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## The Army's G-RAP Fiasco: How the Lives and Careers of Hundreds of Innocent Soldiers Were Destroyed

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## ARTICLE

# THE ARMY'S G-RAP FIASCO: HOW THE LIVES AND CAREERS OF HUNDREDS OF INNOCENT SOLDIERS WERE DESTROYED

JEFFREY F. ADDICOTT\*

*"We believe those [National Guardsmen who worked in the G-RAP] still being investigated are unfairly being targeted and that the result of the investigation has ruined lives, careers, marriages, and credit; indeed, some have opted for suicide to end the relentless harassment."*<sup>1</sup>

—Enlisted Association of the National Guard of the United States

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1. Open Letter from the Enlisted Association of the National Guard of the United States to Lindsey Graham, U.S. Senator, and Patrick Leahy, U.S. Senator (June 1, 2017), [https://eangus.org/wp-content/uploads/sites/6/2017/06/EANGUS\\_G-RAP\\_Letter\\_Senate.pdf](https://eangus.org/wp-content/uploads/sites/6/2017/06/EANGUS_G-RAP_Letter_Senate.pdf) [<https://perma.cc/UK7Y-EHA2>].

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## I. INTRODUCTION

One of the untoward realities of any criminal justice system—either in terms of investigations or prosecutions—is that mistakes and errors sometimes occur, causing great harm to the innocent. While substantive and procedural safeguards have evolved over time and experience to prevent or rectify these injustices *ab initio*, sometimes there emerges a systemic breakdown of such magnitude that it simply overwhelms even the most sacred of our Anglo-Saxon values—that a person is innocent until proven guilty.

Such is the case with what was the largest criminal investigation in the history of the Army's Criminal Investigation Command, Criminal Investigation Division, more commonly known as the "CID." Code-named "Task Force Raptor," the Army-wide criminal probe saw over 200 CID agents "investigate" tens of thousands of Army National Guard and Army Reserve personnel ostensibly to root out individuals thought to have engaged in white-collar styled crimes as participants in the legally flawed and now defunct Army National Guard Recruiting Assistance Program (G-RAP) and/or the Army Reserve Recruiting Assistance Program (AR-RAP). Both programs were conceived out of a need to bolster troop strength due to personnel shortages that occurred in the Global War on Terror (GWOT).<sup>2</sup>

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2. The term "Global War on Terror" (also called the "War on Terror") has been used both as a metaphor to describe a general conflict against all radical Islamic international terrorist groups, and

Although the vast majority of those targeted were innocent of any wrongdoing whatsoever, many were nonetheless branded as suspected criminals and “titled” as such in CID Reports of Investigation (ROI) for crimes that they did not commit. And those were the fortunate. Some of the innocent soldiers were also prosecuted in U.S. federal criminal courts and sentenced to prison terms, while others were subjected to punishment through criminal and administrative processes in the military’s justice system.

The purpose of this article is three-fold. First, this article seeks to explore the legal and policy ramifications of the CID’s multi-year criminal investigation, which targeted vast numbers of innocent Army National Guard and Army Reserve personnel for alleged criminality as contract employees in the G-RAP or AR-RAP.

Second, this article aims to highlight the CID’s longstanding practice—referred to as “titling”—of refusing to delete from their system of records those individuals that are subsequently cleared of any wrongdoing by their commands. This highly dubious administrative practice was particularly devastating to the hundreds of innocent and fully-exonerated participants in the G-RAP and AR-RAP in terms of promotions, security clearances, and job selection both in the military and civilian world.

Finally, this article will call direct attention to the need for congressional action to amend the Wartime Suspension of Limitations Act (WSLA)<sup>3</sup> so that the current suspension of the statute of limitations does not apply to those soldiers who participated in the G-RAP and AR-RAP. Not only does the current version of the WSLA (as amended by the Wartime Enforcement of

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to describe the combat operations against al-Qaeda and the Taliban in 2001 and Saddam Hussein in 2003. The more precise use of the term is to describe the ongoing international armed conflict between the United States of America and the “Taliban, al Qaeda, or associated forces.” Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. § 948 (2006). One of the clearest indications of the congressional authorization for war and for the use of the law of war, the MCA lists “unlawful enemy combatants” as:

- (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
- (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

*Id.* § 948(a).

3. Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (1948).

Fraud Act) violate the long-recognized principle of repose, it irresponsibly blurs the line between civilian contractors and military contractors and casts too broad a net over what reasonably constitutes “wartime” activities.

## II. THE G-RAP

As of this writing, America is still engaged in the longest war in its illustrious history.<sup>4</sup> The GWOT is a multi-dimensional conflict that began on September 11, 2001, when nineteen members of the radical Islamic al-Qaeda network attacked the United States by means of hijacked airplanes.<sup>5</sup> The terror network al-Qaeda was “headquartered” in Afghanistan and openly operated under the protection of the Taliban government. Since that time, the GWOT has been fought on numerous overseas battlefields by American ground troops from the active-duty military augmented by forces from the Army National Guard and Army Reserve. While the GWOT most certainly serves as a reminder of the importance of the Army National Guard<sup>6</sup> and Army Reserve as essential components to maintaining the nation’s military readiness, both the Army National Guard and Army Reserve have periodically struggled to achieve proper force levels—even in “peace time”<sup>7</sup> environments.

While the GWOT began with the al-Qaeda terror attacks, the United States and its allies soon expanded the conflict by targeting the rogue regime of Saddam Hussein in 2003.<sup>8</sup> For better or worse, Iraq quickly

4. See William J. Astore, *The Longest War in American History Has No End in Sight*, NATION (Feb. 28, 2017), <https://www.thenation.com/article/the-longest-war-in-american-history-has-no-end-in-sight/> [<https://perma.cc/G4KA-XE7U>] (indicating the war in Afghanistan is now in its sixteenth year which makes it the longest foreign war in our history); Thomas Nagorski, *Editor's Notebook: Afghan War Now Country's Longest*, ABC NEWS (June 7, 2010, 3:00 PM), <https://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303> [<https://perma.cc/Q9RY-T3AE>] (“And today ‘The Other War’ has gained a fresh and dubious distinction: it is the longest war in our nation’s history, surpassing the conflict in Vietnam.”).

5. See generally JEFFREY F. ADDICOTT, *RADICAL ISLAM WHY?* (2016) (providing a general background discussion of the concept of radical Islam).

6. See *Our History*, ARMY NAT’L GUARD, <https://www.nationalguard.com/legacy> [<https://perma.cc/Q6UP-CF4V>] (“National Guard Soldiers serve both community and country. Our versatility enables us to respond to domestic emergencies, overseas combat missions, counterdrug efforts, reconstruction missions and more.”).

7. John Warner et al., *The Military Recruiting Productivity Slowdown: The Roles of Resources, Opportunity Cost and the Tastes of Youth*, 14 DEFENCE & PEACE ECON. 329, 333 (2003).

8. Rowan Scarborough, *Numbers Show National Guard Bonus Scandal Not Living Up to the Hype*, WASH. TIMES (Feb. 11, 2016), <https://www.washingtontimes.com/news/2016/feb/11/national-guard-fraud-claims-taint-recruiting-assis/> [<https://perma.cc/DU9B-5FCB>].

became part of the GWOT. Among other issues of concern in providing stability to the new interim Iraqi government, the need for additional American ground troops weighed heavily as a key ingredient for success. Back home, however, the active-duty Army was short on personnel, and by 2005, over 100,000 Army National Guard soldiers were already on federal active duty.<sup>9</sup> Although Congress sets troop authorizations under its Article I powers,<sup>10</sup> no politician seemed serious about calling for a mandatory national draft of young men to meet the increased needs. Instead, military planners turned to the state's Army National Guard, looking for more volunteers to "federalize."<sup>11</sup> In the context of this discussion, in July 2005, the Army National Guard counted roughly 330,000 soldiers—20,000 short of Congress's authorization.<sup>12</sup> Due to the shortages, novel steps were taken to bolster recruitment, including the adoption of a highly-irregular recruiting assistance scheme—the G-RAP.<sup>13</sup>

#### A. *DOCUPAK*

In 2005, the Army awarded Document and Packaging Brokers, Inc. (DOCUPAK)—a private civilian corporation operating out of Birmingham, Alabama—an extremely lucrative government contract to administer G-RAP.<sup>14</sup> The mission of G-RAP was simple. "[G-RAP and later AR-RAP]

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9. NAT'L GUARD ASS'N OF THE U.S., *THE G-RAP PROGRAM: THE INVESTIGATIONS AND AN INJECTION OF REALITY 1*, <http://www.defendourprotectors.com/wp-content/uploads/2015/02/G-RAP-Program-The-Investigations-and-an-Injection-of-Reality.pdf> [https://perma.cc/ETR3-DNRJ] [hereinafter NGA G-RAP REPORT].

10. U.S. CONST. art. I, § 8, cl. 12.

11. Scarborough, *supra* note 8.

12. Bob Haskell, *Army Guard Reaches 350,000-Member Goal Ahead of Schedule*, NAT'L GUARD (Apr. 23, 2007), <https://www.nationalguard.mil/News/Article-View/Article/572952/army-guard-reaches-350000-member-goal-ahead-of-schedule/> [https://perma.cc/TG6X-2C6P].

13. *See* NGA G-RAP REPORT, *supra* note 9, at 1 (explaining when Hurricane Katrina hit the Gulf Coast of the United States in August of 2005, an additional 50,000 National Guard were needed for this domestic disaster).

14. *See* United States v. Osborne, 886 F.3d 604, 606 (6th Cir. 2018) (explaining DOCUPAK's role in the G-RAP program). Although the official website for G-RAP ([www.guardrecruitingassistant.com](http://www.guardrecruitingassistant.com)) cannot be found, the Defend Our Protectors website has compiled AR-RAP and G-RAP marketing and other informational materials which have been cited throughout. *Resource*, DEFEND OUR PROTECTORS, <http://www.defendourprotectors.com/resources/> (last visited Mar. 7, 2020). *See also* Memorandum from the Subcomm. on Fin. and Contracting Oversight Majority Staff, to Members of the Subcomm. on Fin. and Contracting Oversight (Feb. 13, 2014), <https://www.hsgac.senate.gov/imo/media/doc/Army%20Recruiting%20Memo%20for%20Members%20and%20Staff%20Final.pdf> [https://perma.cc/GC7R-TVQV] [hereinafter

was designed to be a recruitment tool to supplement the recruiting activities of full-time [Army] recruiters during a time of increased demand for soldiers in a depressed recruiting market . . . [by leveraging] soldiers to identify, mentor, and sponsor potential candidates for enlistment.”<sup>15</sup>

Any National Guard soldier, except an Army National Guard soldier who was a Recruiter,<sup>16</sup> could quickly become qualified to work in G-RAP by completing a rather simplistic online DOCUPAK course of instruction. Once this short online session was done, the soldier would be officially designated as a DOCUPAK “recruiting assistant” (RA).<sup>17</sup> Accordingly, RA’s were compensated directly through DOCUPAK based on fulfilling certain ill-defined and often conflicting DOCUPAK instructions, which centered on the RA discussing the benefits of joining the Army National Guard (and later the Army Reserve) with a civilian who might be interested in joining the military. In the DOCUPAK literature, such a civilian was termed as a potential soldier (PS).<sup>18</sup> The PS could be any civilian that the RA might encounter from “within their individual spheres of influence.”<sup>19</sup>

Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight] (providing a background and summarization of the G-RAP program).

15. NGA G-RAP REPORT, *supra* note 9, at 1.

16. Because Army National Guard Recruiters were paid for recruiting Potential Soldiers, they were not eligible to be Recruiting Assistants. See Testimony of Philip Crane at 124, *Colorado v. Wilson*, No. 14CR327 (C.D. Col. 2015) (explaining Recruiting Assistants were hired and trained by DOCUPAK).

17. *Id.* at 123–24.

18. *G-RAP FAQ: Overview of the Guard Recruiting Assistance Program*, DEFEND OUR PROTECTORS 1, [http://www.defendourprotectors.com/wp-content/uploads/2015/02/G-RAP\\_1.5.pdf](http://www.defendourprotectors.com/wp-content/uploads/2015/02/G-RAP_1.5.pdf) [<https://perma.cc/8F97-YRZ7>].

19. *Guard-Recruiting Assistance Program: From Recruiting and Retention Command*, GUARDLIFE, <https://www.state.nj.us/militar/publications/guardlife/volume32no1/grap.html> [<https://perma.cc/PBB9-NN6U>]. As was done in all States, the New Jersey National Guard strongly encouraged its National Guard personnel to join the G-RAP, placing great emphasis on the “easy money” to be had. The New Jersey National Guard advertisement stated:

New Jersey Guard Recruiting Assistants can earn additional income assisting the NJARNG recruiting efforts by identifying well qualified men and women for service. Recruiter Assistants (RAs) earn \$2,000 for each new recruit who enlists and reports for Basic Training. The RA can also earn \$2,000 for a prior service applicant who enlists in the NJARNG. . . . Guardsmen who apply online at [www.guardrecruitingassistant.com](http://www.guardrecruitingassistant.com) become eligible to serve as a part-time Recruiter Assistant (RA). The RA applicant will be verified and hired by a contractor [DOCUPAK], not the NJARNG. . . . The triad of the NJARNG recruiter, RA and potential Soldier will then work closely together to process the potential Soldier and move them towards accession. Upon enlistment the RA will receive an initial payment of \$1,000. A second \$1,000 payment will be given when a non-prior service applicant ships to Basic Training or when a prior service applicant

The DOCUPAK vision was that a triad, consisting of the RA, the Army Recruiter (who would actually enlist the PS), and the PS would all interact together to move the PS to accession into the National Guard.<sup>20</sup>

Upon making contact with a PS, the RA was instructed to enter basic information about each PS whom they contacted into the DOCUPAK online network, including personally identifiable information (PII) such as name, address, and social security number.<sup>21</sup> When the subject PS enlisted, the RA would receive compensation through DOCUPAK: \$1,000 for every PS who signed an enlistment contract and then an additional \$1,000 when the new enlistee went to basic training.<sup>22</sup> Other higher-level bonuses were offered to RAs for officers who joined the National Guard. DOCUPAK also benefited financially each time a PS joined. On the DOCUPAK side of the equation, in addition to “operational” costs associated with the contract, DOCUPAK received an extra bounty of \$325 on each payment to an RA.<sup>23</sup>

When asked to describe the fundamental workings of DOCUPAK, Philip Crane, the company's former president testified in district court in Adams County, Colorado that DOCUPAK was a marketing and advertising company, stating that “[i]n this particular instance, our focus was on providing services to the United States government Department of Defense for recruiting and retention purposes.”<sup>24</sup> Philip Crane also testified that DOCUPAK was merely a “force multiplier.”

[DOCUPAK] encouraged members in good standing of the Army National Guard to go out and to share their story with other individuals who might have a propensity to also serve in the military . . . the RAs would share their stories [about the benefits of serving in the Army National Guard] within their

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has completed four months of drill. **Do the Math:** You get **\$2,000** for every person you recruit into the New Jersey Army National Guard. Don't let Guard be New Jersey's best kept secret.

*Id.*

20. See *G-RAP FAQ*, *supra* note 18, at 1 (providing an overview of the G-RAP program and how it works).

21. *G-RAP Overview*, DEFEND OUR PROTECTORS 7, [http://www.defendourprotectors.com/wp-content/uploads/2015/02/Rules\\_Version1.pdf](http://www.defendourprotectors.com/wp-content/uploads/2015/02/Rules_Version1.pdf) [<https://perma.cc/4LP2-Z6H3>].

22. NGA G-RAP REPORT, *supra* note 9, at 1.

23. Testimony of Philip Crane at 5, Colorado v. Wilson, No. 14CR327 (C.D. Col. 2015).

24. *Id.* at 105.



sphere of influence, whether it be a community center, high school, church, or any other place of worship.<sup>25</sup>

In short, the military contracted with DOCUPAK to administer recruiting programs for the “Army, the big Army, and the National Guard,”<sup>26</sup> with essentially zero oversight on how the program actually functioned. Then, two years after G-RAP began, the Army Reserve launched AR-RAP in 2007, which was also administered by DOCUPAK with similar rules for the RA to recruit a PS.<sup>27</sup>

G-RAP proved to be extremely successful. By April 2007, the Army National Guard achieved the congressionally-authorized strength number of 350,000 troops.<sup>28</sup> Nevertheless, the two recruiting programs continued to operate under DOCUPAK even though no actual need was demonstrated for them to continue.<sup>29</sup> Before the two recruiting programs were unceremoniously shut down in 2012, approximately 150,000 recruits, Army-wide, joined either the National Guard or the Army Reserve resulting in payments of over \$300 million.<sup>30</sup>

Given the extremely minimalist rules regarding how an RA would work in order to receive payment under G-RAP and AR-RAP,<sup>31</sup> it was not surprising that certain unscrupulous individuals engaged in fraudulent activities to get DOCUPAK to pay out money that was not earned. In 2007, the same year the Army reached its National Guard troop level, the Army's CID investigated several cases of alleged abuse. Two scenarios of fraud were uncovered. First, there were instances where some RAs were suspected of sharing their payment money with Army National Guard Recruiters who had improperly fed the name of a particular PS to an RA with the premeditated agreement to split the money that the RA received for entering the PS in the DOCUPAK system for payment. Since it was illegal for an Army Recruiter to accept money apart from their fixed Army

25. *Id.* at 6, 9.

26. *Id.* at 5.

27. William Nutter, *Recruiting Assistants, New Programs, Help Boost Army Reserve Numbers*, U.S. ARMY (Aug. 1, 2007), [https://www.army.mil/article/4237/recruiting\\_assistants\\_new\\_programs\\_help\\_boost\\_army\\_reserve\\_numbers](https://www.army.mil/article/4237/recruiting_assistants_new_programs_help_boost_army_reserve_numbers) [<https://perma.cc/5JSJ-ESAQ>].

28. NGA G-RAP REPORT, *supra* note 9, at 1.

29. In fact, the National Guard Bureau overpaid DOCUPAK by \$9.2 million. Testimony of Philip Crane at 106, *Wilson*, No. 14CR327 (C.D. Col. 2015).

30. Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight, *supra* note 14, at 2; Scarborough, *supra* note 8.

31. *See supra* note 22 and accompanying text.

salary for recruiting enlistees, this constituted a prima facie case of fraud under federal criminal statutes. Second, an RA would simply input for payment from DOCUPAK the name of a PS that they had never met, which was sometimes accomplished by hacking into the computer system. Perhaps the biggest ring of abuse was uncovered in San Antonio, Texas, where a group of individuals had managed to rake in as much as \$244,000 from DOCUPAK.<sup>32</sup> The reports of fraud led to the erroneous belief of a systemic nationwide scandal in G-RAP and AR-RAP.<sup>33</sup>

The death blow to DOCUPAK and the G-RAP and AR-RAP came in the wake of an Army Audit Agency program-wide audit completed in 2011.<sup>34</sup> By the beginning of March 2012, the findings of this investigation<sup>35</sup> gained intense publicity due to the media's "sensational headlines based on half-truths, innuendo, and anonymous government leaks."<sup>36</sup> For example, the *Washington Post* reported on March 13, 2012, that \$92 million in bonuses were allegedly paid to Army Recruiters who were not eligible for the payments, and that more than a quarter of the \$339 million in bonuses given over the past six years may have been fraudulent.<sup>37</sup> In turn, an Army Inspector General Report from 2014 cited eight general officers and senior civilian officials for suspected wrongdoing, echoing the earlier Army Audit Agency findings that the entire DOCUPAK government contract itself was illegally established in allowing a private civilian company to disburse cash

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32. NGA G-RAP REPORT, *supra* note 9, at 6.

33. Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight, *supra* note 14, at 2; Scarborough, *supra* note 8.

34. Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight, *supra* note 14, at 2; Scarborough, *supra* note 8.

35. See NGA G-RAP REPORT, *supra* note 9, at 1 (noting the Department of Defense and the Army Audit Agency has conducted at least five separate audits of G-RAP with "five additional investigations and reviews by the Army, all under a Recruiting Assistance Program Task Force" set up by the Secretary of the Army).

36. *Id.*; see Robert O'Harrow Jr., *Fraud Investigation Targets Recruiting Program for Army National Guard, Reserves*, WASH. POST (Mar. 13, 2012), [https://www.washingtonpost.com/investigations/fraud-investigation-targets-recruiting-program-for-army-national-guard/reserves/2012/03/12/gIQApl1QXAS\\_story.html?utm\\_term=.a0a0dd4ca5e0](https://www.washingtonpost.com/investigations/fraud-investigation-targets-recruiting-program-for-army-national-guard/reserves/2012/03/12/gIQApl1QXAS_story.html?utm_term=.a0a0dd4ca5e0) [<https://perma.cc/3CEZ-3PNZ>] (discussing the shocking allegation of wide-ranging fraud in the Army National Guard's recruitment program that is the subject of a Pentagon fraud investigation); *Army Cancels Recruitment Program After Allegations of Bonus Payout Fraud*, FOX NEWS (Mar. 14, 2012), <https://www.foxnews.com/politics/army-cancels-recruitment-program-after-allegations-of-bonus-payout-fraud> [<https://perma.cc/52L6-ARKB>] (reporting 1,700 service members could be implicated in the recruiting scandal totaling over 92 million dollars in fraudulent bonuses).

37. O'Harrow Jr., *supra* note 36.

payments to military personnel designated as RAs.<sup>38</sup> While the innocent low-level RAs who worked for DOCUPAK as instructed had no part in setting up G-RAP, they immediately became tainted.

As stated, the independent inquiries rapidly brought about the termination of G-RAP and AR-RAP in January 2012.<sup>39</sup> However, while calls for accountability intensified—causing congressional interest—the DOD tasked the CID with undergoing a massive crusade to investigate any RA involved with G-RAP. Someone had to pay. Often described as “witch hunts,” the CID ruthlessly targeted hundreds upon hundreds of innocent rank-and-file RAs who had, under the parameters of the DOCUPAK contract, simply followed the actual G-RAP and AR-RAP rules to receive payment for their work.<sup>40</sup> Guilty of only complying with the highly dubious and often contradictory mandates set out by DOCUPAK in the G-RAP rules, very few of the RAs were able to afford experienced civilian lawyers to defend themselves from baseless allegations of criminality, particularly if they were facing criminal charges in federal district courts.

Ironically, while the 2011 Army audit detailed profound deficiencies at DOCUPAK to include the very premise upon which the program was constructed, blame was shifted to the low-level RAs who bore the brunt of the ensuing CID onslaught. Code-named “Task Force Raptor,” over two hundred CID investigators set out to determine whether over 100,000 RAs had committed crimes.<sup>41</sup> According to one watchdog group, “[R]ather than accept responsibility for ineffective command and for mismanagement of a contract worth a half a billion dollars, military brass

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38. Rowan Scarborough, *Army Top Brass Skirt Punishment in Fraud Probe as Lower Ranks Take Blame*, WASH. POST (Mar. 13, 2016), <https://www.washingtontimes.com/news/2016/mar/13/army-top-brass-skirt-punishment-in-fraud-probe-as-/> [<https://perma.cc/GH4G-X5ER>].

39. Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight, *supra* note 14, at 2.

40. See generally Darron Smith & Liz Ullman, *The Silent Campaign by the US Government to Brand American Soldiers as Criminals*, HUFF. POST (Jun. 05, 2015, 5:20 PM), [https://www.huffpost.com/entry/the-silent-campaign-by-th\\_b\\_7521228](https://www.huffpost.com/entry/the-silent-campaign-by-th_b_7521228) [<https://perma.cc/A4B2-A5JK>] (“But the federal government has not been satisfied with that level of justice; they intend to extract its ‘pound of flesh’ from this failed incentive program, and they intend to do so by waging silent war against innocent and vulnerable soldiers who tried in earnest to follow the rules as best they knew how.”).

41. Dave Philipps, *Army Fraud Crackdown Uses Broad Net to Catch Small Fish, Some Unfairly*, N.Y. TIMES (May 28, 2017), <https://www.nytimes.com/2017/05/28/us/national-guard-army-fraud-crackdown.html> [<https://perma.cc/J4S2-QE99>].

redirected this uncomfortable inquiry to the rank-in-file soldiers [who served as RAs] . . . .”<sup>42</sup>

#### B. *Task Force Raptor*

While there is no question that Task Force Raptor constituted the largest and most expensive CID investigation in the history of the Army (estimates of between 30 to 60 million dollars spent),<sup>43</sup> it soon became apparent to many that the investigation and the investigatory techniques employed by the CID were rampant with shocking levels of abuse, incompetence, and mismanagement.

Shockingly, in every Report of Investigation (ROI) that targeted a “suspect,” the particular CID agent would not list the specific G-RAP or AR-RAP rule which an alleged RA wrongdoer had allegedly violated. Instead, criminal allegations were set out as violations of various Title 18 United States Code offenses such as “wire fraud”<sup>44</sup> (for receiving payment from DOCUPAK without performing the required work) or “aggravated identity theft”<sup>45</sup> (for improperly obtaining PII from a PS). Amazingly, no one seemed to notice that if the RA followed the published G-RAP rules, they were not committing fraud! Clearly, no G-RAP rule violations were cited in the ROIs simply because it was far easier to allege “fraud” as a general principle than to tie wrongdoing to a specific G-RAP rule.

At the end of the day, the red thread throughout all the ROIs reflected the unwritten perception that it was preposterous for an RA to claim substantial monetary rewards from DOCUPAK for simply engaging a PS in as little as a one-time conversation about the benefits of joining the Army National Guard or the Army Reserve. However, as the former president of DOCUPAK testified, a single conversation of unspecified length about the benefits of joining the Army National Guard (or Army Reserve) with a PS was all the RA was required to accomplish according to the G-RAP rules

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42. Rowan Scarborough, *Army Brass Avoid Rap in Recruitment Fraud Probe: Lower Ranks Take Brunt of Blame*, WASH. TIMES, Mar. 14, 2016, at A6; Smith & Ullman, *supra* note 40.

43. See Phillips, *supra* note 41 (stating Task Force Raptor “has grown into one of the largest criminal investigations ever conducted in the military”).

44. Rowan Scarborough, *Army National Guard Recruitment Fraud Case Rests on Murky Rules*, WASH. TIMES (May 22, 2017), <https://www.washingtontimes.com/news/2017/may/22/army-national-guard-recruitment-fraud-case-rests-o/> [<https://perma.cc/UA7Q-VCH3>].

45. *Id.*

before submitting the name for a future lawful payment should that PS eventually enlist.<sup>46</sup>

Of course, one of the largest inhibitors to investigating any given case of alleged G-RAP abuse was the duration of time from when an alleged incident occurred, in some instances, nine to ten years had elapsed from the time when the RA had made contact with a PS. This directly impacted the ability of witnesses to recall and relate events as well as the CID's ability to obtain reliable information. Indeed, it would be rather unreasonable to expect any given PS to recall a conversation with an RA that took place years ago—some even ten years on.

### C. *The Case of Major John Suprynowicz*

One case that warranted two front-page national headlines from the *Washington Times* perfectly illustrates the almost unbelievable multi-year nightmare visited on a completely innocent RA caught up in the CID witch hunt. A highly-decorated combat veteran of Somalia, Afghanistan, and Iraq, then-Captain John Suprynowicz worked on the side as an RA in the G-RAP from 2006 to 2011.<sup>47</sup> At the urging of his superiors to participate in the G-RAP in order to assist in filling the ranks of the National Guard, Suprynowicz took the short online DOCUPAK course and was immediately qualified as a DOCUPAK RA. Over the course of a five-year period, the former Army sniper worked diligently in accordance with the G-RAP rules to reach out to numerous PSs, earning what amounted to about \$17,000 per year for his efforts.

Then in 2013, while assigned to U.S. Army North in San Antonio, Texas, Department of Justice (DOJ) and CID agents confronted Major Suprynowicz at his workplace, ensuring that the Chief of Staff (COS) at U.S. Army North and all in his chain of command were aware that Major Suprynowicz was going to be “arrested” for committing fraud in the G-RAP. Although Major Suprynowicz stressed that he had done nothing illegal in G-RAP, DOJ and CID agents confronted him and encouraged him to “confess to his crimes” in order to avoid going to jail. No arrest was

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46. Testimony of Philip Crane at 111–12, *Colorado v. Wilson*, No. 14CR327 (C.D. Col. 2015).

47. Gen. Officer Memorandum of Reprimand from Major Gen. Clarence Chinn to Major John W. Suprynowicz (Aug. 31, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas); *but see* Scarborough, *supra* note 8 (“In 2006, [Major Suprynowicz] received \$4,000. The next year, \$49,000. By 2010, his last year as an RA, he had collected \$85,000 for 41 recruits, making him one of the highest-paid RAs in the program’s short history.”).

made, and Major Suprynowicz along with his chain of command assumed that the matter was closed.

A year later, with a new COS and chain of command at U.S. Army North in place, DOJ/CID sent Major Suprynowicz a “Target Letter” threatening prosecution in a federal district court. Facing threats of federal prison, Major Suprynowicz hired a civilian attorney and paid a hefty “retainer” fee. Still, no action was taken against him throughout all of 2014 and the first eleven months of 2015.

By 2015, the federal statute of limitations for his involvement in the G-RAP had tolled, and Major Suprynowicz had changed commands to U.S. Army South, also located in San Antonio, Texas. Reflecting his sterling work ethic and abilities, in December 2015, Major Suprynowicz was selected below the zone for promotion to the rank of Lieutenant Colonel. Family and friends celebrated this positive accomplishment, not realizing that the CID nightmare would soon return.

In January 2016, while serving as the senior Action Officer (AO) lead for the Central American (CENTAM) Regional Leaders Conference (RLC) and the Army National Guard Adjutant Generals (TAG) conference, Major Suprynowicz's top-secret security clearance was abruptly pulled. He was assigned to a desk job, notified that his promotion to Lieutenant Colonel was in abeyance, and denied any opportunity to compete for Battalion Command slots as a career advancement. After three years of “investigating,” the CID had produced an ROI against him. The guilty until innocent onslaught had spun into full gear. Major Suprynowicz sought legal representation from the pro bono legal assistance mission at St. Mary's University School of Law, in San Antonio, Texas. Now known as the Warrior Defense Project (WDP), the center's Director, Professor of Law Jeffery Addicott, had served on active duty for twenty years as an Army Judge Advocate. The WDP agreed to represent Major Suprynowicz.

After meeting face-to-face with a team of CID and FBI agents and chastising them for producing the absurdly phony ROI, it was quickly apparent that no criminal charges would be levied against Major Suprynowicz by the DOJ or under the Uniformed Code of Military Justice (UCMJ). This left only the possibility of military administrative punishment such as a General Officer Memorandum of Reprimand (GOMR), which can nevertheless easily end a soldier's career and lead to an involuntary release from the National Guard. Indeed, on June 28, 2016, Major Suprynowicz was issued a formal GOMR by his commanding

general, Major General Clarence Chinn, Commander, U.S. Army South.<sup>48</sup> This GOMR was accompanied by a two-inch thick CID ROI alleging that “probable cause exists to believe [Major] Suprynowicz committed the offenses of Wire Fraud and Aggravated Identify Theft”<sup>49</sup> by submitting names of PSs for payment that he had never met. Amazingly, the ROI did not contain a single “sworn statement” from a single witness or PS implicating Major Suprynowicz in any wrongdoing, only the typed-up notes of CID agents reflecting telephone conversations they had engaged in with certain individuals who were cited in the CID notes as not knowing then-Captain Suprynowicz, even though DOCUPAK records showed that Suprynowicz had submitted the names of these individuals for payment after talking to them about joining the National Guard.

While the CID ROI took almost three years to complete, Major Suprynowicz was given only forty-five days to gather evidence and rebut the GOMR. During that brief time frame, the WDP was able to track down, interview, and then obtain five sworn written affidavits from former PSs regarding the key and bottom-line element of the alleged misconduct cited in the GOMR—that these individuals did not know, or had never met, or talked to Suprynowicz about entering military service. All individuals swore that the CID notes were grossly inaccurate and that to the contrary of what the ROI purported, that they knew then-Captain Suprynowicz in the context of joining the National Guard. Indeed, given more time, each and every one of the so-called witnesses cited in the CID ROI would provide a contradictory statement as to what the CID telephone interviewer recorded in the CID ROI. In addition, all former PSs said that the CID interviewer never read back their statement over the phone for them to confirm and validate as an accurate rendition of their words. It was blatantly obvious that the CID telephone interviews grossly twisted and recklessly misrepresented the facts.

On the one hand, Major General Chinn possessed a CID ROI that clearly indicated, by means of telephone interviews, that certain PSs did not know then-Captain Suprynowicz. Yet, the sworn statements obtained by the defense showed that not only did they know Suprynowicz, but in many instances knew him very well. Something was seriously amiss.

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48. Gen. Officer Memorandum of Reprimand from Major Gen. Clarence Chinn to Major John Suprynowicz (June 28, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

49. *Id.*

Faced with a clear contradiction between the CID ROI and the defense's evidence, Major General Chinn rescinded the GOMR,<sup>50</sup> and ordered an independent officer (IO) to conduct a "Commanders Inquiry (CI)," and to base the inquiry on actual sworn testimony from witnesses, something the CID ROI had not done. It quickly became apparent that of the eighteen witnesses interviewed by the IO, all had some degree of recollection of then-Captain Suprynowicz in the context of their decision to join the Army National Guard. However, some of the former PSs could not recall giving Captain Suprynowicz their PII.

Major General Chinn elected to issue a second GOMR on August 31, 2016, with new allegations that while Major Suprynowicz had met with all the individuals he had submitted to DOCUPAK for payment, he had in some instances improperly obtained PII from some of the PSs. This second GOMR was also vigorously contested by the WDP in subsequent lengthy and extensive rebuttal legal memorandums.<sup>51</sup> In many ways, the second GOMR was far more insidious than the first GOMR since it was entirely based on ex post facto considerations having absolutely nothing to do with the actual G-RAP rules pertaining to the acquisition or use of PII.

The second GOMR alleged two specific acts of misconduct on the part of Major Suprynowicz, to wit:

- An investigation [The Commander's Inquiry – Memorandum of Findings dated 26 August 2016] reveals that many individuals [Potential Soldiers] you claimed under G-RAP did not provide you with their PII" and
- Others [Potential Soldiers] did not consent to you using their PII for the purposes of G-RAP.<sup>52</sup>

Of course, the key to determining whether or not then-Captain Suprynowicz violated the two areas of concern specifically cited in

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50. Withdrawal of Gen. Officer Memorandum of Reprimand from Major Gen. Clarence Chinn (Aug. 31, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

51. See Memorandum to Major Gen. Clarence Chinn (Sept. 27, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas); Memorandum to Major Gen. Clarence Chinn (Oct. 8, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

52. Gen. Officer Memorandum of Reprimand from Major Gen. Clarence Chinn to Major John W. Suprynowicz, *supra* note 47.



the GOMR, could only be determined in the actual requirements for the RA under the G-RAP rules at the time of the conduct in question. In other words, as an RA in the program, what did the G-RAP rules require of Major Suprynowicz in terms of: (1) obtaining PII from Potential Soldiers; and (2) obtaining consent from the Potential Soldier for use of that PII in the G-RAP system?

The first of the two allegations of wrongdoing set out in the second GOMR was that Suprynowicz did not get the PII directly from each PS he talked to and, by implication, from no other source. This first allegation of wrongdoing was in direct conflict with the G-RAP rules instructing the RA on how he could obtain PII. In short, there was no G-RAP rule at the time that required Major Suprynowicz to obtain all or even partial PII by or from the PS. In short, although the G-RAP rules did require that the RA obtain the necessary PII of the PS in order for DOCUPAK to then enter that PS into the G-RAP system, it did not require that the RA be provided that information from the PS. In fact, the G-RAP rules stated the exact opposite in terms of how the RA could obtain PII regarding a particular PS should they not be able to get all the PII during their conversation with the PS. The G-RAP rules in force at the time specifically stated that any missing or additional PII that the RA might need in order to enter the PS system via computer could be obtained by the RA from the “local RRNCO.”<sup>53</sup> Obviously, Suprynowicz had some bare base level of PII from each and every PS, i.e., their name and some contact information, or he would not be engaged in a conversation with the PS. Since all of the witnesses confirmed that they spoke to then-Captain Suprynowicz, this is simply not an issue. Again, and most critically important, the G-RAP rules do not require that all—or even some—of the PII be obtained from the individual PS as alleged

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53. *G-RAP Overview*, *supra* note 21, at 7. There were multiple versions of the G-RAP rules during the seven years of its existence. According to Agent Julie Thurlow's statement, rules version 2.0 would have taken effect in November 2007. Agent's Investigation Report from Special Agent Julie Thurlow 1 (Nov. 22, 2013) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas). The biggest change between version 1.5 and 2.0 is handling of PII. *See id.* at 4 (noting the update in G-RAP rules “[r]egarding what information the RA needed to get from the Potential Soldier and from where, the RA's G-RAP account informed them of the information required to make a valid nomination[.]”). Additionally, it wasn't until three years later that the National Guard Bureau even issued a memo regarding handling of PII through G-RAP. Memorandum from Ronald S. Walls Explaining Guidelines for Recruiting and Retention Personnel (May 4, 2010) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas). However, neither DOCUPAK nor the government has ever produced any evidence confirming that these rule changes were sent to the DOCUPAK RAs. There was also no mechanism to prove that anyone saw the May 2010 memo regarding PII. *Id.*

as the first point of wrongdoing in the GOMR. The G-RAP rules on page 7 clearly state in response to the hypothetical RA's question about "where do I [RA] get it [PII from the Potential Soldier]?" that the RA need not get all the necessary PII to enter into the computer from the PS.<sup>54</sup> In short, the RA is instructed to obtain PII for the PS directly from the "local RRNCO." Page 7 states in full:

**What information do I [the recruiting assistant] need to get from the Potential Soldier and where do I get it [PII]?**

The online training will inform you of all required information and supporting documentation to effect enlistment. Your local RRNCO [Army Recruiter] will provide specifics for each case [the PS]. Legal Name (Birth Certificate); Address; Social Security Number (SSN Card); Date of Birth (Birth Certificate); Citizenship (Birth Certificate); Dependency Status (Marriage Certificate); Law Violations and Physical Status are key elements of the pre-qualification process.<sup>55</sup>

The second allegation in the GOMR, that some PSs "did not consent to you [Suprynowicz] using their PII for the purposes of G-RAP,"<sup>56</sup> is also ex post facto in nature. Again, in hindsight, this would have been an excellent program metric which one might expect to be found in the G-RAP rules, but the fact is that it is not found in the G-RAP rules. First, there is no written consent form for the affirmative release of PII provided in the G-RAP rules for the RA to use. Second, no RA is ever instructed in the G-RAP rules to create such a consent form. While this would seem like a reasonable requirement, which could also memorialize the conversations between the RA and the PS (now in most cases done over ten years ago), it did not exist in the G-RAP rules and was not required by G-RAP rules. Third, there is no requirement in the G-RAP rules that the RA specifically obtain actual verbal or written consent from the PS.

In fact, the only required consent that the RA had to obtain was if the RA intended to use the PII for any other purpose other than G-RAP. Thus, since Suprynowicz never used the PII for any other purpose other than entering the PS into the G-RAP computer system as required, Suprynowicz was not required to obtain consent. The pertinent language on page 7 of

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54. *G-RAP Overview*, *supra* note 21, at 7.

55. *Id.*

56. Gen. Officer Memorandum of Reprimand from Major Gen. Clarence Chinn to Major John W. Suprynowicz, *supra* note 47.

the G-RAP rules clearly states when consent must be obtained, and that being written consent:

Further release [of PII] without written consent by the Potential Soldier is strictly prohibited.<sup>57</sup>

Although the actual requirements of the G-RAP rules absolutely exonerated Major Suprynowicz from the two statements of alleged wrongdoing contained in the second GOMR—G-RAP rules did not require that the RA get the PII from the PS or obtain consent to enter the PII into the G-RAP—two other questions were also asked in the IO Report. While the second GOMR did not include these two additional questions as a point of wrongdoing, the defense also responded to them as they reflected the confusion of what G-RAP was supposed to do and what it was required to do. The final two IO questions were:

[D]id MAJ Suprynowicz influence their [the Potential Soldier] decision to join the National Guard?

[D]id MAJ Suprynowicz mentor the witness [the Potential Soldier] until he/she shipped to basic training or became fully integrated into his/her unit.<sup>58</sup>

The first portion of this analysis once again required reference to the G-RAP rules regarding the role of the RA in influencing the PS and then providing mentorship to the PS. The required G-RAP rules provided extremely limited guidance for the RA, setting a very low bar of expectation set out in vague and aspirational language only. The entire G-RAP rules in this regard are found on pages 7, 10, and 11, respectively.<sup>59</sup> Page 7 provides the following:

**What can I say/not say to people about joining the ARNG?**

You should start by sharing your personal experiences with the Potential Soldier as they relate to your knowledge of the ARNG. You will speak from authority when telling your own story. It is helpful to ask the Potential Soldier

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57. *G-RAP Overview*, *supra* note 21, at 7.

58. Memorandum of Findings from Colonel Scott P. Nolan, Investigating Officer, to Colonel James E. Dodson, at 6 (Aug. 26, 2016) [hereinafter Memorandum of Findings] (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

59. *G-RAP Overview*, *supra* note 21, at 7–11.

probing questions to determine their individual needs, wants and desires. You should only provide factual information to Potential Soldiers, and tell them you are unsure if you do not know the answer. The RRNCO should be able to provide further insight at the meeting engagement. You are *not authorized* to make guarantees or promises to a Potential Soldier in regard to any benefits or incentives. RRNCOs and MEPS Guidance Counselors are the only authorized personnel to make commitments on behalf of the Guard.<sup>60</sup>

Page 10 provides the following suggested guidance, employing “should” instead of “must:”

**What should I do with the new recruit while they are at Basic Training and AIT?**

You should support your new Soldier from afar by writing letters, e-mails and postcards. Additionally, you should engage the new Soldier's family back home when appropriate.<sup>61</sup>

Page 11 provides the following:

**At what point do I no longer work with the Potential Soldier?**

Your responsibilities end upon receipt of your final \$1,000 payment. However, you are encouraged to maintain a positive relationship with all of your new Soldiers and to cultivate potential nominees from within their spheres of influence.<sup>62</sup>

In light of the G-RAP rules and the gathered witness statements associated with the case of Major Suprynowicz, the following conclusions could be reasonably drawn, giving rest to the last two questions in the IO Report:

(1) Did the IO witnesses confirm knowing Major (P) Suprynowicz?

Yes—18 of 18 witnesses confirm knowing Major (P) Suprynowicz.<sup>63</sup>

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60. *Id.* at 10.

61. *Id.*

62. *Id.* at 11.

63. *See* Memorandum of Findings, *supra* note 58, at 5–6 (summarizing the findings of the eighteen witnesses that met with Major Suprynowicz).

(2) Did the IO witnesses confirm discussing the military as a Potential Soldier with Major Suprynowicz?

Yes—18 of 18 witnesses confirm discussing the military with Major (P) Suprynowicz to some degree.<sup>64</sup>

(3) Did Major Suprynowicz “influence their decision to join the National Guard?”

Not relevant—there is nothing in the G-RAP rules that required Suprynowicz to be the sole source of influence for the PS's decision to join the National Guard as question 3 of the IO Report erroneously asked. The G-RAP rules put no quantitative measure on how much or how long the RA conversations had to be. The degree of influence that Major Suprynowicz had on any given PS is not a metric of the G-RAP—the G-RAP rules do not require this measure of achievement. In turn, neither Major Suprynowicz nor any RA is expected to be a “mind reader” to determine the exact impact of his discussions with the PS's decision to join the Army National Guard. Indeed, viewing the matter the other way, not one of the PSs informed Major Suprynowicz verbally or in writing that they had already made up their mind to join the military and that his conversations with them had no impact on them. This subjective attitude may or may not have been in their minds at the time of their conversations with Major Suprynowicz, but it is irrelevant. Per G-RAP Basic Instructions document page 5, “[a]nyone in your ‘[s]phere of [i]nfluence’ expressing an interest in the ARNG with whom you have a personal relationship” can be nominated.<sup>65</sup>

Still, in the majority of cases, then-Captain Suprynowicz went far beyond the guidance of the G-RAP rules and normal expectations to mentor the vast majority of the PSs he worked with. In fact, the IO generally characterized Suprynowicz in this process as: “inspirational leader,” and “influential.”<sup>66</sup>

Finally, the implication that because Major Suprynowicz applied to DOCUPAK for money he earned under the provisions of G-RAP he was

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64. *See id.* at 2–4 (summarizing each witnesses interaction with Major Suprynowicz).

65. *Guard Recruiting Assistance Program PowerPoint*, DEFEND OUR PROTECTORS, <http://www.defendourprotectors.com/wp-content/uploads/2015/02/GRAP-PPT.pdf> [<https://perma.cc/A45U-4DPG>].

66. Memorandum of Findings, *supra* note 58, at 6.

somehow required to inform the PS of this fact is fallacious. Under the G-RAP rules, no RA was required to inform any of the PSs that their individual efforts under G-RAP might be monetarily rewarded.

At the end of the day, when faced with the facts of the G-RAP rules, the real issue for gauging wrongdoing for any given RA is whether the RA met with the PS. Indeed, there is no doubt that some RAs were guilty of wrongdoing and criminality because they never met with the PS at all and yet entered that PS's name into the DOCUPAK system, usually in a kick-back scheme to split the money with a recruiter. This scenario of wrongdoing and criminality never applied to Suprynowicz. Ironically, the facts are that Suprynowicz personally knew and met with all of the PSs about joining the Army National Guard as required by G-RAP rules. Nevertheless, his reward was to suffer through a four-year slanderous campaign to destroy his reputation and military career. The truth is that Major Suprynowicz followed and complied with all the G-RAP rules in terms of obtaining PII and consent issues when entering that information into the DOCUPAK system. Any money he obtained was lawfully worked for and earned in accordance with the provisions of the G-RAP rules.

Major General Chinn considered the legal and rational arguments in the defense rebuttal and immediately rescinded the second GOMR.<sup>67</sup> Furthermore, Major General Chinn specifically found Major Suprynowicz innocent of any wrongdoing and ordered that the military "flag," which put all favorable action in abeyance, be lifted immediately.<sup>68</sup> By this time, it was evident to any reasonable mind that the initial CID ROI investigation, which had lasted three years, was an affront to basic values of due process and fairness. While all CID investigations carry the usual weight of stress and uncertainty to the accused, taking three years to investigate what should have taken three months (at most) is unfathomable. It leads to the obvious conclusion that something within the CID system is seriously amiss. Considering the high-profile fiasco of G-RAP, which touched the highest levels of the Army command structure, the answer must certainly rest, in part, to a relentless pressure on Army CID to get results—regardless of the

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67. See Filing Determination on General Officer Memorandum of Reprimand from Major Gen. Clarence Chinn for Major John Suprynowicz (Nov. 23, 2016) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas) (directing the reprimand be withdrawn and destroyed).

68. Memorandum from Major Gen. Clarence Chinn withdrawing Gen. Officer Memorandum of Reprimand of Major Suprynowicz (Jul. 5, 2017) [hereinafter *Withdrawal of Second GOMR*] (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

means or consequences. This extreme zealousness engulfed many innocents, like Major Suprynowicz.

#### D. CID's "Titling" System

In the normal course of events within the Army military justice system, once a suspected crime has occurred, the CID will conduct an investigation to gather evidence associated with the alleged crime and to identify a suspect(s) that might have committed the offense(s). This process can culminate in a written formal ROI. The CID ROI will then go to the servicing Judge Advocate for a legal opinion to affirm the ROI's conclusion that enough evidence has been gathered to conclude that there is probable cause to believe that a particular suspect has committed a crime. If the Judge Advocate concurs, then the suspect is automatically "titled" by the CID in their system of records. In the vast majority of the G-RAP cases, the servicing Judge Advocate provided great weight to the assertions and conclusions contained in the ROI under the assumption that the agents performed their investigative jobs in accordance with law and policy. Further, the ROI is taken at face value as the legal office does not have the assets to "double check the math" for accuracy of what is in the CID ROI. In short, once a suspect is "titled," he remains in the CID system—which is freely accessed by fellow agencies in and out of the military—regardless of if that individual is later fully exonerated by proper judicial or administrative bodies.

Accordingly, going back to the illustration from the case of Major Suprynowicz, even though his command rejected the CID ROI and exonerated him, his struggle for justice was far from over. Due to the CID's practice of storing in a system of records all those individuals that are "titled" in a CID ROI,<sup>69</sup> Major Suprynowicz was notified that his promotion to Lieutenant Colonel announced in 2016 could not go forward, regardless of the findings of innocence by his commander, Major General Chinn.<sup>70</sup> Because Major Suprynowicz remained in the CID title system, his case must now be referred to a Promotion Review Board (PRB) and he would have to submit rebuttal materials all over again to prove his innocence. The PRB would consider the defense rebuttal written

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69. See Patricia A. Ham, *The CID Titling Process—Founded or Unfounded*, 1998 ARMY L. 1, 1 (1998) ("Titling is the decision to place the name of a person or other entity in the 'subject' block of a CID report of investigation.").

70. Withdrawal of Second GOMR, *supra* note 68.

materials and the unfavorable CID ROI and, in turn, make a recommendation to the Secretary of the Army for a final decision. The WDP assisted Major Suprynowicz in this process as well. It then took another year to play out before the Secretary of the Army, Mark T. Esper, issued a favorable memorandum on October 29, 2018 stating, "Effective immediately, I retain Major John W. Suprynowicz on the FY17 LTC . . . recommended promotion list, pursuant to Army Regulation 135-155, paragraph 4-11."<sup>71</sup>

As illustrated by the Suprynowicz case, all those innocents that are improperly "titled" by the CID face similar hurdles in their subsequent military career progression ranging from promotions, holding security clearances, and filling choice job assignments. All while the soldier sits in limbo for years trying to clear his name. Indeed, negative ramifications bleed over into the National Guard soldier's civilian job as well. Examples of cases handled by the WDP include a Tennessee National Guard military police soldier who was automatically denied a State license to carry a concealed weapon<sup>72</sup> and a National Guard officer in South Carolina who was fired from his civilian police officer position solely because his name popped up on a background check that he was "titled" by the CID.<sup>73</sup> Both of these soldiers have been exonerated by their respective commands of the CID accusations that they engaged in criminality in G-RAP, but because they were "titled," their respective States took adverse action against them.

Although the CID has an administrative procedure for a soldier to request that he be deleted from the CID "title" system of records, it is an internal decision made by and within the CID itself and is rarely ever granted. There is no independent oversight.<sup>74</sup> It is truly a case of the fox guarding the henhouse.

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71. See Memorandum for Deputy Chief of Staff, G-1 from Mark T. Esper, Secretary of the Army (Oct. 29, 2018) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas) (recommending the promotion of Major Suprynowicz). Major Suprynowicz was actually promoted while assigned at the Pentagon in early 2020.

72. Letter from Lisa Knight, Director of Handgun Program, Dept. of Safety and Homeland Sec., Tenn., to Kristin Steakley (Apr. 17, 2015) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

73. Memorandum from Major Irick A. Geary Jr., Division of Law Enft and Safety, Univ. of S.C., to Benjamin Sternemann (Mar. 28, 2019) (on file with the Warrior Defense Project, St. Mary's University School of Law, San Antonio, Texas).

74. Ham, *supra* note 69, at 15.



In January 2020, the Director of the newly-formed Congressional Justice for Warriors Caucus (CJWC)<sup>75</sup> requested that the WDP produce a “white paper” on the matter of the CID title system and how it can act to harm innocent members of the armed forces who have been exonerated of wrongdoing. The WDP paper provided was entitled: “The Army’s Criminal Investigation Command, Criminal Investigation Division (CID) Use of an Administrative Identification System of Records called ‘Titling’ of Individuals Suspected of UCMJ Criminal Activity.”<sup>76</sup> The WDP paper urged Congress “[t]o develop a legal/policy methodology to address those cases where an individual is ‘titled’ by the CID but later found innocent of the alleged UCMJ violation(s), is expeditiously withdrawn from the CID ‘title’ system of records.”<sup>77</sup>

### III. THE WSLA AND G-RAP

A final point of concern in alleging criminality in the G-RAP and AR-RAP is the matter of the government’s ability to bypass the statute of limitations. Since federal law prohibits prosecuting a crime after the tolling of the associated statute of limitations, criminal investigations are also abated.<sup>78</sup> For fraud, the time limit is five years, which would automatically disqualify the vast majority of the investigations undertaken by the CID in G-RAP and AR-RAP cases. As of April 2014, a total of thirty-five individuals were convicted in federal court, twenty-one of those from Texas.<sup>79</sup>

With the use of unprecedented numbers of civilian contractors on the battlefield to support the efforts of the military in the GWOT, Congress expressed its concern that cases of fraud might go unpunished unless the statute of limitations was waived. Because the longstanding WSLA<sup>80</sup> only applied to conflicts where Congress had made a formal declaration of war

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75. The Congressional Justice for Warriors Caucus (CJWC) is “dedicated to educating Members of Congress about combat-related incidents where U.S. service members who are fighting for our freedoms have been unjustly incarcerated under the UCMJ.” *Congressional Justice for Warriors Caucus*, GOVSERV, <https://www.govserv.org/US/Washington-D.C./474951293314603/Congressional-Justice-for-Warriors-Caucus> [<https://perma.cc/8DDT-FZLA>].

76. Jeffrey F. Addicott, *The Army’s Criminal Investigation Command, Criminal Investigation Division (CID) Use of an Administrative Identification System of Records Called “Titling” of Individuals Suspected of UCMJ Criminal Activity* (on file with the Warrior Defense Project, St. Mary’s University School of Law, San Antonio, Texas).

77. *Id.*

78. Wartime Suspension of Limitations Act, 18 U.S.C. § 3287 (1948).

79. NGA G-RAP REPORT, *supra* note 9, at 4.

80. 18 U.S.C. § 3287.

under its Article I powers, in 2008 Congress passed the Wartime Enforcement of Fraud Act (WEFA) which amended the WSLA so that it would now apply to conflicts where Congress had passed an authorization for use of military force.<sup>81</sup> During the GWOT, Congress passed two such authorizations. Congress specifically authorized the use of military force by enacting, respectively, the 2001 Authorization for Use of Military Force (AUMF)<sup>82</sup> and the 2003 Authorization for Use of Military Force Against Iraq Resolution (AUMFAI).<sup>83</sup> The AUMF limits the authorized use of military force to “those nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks which occurred on September 11, 2001.”<sup>84</sup> The AUMFAI, authorized the President to:

[U]se the Armed Forces of the United States as he determines to be necessary and appropriate in order to:

- (1) defend the national security of the United States against the continuing threat posed by Iraq; and
- (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.<sup>85</sup>

For the soldiers who also served as “contractors” in the G-RAP and AR-RAP cases, the WEFA raises several critical legal issues pertaining to its applicability to soldiers who served as contractors and to the issue of the location of the “battlefield.” In 2019, by a writ of certiorari, the United States Supreme Court was asked to take up the matter in the case of *United States v. Jucutan*.<sup>86</sup> In 2015, Jordan M. Jucutan, a member of the Army Reserve in the Northern Mariana Islands, was charged with AR-RAP related offenses, which were allegedly committed between 2005 and 2009.<sup>87</sup> The charges—

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81. S. REP. NO. 110-431, at 1 (2008).

82. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

83. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

84. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

85. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).

86. *United States v. Jucutan*, 756 F. App'x 691 (9th Cir. 2018).

87. *United States v. Jucutan*, No. 1:15-CR-00017, 2016 WL 3063852, at \*1 (N. Mar. I. May 26, 2016).

wire fraud<sup>88</sup> and aggravated identity theft<sup>89</sup>—were brought well past the five-year statute of limitations for most federal crimes and should have been barred.<sup>90</sup> The government asserted that the five-year statute of limitations period, as provided in 18 U.S.C. § 3282(a), had been suspended by the WSLA. Jucutan appealed the district court's denial of his motion to dismiss for prosecution of acts beyond the set statute of limitations and lack of standing to prosecute due to lack of any alleged criminal acts committed against the United States of America.<sup>91</sup> The district court concluded that the criminal indictment against Mr. Jucutan was not barred by the generally applicable five-years statute of limitations period,<sup>92</sup> finding that the WSLA tolled 18 U.S.C. § 3282(a), and the Ninth Circuit affirmed the district court's denial, by a 2-1 vote.<sup>93</sup>

Agreeing that both lower courts in *Jucutan* erred in concluding that the WSLA applied to the wire fraud and aggravated identity theft charged against Mr. Jucutan, the WDP filed an amicus brief on behalf of Mr. Jucutan's writ of certiorari.<sup>94</sup> Unfortunately, even though there existed a split in decisions about the legality of tolling the statute of limitations in two circuit courts, the Supreme Court refused to take up the matter, leaving it to Congress to pass corrective legislation.

#### A. *The History of the WSLA and WFEA*

In 1942, during World War II, President Franklin D. Roosevelt signed into law the WSLA, tolling the statute of limitations and providing prosecutors more time to bring charges “relating to criminal fraud offenses in the United States”<sup>95</sup> by civilian contractors. In 1948, President Harry S. Truman signed a new law making the WSLA permanent.<sup>96</sup> The WSLA, however, only applied to a formal congressional declaration of war under Article I.

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88. 18 U.S.C. § 1343 (2017).

89. *Id.* § 1028A.

90. *See id.* § 3282(a) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”).

91. *See Jucutan*, 756 F. App'x at 692 (denying the defendant's motion to dismiss).

92. *Id.*

93. *Id.*

94. Brief for Jordan M. Jucutan as Amici Curiae Supporting Petitioner, *Jucutan v. United States*, 139 S. Ct. 2656 (2019) (No. 18-8956), 2019 WL 2226021.

95. S. REP. NO. 110-431, at 2 (2008).

96. *Id.*

As noted, in the GWOT there was no such formal declaration of war by Congress. The WEFA amended<sup>97</sup> the WSLA, so its tolling clause would apply to a congressional authorization of military force pursuant to the War Powers Resolution.<sup>98</sup> A report from the Committee on the Judiciary, providing the purpose of the WEFA, specified that the original WSLA was signed in “[recognition of] the extreme difficulty in tracking down contracting fraud in the midst of a war . . . .”<sup>99</sup> Still, at no point does the report stipulate a deviation from the original purpose of the WSLA.<sup>100</sup> In summary, the WSLA, as amended, applies to fraud against the United States in “[relation] to the ongoing conflicts in Iraq and Afghanistan,”<sup>101</sup> not to performing purely support functions which have no direct nexus to combat activities.

#### B. *Use of Contractors on the Battlefield*

The level of civilian contractor activities in concert with Department of Defense (DOD) missions—encompassing a range of technical, logistical, maintenance, and security support services—has caused a “substantial shift in the types of contracts for troop support services.”<sup>102</sup> Without the extensive use of contractors, the American military could not conduct combat operations, contingency operations, or even peacetime operations.<sup>103</sup>

Indeed, given the scope and pace of the modern military, military planners no longer consider civilian contractors as a luxury or a “nice to have” addition to the force structure. Because civilian contractors now provide a wide range of essential support to DOD missions, American military superiority requires contractor support to maintain military readiness and

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97. *See id.* at 6 (“The [WSLA] . . . would close a loophole in current law and give the government new power to prosecute contracting fraud in Iraq and Afghanistan.”).

98. 50 U.S.C. § 1544(b) (2017) (outlining the steps Congress must take to authorize the lawful use of military force by the Executive in a prolonged military engagement lasting more than sixty days).

99. S. REP. NO. 110-431, at 2 (2008).

100. *Id.*

101. *Id.*

102. *See* VALERIE BAILEY GRASSO, CONG. RESEARCH SERV. RL33834, DEFENSE CONTRACTING IN IRAQ: ISSUES AND OPTIONS FOR CONGRESS, at ii (2008) (discussing the various types of Logistics Civil Augmentation Program (LOGCAP) contracts that have been awarded); Jeffrey F. Addicott, *Contractors on the “Battlefield:” Providing Adequate Protection, Anti-Terrorism Training, and Personnel Recovery for Civilian Contractors Accompanying the Military in Combat and Contingency Operations*, 28 HOUS. J. INT’L L. 323, 358 (2006) (“DOD guidance regarding the provision of basic AT training has not kept up with the volume of contractors pouring into Iraq and other places around the globe.”).

103. *See* 10 U.S.C. § 101(a)(13) (2017) (defining “contingency operation”).

operational capabilities.<sup>104</sup> As such, civilian contractors are critical to national security in and out of armed-conflict scenarios. In turn, as evidenced by the Army's ill-conceived contract with DOCUPAK, certain contractors were simultaneously serving as military personnel, albeit complying with requirements attempting to separate their status as soldiers and contractors performing work for DOCUPAK.

Because Mr. Jucutan was employed by DOCUPAK as a contractor and performed his contract requirements under AR-RAP outside of the scope of any wartime activity, he should not have been subjected to the tolling provisions of the WSLA. Further, the military provided limited guidance on how DOCUPAK established and administered the subject contract, making that relationship beyond the intent of the legislation.

The GWOT is unlikely to end soon. In *Boumediene v. Bush*,<sup>105</sup> the Supreme Court said the GWOT may not end for "a generation or more."<sup>106</sup> Without an end to the GWOT, the WSLA has the unintended consequence of creating a potentially unlimited statute of limitations for contractors. This means contractors could remain subject to potential liability for criminal offenses for years, possibly a lifetime. Consequently, the potential for prolonged liability will prevent otherwise willing contractors from assisting the military in completing its mission, hindering U.S. military capabilities and national security.

The repeated position of the Court is that the WSLA "should be 'narrowly construed' and 'interpreted in favor of repose.'"<sup>107</sup> Given that the government has had more than ten years to indict Mr. Jucutan, a "statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict."<sup>108</sup> According to the Tenth Circuit, quoting the Supreme Court, the time limit barring a criminal charge is:

[D]esigned to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the

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104. JEFFREY F. ADDICOTT, *TERRORISM LAW: MATERIALS, CASES, COMMENTS* 286 (7th ed. 2014).

105. *Boumediene v. Bush*, 553 U.S. 723 (2008).

106. *Id.* at 785.

107. *Kellogg Brown v. United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (quoting *Bridges v. United States*, 346 U.S. 209, 216 (1953)).

108. *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting *Stogner v. California*, 539 U.S. 607, 615 (2003)).

far-distant past. Statutes of limitations also encourage law enforcement to promptly investigate suspected criminal activity.<sup>109</sup>

As stated, the original version of the WSLA was enacted “to ensure that the fog of war does not allow those who defraud the United States from getting away with it because their actions could not be investigated during hostilities.”<sup>110</sup> Regardless, however, the WSLA “creates an exception to a longstanding congressional ‘policy of repose’ that is fundamental to our society and our criminal law.”<sup>111</sup> Accordingly, any ambiguity in 18 U.S.C. § 3287 should be strictly construed and “interpreted in favor of repose.”<sup>112</sup>

### C. *Repose*

The Ninth Circuit’s decision to uphold the tolling provisions violates the Supreme Court’s longstanding principle of repose. Providing an extended—potentially indefinite—statute of limitations for a criminal offense is contrary to the Court’s precedent. In *Toussie v. United States*,<sup>113</sup> the Court held:

The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.<sup>114</sup>

The charged offenses against Mr. Jucutan are precisely of the same kind *Toussie* finds problematic. Indeed, if the statute of limitations is to be tolled, the alleged offenses must be directly related to wartime activities. In turn, although the WEFA extended the statute of limitations to the overseas conflicts in Iraq and Afghanistan, the WEFA did not broaden WSLA’s scope beyond the type of charged offenses it would toll during wartime. Specifically, the report from the Committee on the Judiciary states that the WSLA “is not intended to apply to . . . military actions not specifically

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109. *Id.* (quoting *Toussie v. United States*, 397 U.S. 112, 114–15 (1970)).

110. *United States v. Sack*, 125 F. Supp. 633 (S.D.N.Y. 1954); S. REP. NO. 110-431, at 3 n.4 (2008).

111. *DeLia*, 906 F.3d at 1217.

112. *Id.*

113. *Toussie v. United States*, 397 U.S. 112 (1970).

114. *Id.* at 114–15.

authorized by Congress pursuant to the War Powers Resolution.”<sup>115</sup> Thus, the WSLA only applies to fraud against the United States, which is connected to the specifically authorized use of military force, which must be directly tied to those activities in the overseas war zones outside of the continental United States.

Both congressional authorizations of military force limit the use of force to specific locations for specific purposes—all overseas. Conversely, the WSLA was “not intended to apply to . . . military actions not specifically authorized by Congress pursuant to the War Powers Resolution.”<sup>116</sup> Thus, alleged criminal actions by a soldier—engaged as a contractor or not—committed solely within the confines of the United States without a connection to the GWOT is most assuredly beyond the reach of the WSLA.

Again, offenses involving fraud under the WSLA are “limited strictly to offenses in which defrauding or attempting to defraud the United States is an essential ingredient of the offense charged.”<sup>117</sup> *Bridges v. United States*<sup>118</sup> held that the WSLA did not apply to offenses outside defrauding the United States “in any pecuniary manner or in a manner concerning property.”<sup>119</sup> In contrast, the Court has also held that the WSLA applied “to false claims for wool purchases from a federal agency . . . because defrauding the federal government was ‘an essential ingredient of the offenses charged.’”<sup>120</sup> In this context, to determine whether WSLA should apply to the criminal offenses alleged against Mr. Jucutan, a soldier and also a contractor with DOCUPAK, the court must evaluate the elements of the charged offense and the nexus to wartime activity.<sup>121</sup>

#### D. *Military Contractors—What Was the Army Thinking?*

Like all other RAs, Mr. Jucutan was employed by DOCUPAK as a contractor and performed his contract requirements under AR-RAP outside of the scope of any wartime activity. Further, the military provided limited guidance on how DOCUPAK established and administered the subject

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115. S. REP. NO. 110-431, at 4 (2008).

116. *Id.*

117. *DeLia*, 906 F.3d at 1217.

118. *Bridges v. United States*, 346 U.S. 209 (1953).

119. *Id.* at 221.

120. *DeLia*, 906 F.3d at 1219 (quoting *United States v. Grainger*, 346 U.S. 235, 237, 241–45 (1953)).

121. *Id.* at 1219–21.

contract, making that entire relationship and performance of activity beyond the intent of the WSLA.

Civilian parent-contracting companies function under individualized contracts either directly with the DOD or with other federal agencies. Because overseas military operations give rise to their fair share of untoward activities caused by negligent or intentional acts, including wrongful deaths and accidents, it is not surprising that during the GWOT parent-contracting companies have faced a number of civil lawsuits emanating from the acts of their civilian employees, other contractors, military personnel, and host-nation foreigners.

An often raised “defense” employed by contracting companies in the litigation process is the political question doctrine, which, if adopted by the court, serves as a complete jurisdictional bar to the suit.<sup>122</sup> Even if the plaintiff’s lawsuit is appropriate and meritorious as to every other procedural and substantive matter, the political question doctrine renders the case non-justiciable. In other words, it cannot be heard.

How to identify a non-justiciable political question is set out in *Baker v. Carr*.<sup>123</sup> The so-called *Baker* inquiry lists six separate factors, any one of which renders the case non-justiciable.<sup>124</sup> The six *Baker* factors are:

[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>125</sup>

The *Baker* factors are broadly defined and apparently listed in descending order of importance, with the first and second factors providing the most

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122. See *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“The Political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”).

123. *Baker v. Carr*, 369 U.S. 186 (1962).

124. *Id.* at 217.

125. *Vieth v. Jubelirer*, 541 U.S. 267, 277–78 (2004) (quoting *Baker*, 369 U.S. at 217).



weight.<sup>126</sup> Each case mandates “a discriminating analysis of the particular question posed, in terms of the history of its management.”<sup>127</sup> One of the most critical elements is the amount of command and control that the military has over the particular contract and contractor. The greater the level of military command and control, the greater the probability that the requisite *Baker* factors will be invoked to bar the civil suit.

For instance, the 2006 case of *Smith v. Halliburton Co.*<sup>128</sup> involved a cause of action against a civilian contractor who operated a dining facility on Forward Operating Base (FOB) Marez in Mosul, Iraq.<sup>129</sup> In December 2004, a suicide bomber entered the dining facility, detonated explosives packed with shrapnel, and murdered twenty-two people.<sup>130</sup> The court applied the *Baker* factors and determined that the contractor was operating pursuant to the military's orders, instructions, regulations, and protection, and therefore the contractor was under military control, making the case non-justiciable.<sup>131</sup>

On the other hand, in *McMahon v. Presidential Airways, Inc.*,<sup>132</sup> the Eleventh Circuit upheld a lower court's denial of a motion to dismiss based on the political question doctrine.<sup>133</sup> Although the civilian contractor company Presidential Airways (Presidential) was under military contract to provide transportation support to the DOD in Afghanistan, it could not satisfy any of the *Baker* factors in a negligence lawsuit filed by survivors of a Presidential plane crash, killing all aboard.<sup>134</sup> The Eleventh Circuit dismissed the first *Baker* factor, finding that while the military was involved in choosing the starting and ending points of various Presidential flights, the military's role in directing the activities was “relatively discrete.”<sup>135</sup> Because the court felt the facts demonstrated minimal military involvement and the type of claim was squarely in the realm of a negligence claim, the remaining *Baker* factors were disposed of in quick step.

126. *Id.* at 278.

127. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1365 n.36 (11th Cir. 2007), *aff'g* 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

128. *Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 2521326 (S.D. Tex. Aug. 30, 2006).

129. *Id.* at \*1.

130. *Id.*

131. *Id.* at \*6–7.

132. *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331 (11th Cir. 2007), *aff'g* 460 F. Supp. 2d 1315 (M.D. Fla. 2006).

133. *Id.* at 1361.

134. *Id.* at 1337, 1365.

135. *Id.* at 1361.

In the case of DOCUPAK, this civilian contracting company operated outside of any theater of combat and was provided little guidance and oversight from the military as to how to organize or run the G-RAP and AR-RAP initiatives. Thus, DOCUPAK would certainly fail to satisfy any of the *Baker* factors.<sup>136</sup> DOCUPAK and the individual RA “military” contractor who worked for DOCUPAK were far removed from any real connection to the GWOT and, by extrapolation, far removed from the letter and spirit of the WLSA. While it is undeniable that the RA working for DOCUPAK provided some service to the military in the sphere of reaching certain enlistment goals, those services were not connected to combat-related actions on the battlefield or in direct support of wartime activities.

When the Ninth Circuit held that the WSLA applied to the criminal offenses alleged against Mr. Jucutan it mistakenly applied the WSLA to criminal offenses “committed in connection with the . . . performance . . . of any contract . . . which is . . . directly connected with or related to [congressionally] authorized use of the Armed Forces.”<sup>137</sup> In fact, the government failed to show that AR-RAP itself is “directly connected with or related to the authorized use of the Armed Forces.”<sup>138</sup> Amazingly, the Ninth Circuit seemed satisfied by the government’s haphazard reliance on a work statement for AR-RAP to show that the program was directly connected with or related to the AUMF:

[A]s the Army Reserve (AR) transitions from a stand-by reserve to an operational reserve there still remains challenges for the Global War on Terror (GWOT) and for manning the AR. The current strength of the Selected Reserve (SELRES) is just under 195K; missing end-strength goal by 10K.<sup>139</sup>

This AR-RAP work statement fails to expand the narrow authorization of the AUMF and AUMFAI.<sup>140</sup> Again, only a congressionally authorized use of military force activates the WSLA’s suspension of the applicable

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136. See *United States v. Osborne*, 886 F.3d 604, 606 (6th Cir. 2018) (stating DOCUPAK is a private corporation); Memorandum to the Members of the Subcomm. on Fin. and Contracting Oversight, *supra* note 14, at 7 (“The National Guard Bureau also failed to obtain sufficient legal reviews for any of the G-RAP contracts awarded to Docupak.”).

137. 18 U.S.C. § 3287 (2018).

138. *Id.*

139. *United States v. Jucutan*, No. 16-10452, 2018 WL 6445749, at \*3 (9th Cir. 2018) (Berzon, J., dissenting).

140. 18 U.S.C. § 3287 (2017).

statute of limitations.<sup>141</sup> The government has made no effort to show that the need to recruit more troops for the Army Reserve was “directly connected with or related to the authorized use” of military force under the AUMF or AUMFAI. Additionally, the charged offenses against Mr. Jucutan—wire fraud<sup>142</sup> and aggravated identity theft<sup>143</sup>—contain no element which requires Mr. Jucutan to have defrauded the United States government.<sup>144</sup>

Furthermore, as previously delineated, the Supreme Court has applied the WSLA to toll the limitations period only when the alleged fraud was an “essential ingredient of the offense charged.”<sup>145</sup> Defrauding the U.S. government is not an essential ingredient of the charged offenses—wire fraud and aggravated identity theft—because neither offense requires Mr. Jucutan to have defrauded the U.S. government.<sup>146</sup>

#### IV. CONCLUSION

The G-RAP may have increased the ranks of the National Guard at a time when it was needed, but it left in its wake a legacy of destroyed lives of many innocent RAs. According to all open-source information, the CID never accounted for even a fraction of the alleged 92 million dollars in so-called fraud in the recruiter programs.<sup>147</sup> Ironically, far more money was spent “investigating” innocent RAs for the sole purpose of getting individuals “titled.” Regardless of what the outcome might be as to how the cases were disposed of, the CID could boast that they had at least discovered significant numbers of wrongdoers, as evidenced by numerous “successfully concluded” ROIs. Of course, Task Force Raptor may be over, but the repercussions associated with being “titled” will continue to haunt the innocent for years to come—both in the military and civilian world.

It is time that the DOD order a complete and detailed independent review of all ROIs related to Task Force Raptor. Not only must the DOD take

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141. *See id.* (outlining the requirements for a wartime suspension of limitations).

142. *Id.* § 1343.

143. *Id.* § 1028A.

144. *See id.* § 1343 (showing defrauding the U.S. government is not an element of wire fraud); *id.* § 1028A (lacking an element which would require defrauding the government).

145. *United States v. DeLia*, 906 F.3d 1212, 1217 (10th Cir. 2018) (quoting *Bridges v. United States*, 346 U.S. 209, 221 (1953)).

146. *See* 18 U.S.C. § 1343 (2008) (demonstrating no requirement of defrauding the government); 18 U.S.C. § 1028A (2004) (providing no element requiring the government be defrauded).

147. *See* NGA G-RAP REPORT, *supra* note 9, at 3 (indicating only \$900,000 was accounted for as fraudulently paid out).

immediate steps to delete all those cases from the CID “title” systems where the command has found the RA innocent of wrongdoing, but all those CID investigators that conducted sham “telephone-styled” ROI must be held to account.

Finally, in light of the Supreme Court’s inaction to deal with the statute of limitations issue posed by the WSLA, Congress must amend the WEFA to limit its application to contractors that have a direct nexus to “wartime” activity.