting Iraqi detainees being systematically tortured and sexually humiliated.[3] Troubled by the photographic evidence of abuse and torture, Darby immediately slipped a one-page anonymous note, and a copy of the pictures on CD, under the door of the Army's CID, or Criminal Investigation Division.[4] Shortly thereafter, special agents from CID were able to trace the note back to Darby, and Abu Ghraib became a full-fledged nightmare for the United States government.

On January 14th, the Army launched a discrete investigation.[5] On March 20th, the seven reservists involved in the photographed abuses were charged with conspiracy, dereliction of duty, assault, maltreatment and indecent acts, and six additional soldiers up the chain of command were severely reprimanded (ending their careers) and one was admonished.[6] However, the fallout did not stop there. Many politicians in Congress, and members of the news media, looked for accountability higher up the chain of command. Donald Rumsfeld, the Secretary of Defense, took most of the fire after the White House

---

[2] Hanna Rosin, *When Joseph Comes Marching Home*, Washington Post, May 17, 2004, at C01.
[3] Johanna McGeary, *The Scandal's Growing Stain*, Time, May 17, 2004.
[4] *Id*.
[5] *Id*.
[6] *Id*.

revealed that he had been chastised by President Bush for not reporting how bad the allegations were or warning that the photographs were about to break on 60 Minutes II.[7] Rumsfeld later conceded that he had "failed to identify the catastrophic damage that the allegations of abuse could do to our operations in the theater, to the safety of our troops in the field, to the cause to which we are committed."[8] The domino effect resulting from Abu Ghraib also forced the Army to investigate the deaths of 25 detainees in Iraq and Afghanistan, including two that were ruled homicides, while the Justice Department examined the role of the CIA and contract employees in the deaths of three other detainees. Most importantly however, the Abu Ghraib scandal made it "exceedingly difficult for the United States to build support for its faltering project in Iraq by pointing to good intentions."[9] Because Abu Ghraib was the location of Saddam Hussein's most famous torture chamber, the scandal made our pledge to bring freedom and liberty to the Iraqi people ring hollow. Nonetheless, Americans can be proud that Specialist Darby made such an important sacrifice, despite the repercussions that have made the work in Iraq that much harder.

The Birth of the Military Whistleblower Protection Act

The origins of military whistleblower protection can be traced back more than five decades. While Congress was debating the amendments to the Universal Military Training and Service Act of 1951, Representative John W. Byrnes received a letter from

[7] *Id.*
[8] *Id.*
[9] *Id.*

a constituent.[10] The parents of a sailor asked the congressman for help in acquiring a hardship discharge for their son. When Byrnes discovered that a Navy regulation prohibited sailors from communicating with members of Congress without first going through the chain of command, he proposed an amendment to the UMTSA. As a result, Congress passed the Byrnes Amendment, which allowed service members to have direct and unrestricted communication with members of Congress.[11] The subject matter could include grievances against commanders, and the only requirement was that the communications with members of Congress had to be lawful.[12] The Byrnes Amendment was later codified at 10 U.S.C. § 1034 in 1956.

In 1986, Congress considered expanding 10 U.S.C. § 1034 by proposing military whistleblower legislation.[13] After the House bill failed to win Senate approval in 1986, the House re-introduced the military whistleblower legislation the next year and held hearings. In 1988, Congress finally enacted the Military Whistleblower Protection Act (MWPA). The purpose of the MWPA of 1988 was to balance the commander's authority to preserve discipline with the service member's duty to report illegal conduct without fear of retaliation, or in other words, to provide a degree of protection to military personnel who report information on improper or illegal activities by other military personnel.[14] The MWPA of 1988 mandated unrestricted and reprisal-free communication between service members and Congress or an Inspector General (IG).[15] However, the communication had to be lawful and involve a "violation of law or

---

[10] Major Daniel A. Lauretano, *The Military Whistleblower Protection Act and the Military Mental Health Evaluation Protection Act*, 1998-OCT Army Law. 1.
[11] *Id*. at 2.
[12] *Id*.
[13] *Id*.
[14] *Hernandez v. United States*, 38 Fed. Cl. 532 (1997).
[15] Lauretano, *supra* note 10, at 3.

regulation," mismanagement, fraud, waste, abuse or a "substantial and specific danger to public health or safety."[16] The MWPA was amended in 1989 and 1991 in order to expand the class of persons that could make and receive protected communications, and also to make violations of the MWPA punitive.[17] The MWPA was also amended in 1994, broadening both the class of persons that can receive protected communications and the categories of protected communications that a person can make.[18] In addition, Congress made several procedural changes to the MWPA that same year. In October 1998, Congress again revised the MWPA, making significant changes in how the Military Department Inspectors General and the Department of Defense Inspector General (DODIG) processed reprisal allegations.[19] The most significant change was that Military Department IGs were given the authority to grant the protections of 10 U.S.C. § 1034 to reprisal allegations they received. Before 1998, the law required military members to submit reprisal allegations directly with the DODIG for coverage under the MWPA.[20]

By all accounts, Congress has done a fairly good job of expeditiously plugging holes in the MWPA as the individual experiences of military members have shown the need for reform in various aspects of the law, both substantively and procedurally. Through 1998, the most mechanical and inconvenient of the original provisions were replaced or modified.

---

[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] "Whistleblower Protection Information," www.dodig.osd.mil/HOTLINE/hotline3.htm.
[20] *Id*.

The Current Law

The current iteration of the MWPA, most recently amended by the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, provides a comprehensive scheme of protection for members of the Armed Forces who discover and report a violation of law. 10 U.S.C. § 1034 states that "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, or making or preparing a communication that the military member "reasonably believes" constitutes evidence of "a violation of law or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[21] Communications disclosing information that the military member reasonably believes constitutes evidence of a violation of law can be made to a broad range of recipients, including a member of Congress, an Inspector General, a member of a Department of Defense (DOD) audit, inspection, investigation, or law enforcement organization, any person in the chain of command, or "any other person or organization designated pursuant to regulations or other established administrative procedures for such communications."[22] This language includes a variety of individuals, including all DOD and service equal opportunity advisors, all DOD, service, major command, or installation level hotlines, including sexual harassment or discrimination hotlines.[23] In addition, the DOD Inspector General guide that covers the investigation of reprisal cases expands the scope of protected communications to include those that are made by third parties on

[21] 10 U.S.C. § 1034(b)(1)(A) and 1034(c)(2)(A), (B).
[22] 10 U.S.C. § 1034(b)(1)(B)(v).
[23] Lauretano, *supra* note 10, at 7.

behalf of service members.[24] For example, assume that the spouse of a service member reports a violation of law or regulation to any one of the statutory recipients. If the service member's commander retaliates against the service member because of a report that the service member's spouse made, the DOD IG will treat the communication as a protected communication by the service member.[25]

The MWPA provides complainants with a number of remedies, including the correction of records, disciplinary action against the offender, compensation,[26] and clemency on a court-martial sentence.[27] The DOD directive that implements the MWPA defines whistleblower remedies as "any action deemed necessary to make the complainant whole." This may include changing "agency regulations or practices," imposing administrative or criminal sanctions against the RMO (Responsible Management Official), or "referral to the United States Attorney or courts-martial convening authority any evidence of a criminal violation."[28] Despite various complainants' attempts to seek judicial review of their whistleblower cases, recent federal court decisions have held that the MWPA only grants "administrative remedies" rather than "private causes of action."[29]

One of the unique aspects of whistleblower protection for military service members is the existence of the BCMR, or the Board for the Correction of Military Records. The general authority for the correction of military records is found in 10 U.S.C. § 1552, which authorizes a BCMR to take appropriate action, including the correction or

---

[24] *Id*. at 5.
[25] *Id*.
[26] 10 U.S.C. § 1552(c) authorizes payment of a claim "for the loss of pay, allowances, compensation, emoluments, other pecuniary benefits, or for the repayment of a fine or forfeiture…."
[27] *Id*. at 9.
[28] *Id*.
[29] *Hernandez*, 38 Fed. Cl. at 534.

removal of records from the service member's personnel files, compensation for loss of pay, or repayment of a fine or forfeiture if it determines that personnel actions were taken in reprisal against the whistleblower.[30] A BCMR can also make recommendations to the service secretary on the appropriateness of disciplinary actions against the individual or individuals who committed the reprisal.[31] Although service members are required to request corrections to their records within three years after they discover reprisals, the BCMRs are authorized to waive the time limit if the board finds it to be "in the interest of justice."[32] The BCMRs are unique within the Department of Defense in that they function as super-appellate organizations, comprised of civilians appointed by the respective service secretary. The federal civilian workforce has no equivalent. In addition, the BCMR system provides a mechanism for service members to challenge reprisals that occurred before 10 U.S.C. § 1034 was enacted in 1988.[33]

Strengths of the Current MWPA

The substantive provisions of the MWPA, while not perfect, provide a relatively exhaustive scheme of protection to members of the military. In fact, there are many aspects of the law that provide protections at least equal to those found in civilian whistleblower protection statutes, or are somewhat more progressive.

One of the most forward thinking aspects of the law is found in the DOD IG guide that covers the investigation of reprisal cases. As mentioned earlier, the guide expands the scope of protected communications to include those that are made by third parties on

[30] United States General Accounting Office, "Whistleblower Protection: Continuing Impediments to Protection of Military Members, Feb. 1995.
[31] *Id.*
[32] 10 U.S.C. § 1552(b).
[33] GAO, *supra* note 31, at 8.

behalf of service members. The decision to interpret this particular feature of the law to include third parties is unique among similar whistleblower statutes.

In addition, the MWPA prohibits retaliation against a service member for making "or preparing" protected communications to a statutorily recognized recipient. Although the MWPA, the DOD, and the Army have not specifically defined what act would qualify as "preparing a communication," the legislative history to the MWPA suggests that it would include any reasonable attempt to communicate. Again, by including the language "preparing a communication," Congress has made it clear that in close situations, where determining whether a service member falls under the protection of the statute is difficult, military whistleblowers are to be given the benefit of the doubt.

Third, retroactive corrections to military records are available through the BCMR system. In other words, as long as a service member requests a correction to military records within three years of discovering a case of reprisal, it doesn't matter whether or not the reprisal occurred before the enactment of 10 U.S.C. § 1034 in 1988. As mentioned earlier, there is no civilian equivalent to this particular remedy.

Fourth, if a BCMR elects to hold an administrative hearing to evaluate a claim of reprisal, the member or former member who filed the application may be represented by a Judge Advocate (military lawyer) if (1) the IG investigation finds there is probable cause that a personnel action was in reprisal for a member of the Armed Forces making or preparing a protected communication, and (2) the Judge Advocate General concerned determines that the case is unusually complex or otherwise requires Judge Advocate assistance to ensure the proper presentation of the legal issues in the case.[34] In addition, the service member may examine witnesses through depositions, serve interrogatories,

[34] 10 U.S.C. § 1034(f)(3).

and request the production of evidence, including evidence in an IG investigative record not included in the report released to the member or former member.[35] While legal representation in the civilian world is practically a given in whistleblower cases, providing a lawyer to service members for free is a significant benefit because many soldiers live at or below the poverty line and would be unable to afford a lawyer otherwise.

Fifth, Congress, by passing the Ronald W. Reagan National Defense Authorization Act for fiscal year 2005, recently clarified and emphasized that statutory recipients of protected communications can include "any person or organization in the chain of command," or "any other person or organization designated pursuant to regulations or established administrative procedures for such communications." Until the most recent amendment to the MWPA, some lawmakers and news media questioned whether Joseph Darby's disclosure was specifically protected because of the nature in which it was made.[36] Under the new amendments to the MWPA, this is no longer an issue.

Sixth, the investigator of reprisal allegations (and the underlying communication) must be independent and outside the chain of command of both the complaining service member or the responsible management official (RMO).[37] To resolve reprisal allegations, the investigator handling a particular case follows a checklist that focuses on answering three questions. First, whether the complainant made or prepared a protected communication. Second, whether the complainant suffered an "unfavorable personnel action," or whether an RMO deprived the complainant of a "favorable personnel action"

---

[35] *Id*. at 1034(f)(3)(B).
[36] Rick Maze, *Congress Expands Whistleblower Protection*, Air Force Times, Nov. 15, 2004.
[37] Lauretano, *supra* note 10, at 8.

after the complainant made or prepared the protected communication. Third, whether the RMO knew of the protected communication before he took or threatened to take an unfavorable personnel action or withheld a favorable personnel action. If the answer to all of these questions is "yes," the complainant has established a prima facie case of reprisal, and the burden then shifts to the RMO to establish that the taking, threatening, or withholding of the personnel action was not done in reprisal.[38] By publishing and requiring investigators to follow specific guidelines, the military ensures that the officials involved are accountable to their findings of fact and conclusions of law. And if the complainant is not satisfied with the disposition of the case, he or she can appeal to the Secretary of Defense.

Finally, the definition of "personnel action" is unusually broad. The MWPA's legislative history suggests that this would include any act or omission that has "the effect or intended effect of harassment or discrimination against a member of the military."[39] The DOD's interpretation of "personnel action" includes "any 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."[40] This could include any number of actions, both formal and informal. From the perspective of potential whistleblowers, this is an extremely favorable definition.

Potential Problems with the Current Version of the MWPA

The MWPA is by no means a perfect whistleblower protection statute. In fact, there are a number of provisions that make the MWPA a bureaucratic mess in some

[38] *Id*. at 9.
[39] *Id*. at 8.
[40] *Id*.

respects. In addition, the liberal interpretation of a few provisions, one of the aspects of the MWPA that make it very friendly to service members who are the victims of reprisal, also make the statute a possible vehicle for frivolous claims.

Although Congress has done an exceptional job of expanding the potential pool of recipients of protected communications since the first version in 1988, they have done an equally poor job responding to some of the bureaucratic excess. For example, section 1034(c)(1) requires a service member who is the victim of an unfavorable personnel action prohibited by the MWPA to make the allegation to an "inspector general" in order to fall under the protections of the statute. The term "inspector general" means either the Inspector General of the Department of Defense or the Inspector General of the Army, Navy, Air Force, or Department of Homeland Security.[41] Essentially, this boils down to five people in the United States who are statutorily able to receive an allegation of reprisal. Although this is an improvement over the original version, which required allegations to be made to the DOD IG, this is a potential problem for several reasons. First, as a matter of drafting, it doesn't make sense to allow service members to make the protected communication to almost anyone, including someone in their chain of command, while requiring the service member to go "straight to the top" with their allegation that a prohibited personnel action has been taken. This seems incongruous. Secondly, for most members of the military, making an allegation of reprisal to either an SES (senior executive service, the equivalent of a four-star general in the military) in the case of the DOD IG, or to an actual four-star general (in the case of an IG of one of the branches), would be extremely intimidating. In some cases it might deter service members from coming forward, although there is no empirical evidence of this happening.

[41] 10 U.S.C. § 1034(i)(2).

For example, Joseph Darby was a twenty-four year-old high school graduate from western Maryland, living at or below the poverty line. This is a typical back-story for the large majority of men and women in the military. To expect a service member to "speak truth to power" under these conditions is unrealistic. It would make much more sense as a matter of consistency to allow alleged victims of reprisal to communicate that concern with someone they are comfortable with.

A second problem with the MWPA is that several of the time constraints imposed by the Act are potentially unfair to the whistleblower. For example, neither an initial determination that an investigation into an allegation of reprisal is warranted, nor an actual investigation of the claim, 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."[42] The concern on the part of drafters in Congress is that allowing whistleblowers more time to report would unreasonably lengthen the process, making it harder to confirm or deny allegations. However, a service member may need more than two months, a relatively brief period, just to figure out on their own that there is an ulterior motive behind a personnel action. Another time constraint that is potentially unfair to the whistleblower is found in section 1034(f)(4). After an application is made to the BCMR for the correction of a record, the Secretary concerned has 180 days to issue a final decision.[43] With this provision in place, the whole process, from retaliation to final disposition, is likely going to last more than an entire year. This is not only unnecessary, but also completely unjust.

---

[42] *Id*. at 1034(c)(4).
[43] *Id*. at 1034(f)(4).

Finally, the definitions/interpretations of some key phrases in the MWPA are dangerously broad, especially when there are no repercussions for frivolous claims. For example, the MWPA fails to define what "preparing to make" a protected communication means.[44] The DOD IG further complicates the situation by investigating all reprisal complaints as long as they allege that they made or prepared a protected communication, even if it was never actually made or prepared.[45] Without any disciplinary action for completely unsubstantiated claims, this fluid interpretation invites abuse. It allows service members who justifiably receive unfavorable actions to invoke the MWPA's protections by simply claiming that they were preparing a protected communication.[46] Through 1998, the DOD IG substantiated between fifteen to twenty percent of all reprisal cases that were submitted to it for investigation.[47] The remaining eighty to eighty-five percent were unsubstantiated. In addition, approximately ten percent of the unsubstantiated reprisal cases were frivolous or "cover your behind" cases. In these situations, the DOD IG found that service members filed frivolous reprisal allegations upon learning that some unfavorable personnel action was imminent.[48] Because the number of reprisal complaints is increasing year by year, it is imperative that the DOD curbs the use of the MWPA as a "sword" rather than as a "shield" by implementing penalties for those soldiers who are taking advantage of the protections.

Another phrase that invites abuse in the MWPA is "personnel action," which, according to the legislative history of the MWPA, includes any act or omission that has "the effect or intended effect of harassment or discrimination against a member of the

---

[44] Lauretano, *supra* note 10, at 9.
[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.

military."[49] The DOD's interpretation of "personnel action" is equally broad, and includes "any action taken on a military member that affects or has the potential to affect the military member's current position or career."[50] Although an interpretation that gives flexibility to whistleblowers under the law is, in some respects, a good thing (see discussion above), there is the potential for abuse when "personnel action" is not even defined in the actual statute. The inherent danger with a lack of precision is that it could cause bureaucratic gridlock for those with valid claims.

Conclusion

Since 1988, Congress has generally been proactive in addressing some of the major problems with the MWPA. Most recently, Joseph Darby and the scandal at Abu Ghraib forced the legislative process into action by focusing media and renewed Congressional attention on whistleblower protection for members of the Armed Forces. Work remains to be done regarding punitive measures for habitual complainers, and others who abuse the system, but this is easily fixable. The most important issue now concerns the "hearts and minds" of the military and ordinary Americans. Without question, other soldiers like Joseph Darby exist. They have a moral compass, and they have horrific stories to tell of mismanagement, physical and sexual abuse, fraud, etc. The law and the media can help protect them from retaliation for coming forward, but no institution exists to protect them from public opinion. There will continue to be Americans, both in the military and the rest of the U.S., who believe that whistleblowers

[49] *Id*. at 8.
[50] *Id*.

are putting others in harm's way. Sadly, this is the one problem that legislation can't solve.