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Task Force Raptor: Failure of Military Justice

By Dennis P. Chapman

Introduction

In the Parable of the Tares, Jesus relates the story of a farmer whose wheat field an enemy has sown with tares. When the seed germinates, his servants ask him whether they should go into the field and pull the tares up. To this, the master answers

> "[n]ay; lest while ye gather up the tares, ye root up also the wheat with them. Let both grow together until the harvest: and in the time of harvest I will say to the reapers, Gather ye together first the tares, and bind them in bundles to burn them: but gather the wheat into my barn."[1]

Christ's parable is theological, describing the course of the future, in which saints and sinners are allowed to live together in the world, side-by-side, until the end of time, when the saints will go to their reward, and sinners to judgment. But it also fairly describes the operation of any fair and equitable system of justice; under such a system, the state does not charge out among the populace, seeking to distinguish, preemptively, between saint and sinner, upon the basis of the potential for criminality; rather, it leaves every person in peace, until their lives bear evil fruit in the form of criminal conduct; only then is the criminal tare pulled up from the field.

In most instances, our criminal justice system functions along these lines, implicitly accepting the validity of Blackstone's Ratio, which posits that it is "[b]etter that ten guilty persons escape, than that one innocent suffer."[2] In their zeal to expose and punish the guilty, however, authorities occasionally forget Blackstone and adopt, even if unwittingly, an approach closer to that of Thomas Danforth in *The Crucible*, that "I should hang ten thousand that dared to rise against the law, and an ocean of salt tears could not melt the resolution of the statutes."[3] At times, such overwrought zeal has driven authorities to the extreme of knowingly detaining thousands of innocent people as a preventive measure against speculative future wrongdoing by unknown persons who might not even exist, as in the notorious internment of Japanese Americans during the Second World War.[4] More commonly, such excessive zeal manifests itself in entrapment stings wherein law enforcement officers "'test the virtue' of a wide range of targets"[5] in the hopes of smoking out unknown evildoers from among the public, often goading otherwise innocent people into compromising themselves in the process, thus creating the very crimes they seek to suppress.

The military justice system is no more immune to such problems than are its civilian counterparts. In fact, one of the largest criminal investigations in the history of the U.S. Army—its investigation into a referral program known as the Guard Recruiting Assistance Program (G-RAP)[6]—was marred by an overzealous quest in which Army investigators grew so single-

[1] Matthew 13:24-30 (King James).

[2] Alexander Volokh, *N Guilty Men*, 146 Univ. Pa. L. Rev. 173 (1997) (quoting 4 William Blackstone, Commentaries at *352).

[3] Arthur Miller, *The Crucible*, 81 (Acting Edition, 1954).

[4] *See generally* Korematsu v. United States, 323 U.S. 214 (1944).

[5] People v. Butler, 502 N.W.2d 333 at 338 (Mich. App. 1993).

[6] Tom Vanden Brook, *Recruiting fraud, kickback scandal rocks Army,* USA Today, Feb 3, 2014, at https://www.usatoday.com/story/news/nation/2014/02/03/army-national-guard-bogus-bonus-payments-iraq-afghanistan/5182717/.

minded in their pursuit of wrongdoing that they became blind to exculpatory evidence and willing to pronounce Soldiers guilty of fraud on evidence so thin that one might reasonably question whether they had implicitly adopted a presumption of guilt as their basic operating assumption. Stung by critical media reports and subjected to withering political fire, a panicked U.S. Army responded to isolated reports of fraud in the G-RAP program by activating a massive investigatory structure under the Army's Criminal Investigation Command (CID), manned by Reserve Component investigators activated for this specific mission. Rather than focus its efforts on instances of clear fraud, this provisional investigative entity—dubbed Task Force Raptor—proceeded to ignore the wise counsel of our proverbial farmer by scrutinizing nearly the entire population of Soldiers that participated in G-RAP—more than 100,000 people. The results were predictable: While instances of genuine fraud were uncovered and prosecuted, this was only accomplished at the cost of trampling under foot thousands of ordinary soldiers, stigmatizing entirely innocent conduct as fraudulent, upending lives, damaging careers, and ruining finances in the process.

It is this last that is the focus of this paper—the pain visited upon innocent men and women of the Army National Guard and other components as the high price paid for the relatively few convictions for genuine fraud in the program that were obtained. Part I provides an overview of the Guard Recruiting Assistant Program itself. Part II addresses the findings of the Army audits that uncovered the problems in the G-RAP program, both fraud and otherwise. Part III introduces Task Force Raptor's response: Part III-A focuses on G-RAP's program rules and how they shaped the criminal inquiry, while Part III-B discusses the shortcomings of human memory as it impacted Task Force Raptor's findings; with Part IV, this paper turns to its primary focus, the plight of thousands of Soldiers accused of fraud and related misconduct by Task Force Raptor investigators but never charged: Part IV-A addresses the Army's system of Titling Soldiers under investigation—the principal source of the misery inflicted upon many innocent G-RAP participants; Part IV-B discussed the history and purpose of Titling; Parts IV-C and IV-D discuss the risks inherent in the "credible information standard"—the evidentiary standard under which the decision to Title a Soldier is made; and Part IV-E discusses the impact of having been Titled on G-RAP participants. Part V discusses policy considerations militating against deeming most G-RAP participants as culpable for any errors that they may have made during the course of their participation in the program, using the criminal law doctrines of Entrapment and Mistake of Law as a prism through which to examine the treatment of the Soldiers by the Government. Part VI considers the impact of Unlawful Command Influence upon the G-RAP probe; and finally, Part VII offers a few concluding remarks.

I. The Guard Recruiting Assistance Program

The terrorist attacks of September 11th, 2001 triggered a substantial increase in military deployments, with large numbers of Active Duty and Reserve Component personnel deployed in support of Operation Nobel Eagle (security force operations in the United States) and Operation Enduring Freedom (combat operations in Afghanistan).[7] The U.S.-led invasion of Iraq in 2003 greatly intensified the demands being made on U.S. forces, with "the Army components … deploying the largest numbers of personnel to the military operations in Iraq and Afghanistan."[8]

According to an analysis by the Defense Science Board,

[7] Cong. Budget Off., *Recruiting, Retention, and Future Levels of Military Personnel*, XI, (2006).
[8] *Id.*

> "Over 575,000 National Guard and reserve members [had] been mobilized since September 11, 2001 (as of May 31, 2007) in support of the attacks of September 11 (Operation Noble Eagle), operations in Afghanistan (Operation Enduring Freedom), and operations in Iraq (Operation Iraqi Freedom). After September 11, 75,835 members were mobilized at the height of operations in Afghanistan. At the close of major combat operations in Afghanistan, troop levels began to decline, only to spike to more than 213,000 troops when the United States invaded Iraq."[9]

By 2005 the Army was feeling the strain, struggling to maintain assigned strength[10] at the same time as it was "attempting to increase its personnel levels and its number of combat brigades."[11] The Army's Reserve Components—the Army National Guard and the Army Reserve—were not spared. The "Army National Guard and U.S. Army Reserve were below their congressionally approved end strengths by 16,823 and 15,995, respectively"[12] at this time. The Army National Guard fell short of recruiting goals by at least 13 percent every year from 2003 to 2005; to address this, it set an unusually high goal of 70,000 enlistments for 2006, and bolstered its complement of full time recruiters "from 3,915 at the end of 2004 to 4,955 by the end of 2005, or an average of 4,400 for those two years,"[13] achieving 90% of its recruiting goal—63,000 Soldiers—by August of that year.[14] But hiring more recruiters was not by itself sufficient to achieve this result; "increases in other resources and incentives" was also required.[15] One such resource and incentive program, launched with the express purpose of helping the Army National Guard achieve this 70,000 recruit goal, was the Guard Recruiting Assistance Program (G-RAP).[16]

Modelled on civilian contract recruiting,[17] G-RAP "leveraged Soldiers, Families, and military retirees to identify… potential candidates for enlistment."[18] As described by the National Guard Association of the United States (NGAUS),

> "Soldiers in the Army National Guard (ARNG) were uniquely situated in their communities to identify potential quality recruits among fellow students, coworkers, etc. This was an advantage that full-time recruiters did not have. From a budgetary standpoint, the cost of incentive payments to these soldier-recruiters was much less than the overhead costs of supporting full-time recruiters. In time, it was thought possible, to reassign some of the full-time recruiters to other duties, even to combat readiness."[19]

Under G-RAP, eligible individuals would become part-time contractors known

9 Off. of the Under Sec'y of Def. for Acquisition, Tech. and Logistics, *Defense Science Board Task Force on Deployment of Members of the Guard and Reserve in the Global War on Terrorism*, 6 (2007).

10 Cong. Budget Off., supra note 7.

11 *Id.* at iv.

12 Memorandum from Joseph P. Mizzoni, Principal Deputy Auditor General, *Army Audit Agency for the Recruiting Assistance Program Task Force on Audit of Recruiting Assistance Programs—Reserve Components*, (https://www.hsgac.senate.gov/imo/media/doc/A-2012-0115-IEF%20Audit%20of%20Recruiting%20Assistance%20Programs-Reserve%20Components_Redacted.pdf).

13 Cong. Budget Off., supra note 7 at xiii (explaining how the number of full time recruiters was further increased to 5,100 by fiscal year 2007); *See also* U.S. Army Audit Agency, Contracts for the Guard Recruiting Assistance Program, Audit Report: A-2013-0128-MTH 1 3(2013).

14 Cong. Budget Off., supra note 7 at xiii.

15 *Id.*

16 Nat'l Guard Recruiting Assistance Program. *What is G-RAP?*, G-RAP One Sheets V1.5, at 1 (n.d.).

17 Mizzoni, supra note 12 at 5.

18 Mizzoni, supra note 12 at 5.

19 Nat'l Guard Ass'n of the U.S., *The G-RAP Program: The Investigations and an Injection of Reality*, 1 (n.d.).

as "Recruiting Assistants" (RA) who would "cultivate quality potential Soldiers (PS) from within their individual sphere(s) of influence," and then bring these potential soldiers together with a full-time ARNG recruiter.[20] "The triad of RRNCO [Army National Guard Recruiters], RA, and potential Soldier [would] then work closely together to process the potential Soldier and move them towards accession [enlistment]."[21] As originally envisioned, the Recruiting Assistant's spheres of influence consisted of facets of his or her life outside of the Army National Guard—work, school, church, family, social and recreational activities, and acquaintances.[22] As the program progressed, Recruiting Assistants were encouraged to embark upon more advanced recruitment enterprises in which they would actively market the Army National Guard to persons not previously known to them in other contexts. G-RAP was initially launched as a pilot program, first in five states, with another 14 coming on line by the end of January 2006;[23] it was expanded to the rest of the country the next month, in February 2006.[24]

The Army National Guard did not operate the G-RAP program directly. Instead, it contracted with Document and Packaging Brokers, Inc.—commonly known as Docupak—to administer the program.[25] The Recruiting Assistants would enter into contracts with Docupak as 1099 contractors. Generally, Recruiting Assistants would be paid $1,000 upon a Prospective Soldier's execution of an enlistment contract, and a second $1,000 upon the Prospective Soldier's shipping to Basic Training, for a total of $2,000;[26] for some specialties, the total payment could be as high as $7,500.[27] The Recruiting Assistant would be paid by Docupak for these accessions; Docupak received a $345 payment from the Government for each enlistment.[28]

As a recruiting incentive program, G-RAP was a smashing success, producing over 80,000 enlistments by the endof December, 2008,[29] with approximately 109,000 active Recruiting Assistants referring as many as 139,000 enlistments over the life the program[30] —an astonishing 39.7% of the Congressionally-authorized 350,000 Soldier Army National Guard end strength as of 2005.[31] Even one of the most implacable critics of the program was forced to admit that "[i]n an important way, the program worked. The National Guard paid over $300 million for more than 130,000 enlistments, and began meeting its recruiting goals … During the G-RAP program years, almost 40% of National Guard recruits enlisted through G-RAP."[32] So impressive was GRAP's performance that the U.S. Army Reserve implemented its own version of the program from 2007—2012, and the Active Component (the Regular Army) implemented the program itself from 2008—2009,[33] both promoting their programs—AR-RAP and A-RAP, respectively—in their recruiting promotional materials.[34] The

20 *Nat'l* Guard Recruiting Assistance Program, supra note 16
21 *Id.*
22 *Id.* at 5.
23 *Id.* at 6.
24 Cong. Budget Off., supra note 1 at 10; *see also*, The Hon. Pete Geren & Gen. George W. Casey Jr., *A Statement on the Posture of the United States Army* 2008 (Feb. 26, 2008).
25 Mizzoni, supra note 12, enclosure 1 6.
26 Nat'l Guard Recruiting Assistance Program, supra note 16.
27 Mizzoni, supra note 12 at enclosure 1 7.
28 Mizzoni, supra note 12 at 1; *see also* Dept. of William Allen Stewart, *Remsburg v. Docupak*, 24:19-25.
29 U.S. Army Audit Agency, Contracts for the Guard Recruiting Assistance Program, Audit Report: A-2013-0128-MTH 13 (2013).
30 G-RAP Timeline, *Defend Our Protectors*, http://www.defendourprotectors.com/about/g-rap-timeline/ (last visited Nov. 15, 2020).
31 U.S. Army Audit Agency, *supra* note 29 at 3; *see also* Nat'l Guard Ass'n of the U.S., supra note 19
32 Memorandum from Subcomm. on Fin. and Contracting Oversight Majority Staff to Members of the Subcomm. on Fin. and Contracting Oversight U.S. Senate (February 3rd, 2014).
33 Nat'l Guard Ass'n of the U.S., *supra* note 19
34 *See* 70th RRC Strength Management Team, *AR-RAP News*, Issue IV (June 2008); *see also* Fonda Bock, *Future Soldier Cashes in on A-RAP*, 60.7 *Recruiter Journal* 18, 18-19, United States Army Recruiting Command (July 2008).

Air National Guard also participated in G-RAP,[35] though largely avoiding the controversy that dogged the Army's use of the program.[36]

Despite G-RAP's resounding success in generating enlistments for the Army National Guard, problems began to appear when in 2007 Docupak began referring instances of suspected fraud to U.S. Army Criminal Investigation Division (CID);[37] in response to these complaints, CID asked the United States Army Audit Agency to audit G-RAP and its sister programs in 2011.[38] Worse was to come. Although G-RAP had been already been suspended on January 23rd, 2012[39] and formally terminated on February 1st, 2012,[40] "[b]eginning in March 2012, the program came under intense scrutiny in the media … From a leaked Army Audit Agency document, the *Washington Post* reported on March 13, 2012, that $92 million in bonuses was allegedly paid to 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"[41] (emphasis in original). This negative media attention drew Congressional scrutiny in the form of an investigation led by then Missouri Senator Claire McCaskill, Chair of the Senate Committee on Homeland Security and Governmental Affairs' Subcommittee on Financial and Contracting Oversight.[42]

II. The Audit Findings and the Response

In 2011, CID asked the Army Audit Agency (AAA) to review G-RAP.[43] The resulting reports subjected National Guard Bureau (NGB) to scathing criticism for its handling of the program, including charges of insufficient "[a]cquisition planning" and "[a]dministration of contract actions," as well as inadequate "[o]versight of the [Docupak's] performance."[44] AAA found that

> NGB should have solicited offers for a new contract for G-RAP in 2005, but instead inappropriately used an existing contract. As a result, NGB paid about $9.3 million for fees that weren't included in or authorized by the contract. Then, in 2007, the NGB awarded a sole-source contract to continue the program because it didn't allow enough time to compete [for] a new contract. The solicitation and evaluation of proposals for the new contract gave an unfair advantage to the incumbent, who was subsequently awarded the contract. Further, contracting officer's representatives didn't perform sufficient oversight of the contracts and task orders and the contractor didn't notify contracting personnel when it identified potentially fraudulent activity by its subcontractors.[45]

AAA also found that "705 recruiters (601 Army National Guard and 104 Army Reserve [the latter participating in AR-RAP]) were affiliated with potentially fraudulent Recruiting Assistance Program payments" deemed to be a "high risk

35 H. Steven Blum, *Transforming the Guard to an Operational Force*, 43 Joint Forces Quarterly 13, 17 (4th Quarter 2006).

36 *See generally* Remsberg v. Docupak, No. 12-CV-41, 2013 WL 704657(N.D. W.Va. Feb. 27, 2013).

37 Mizzoni, *supra* note 12 at 2.

38 *Id.*

39 U.S. Army Audit Agency, Audit Report A-2013-0128-MTH, *Contracts for the Guard Recruiting Assistance Program*, at 5 (2013).

40 Mizoni, supra note 12 at 4.

41 Nat'l Guard Ass'n of the U.S., *supra* note 19 at 2.

42 *Id.*

43 Mizzoni, *supra* note 12 at 3.

44 U.S. Army Audit Agency, *supra* note 29, at n.p (providing a summary of "Results").

45 Id.

for fraud."[46] Another "551 recruiters (444 Army National Guard and 107 Army Reserve) were affiliated with suspicious Recruiting Assistance Program payments" deemed to constitute a "medium risk of fraud."[47] Finally, AAA found that "2,022 recruiter assistants received payments that potentially violated program rules," including 611 that "were affiliated with potentially fraudulent or suspicious Recruiting Assistance Program payments," which AAA considered to be at "low risk for fraud."[48]

III. The TF RAPTOR Investigation: Pulling Up the Wheat with the Tares

Both the Army and Congress were understandably concerned at the Army Audit Agency's findings and, quite properly, directed that corrective action be taken. This action began on February 9, 2012 when Secretary of the Army John H. McHugh issued a sweeping directive on the G-RAP program.[49] In it, he directed U.S. Army Criminal Investigation Command (CID) to, *inter alia*, "initiate a criminal investigation into any case identified by the AAG [AAA] … as having a 'high' or 'medium' risk of fraud."[50] CID formed Task Force (TF) Raptor to investigate G-RAP in 2012, in response to Secretary McHugh's directive.[51] Secretary McHugh further directed the Chief, National Guard Bureau (CNGB) to initiate "an investigation into any [NGB/State ARNG] USAR personnel identified by the AAG [AAA] . . . as having a 'low' risk of fraud, mindful of the requirement to refer evidence of criminality to CID."[52] Assistant Secretary of the Army Thomas Lamont issued his own directive on the subject on May 15, 2012,[53] and Lieutenant General William E. Ingram, Jr., Director of the Army National Guard, issued the implementing instructions for the National Guard state-level investigations on June 1, 2012.[54]

The Army Audit Agency identified 3,278 instances of potential fraud, in categories of low, medium and high risk.[55] In a letter dated November 26, 2018 to this author, National Guard Bureau stated that "TF Raptor identified 3,226 ARNG Soldiers that required further review. Of those, the TF determined 1,542 case to be unfounded, meaning there was potential the allegations was baseless or did not occur . . . . Of the remaining 1,684 Soldiers investigated, the TF determined their cases were founded, meaning the Army found probable cause that the individual violated the law."[56] In the same letter, National Guard Bureau letter noted that the CID would furnish the case report information for favorable screening purposes (i.e. promotions and background investigations for security clearances) only if the TF Raptor deemed the allegations of fraud to be "founded.[57]

These statements as to the number of Soldiers investigated and the assurances as to which Soldiers' personnel actions would be affected by the outcome of the investigation almost certainly understate the true extent of the Task Force Raptor investigation and the number of

46 Memorandum from Joseph P. Mizzoni, Principal Deputy Auditor General, U.S. Army Audit Agency on Recruiting Assistance Program Task Force (June 4, 2012).
47 Id.
48 Id.
49 Memorandum from John M. McHugh, Secretary of the Army (Feb. 9, 2012).
50 Id.
51 Letter from Donna Warren, Chief, Congressional Inquiries, Nat'l Guard Bureau, to Dennis Chapman (Nov. 26, 2018) (on file with author).
52 *Supra* note 49, at 6.
53 Memorandum from Thomas R. Lamont, Assistant Sec'y of the Army for Manpower and Reserve Aff.'s, to Chief, Nat'l Guard Bureau (May 15, 2012).
54 Memorandum from Lieutenant General William E. Ingram, Jr., Director, Army Nat'l Guard, to the Adjutants General of all States, Puerto Rico, the U.S. Virgin Islands, Guam, and the Commanding General of the District of Columbia (June 1, 2012).
55 Mizzoni, supra note 46, at 3.
56 National Guard Bureau, supra note 51.
57 Id.

Soldiers—including innocent Soldiers—whose lives were affected thereby.

Task Force Raptor's investigation seems to have gone off the rails almost from the start, beginning with a scope of investigation that was grossly overbroad. "The majority of RAP fraud involved Army recruiters[,]"[58] as evinced by the fact that AAA found a larger percentage of ARNG full time recruiters were associated with potentially fraudulent transactions—1045 out of 4,995 authorized, or 21%—than Recruiting Assistants. By contrast, the AAA audits identified 2,022 Recruiting Assistants that received potentially fraudulent payments—a mere 2% of the 109,000 Recruiting Assistants that participated in the program, with most of those transactions deemed to pose a low risk of fraud. It was clear early on that most of the fraud associated with the G-RAP program was perpetrated by a comparatively small group of individuals in unusual circumstances. As one Congressional source noted,

> The majority of RAP fraud involved Army recruiters. As designed, G-RAP specifically prohibited recruiters from registering as recruiting assistants or receiving payments because recruiting new enlistees was already part of the recruiters' regular duties, and under the RAP programs, a recruiter's role was simply to process the enlistees that recruiting assistants referred to them. However, many recruiters found ways to obtain RAP payments. For example, one scheme involved two recruiters who coerced a subordinate into registering as a recruiting assistant. The recruiters provided the recruiting assistant all the names of the recruits who were coming through their doors, and the recruiters then split the incentive money with the recruiting assistant. Other recruiters simply registered an unwitting person as a recruiting assistant, then substituted their own bank account for the direct deposit incentive payments. Other RAP fraud involved recruiting assistants. Often, the prohibited conduct was using a nominee's personal information without their consent. For example, a school principal or guidance counselor would register as a recruiting assistant and enter large numbers of their students as nominees without their permission. Some recruiters also simply ignored the registration prohibition and just registered themselves as recruiting assistants.[59]

It should have been clear early in the investigation that the problem with fraud in Recruiting Assistance Programs lay with a comparative few individuals associated with special characteristics and circumstances, largely recruiters. Instead of starting with the presumption of innocence and focusing its inquiry on those G-RAP participants associated with such indicators, the Army seemingly proceeded on the assumption that every G-RAP participant was potentially guilty of fraud until it was proven otherwise. As late as February 2014, Lieutenant General (LTG) William T. Grisoli, Director of the Army Staff, let the mask slip while testifying to Congress that "*basically, we have 100,000 individuals that could be held accountable* and trying to figure out the high-and the medium-and the low-risk, so we did not waste our time on the low-risk cases and we went after the high-and the medium-risk."[60] But, LTG Grisoli's assurance

[58] Memorandum from the Subcommittee on Financial and Contracting Oversight Majority Staff to Members of the Subcommittee on Financial and Contracting Oversight on Hearing: Fraud and Abuse in Army Recruiting Contracts (Feb. 4, 2014).

[59] *Id.*

[60] Fraud and Abuse in Army Recruiting Contracting: Hearing Before the Subcommittee on Financial and Contract-

that Task Force Raptor was focusing on high and medium risk cases appears dubious. By the time of his testimony, CID had already reviewed 86,000 G-RAP participants—nearly79% of the total.[61] CID had been investigating G-RAP cases since 2011 and the program as a whole for two years when LTG Grisoli made this statement; given his stated prioritization of "High" and "Medium" risk cases, it is likely that most or all of the serious instances of fraud had been detected by that point; yet, Task Force Raptor continued its investigation for years longer, not concluding its work until July 2017.[62] It must be assumed, therefore, that every Soldier that participated in G-RAP was investigated to one degree or another over their participation in the program.

To an observer unfamiliar with Army investigative and personnel administration policies and procedures, such diligence may seem laudable, but sadly, the reverse is true. The Army's position that all 109,000 G-RAP participants, as well as thousands of recruiters, required screening for potential fraud injected a poisonous presumption of guilt into the investigation, exposing untold numbers of innocent Soldiers to needless disruption of their careers and erroneous accusations of wrongdoing. As Congressman Mike Coffman wrote to then-CID Commanding General Major General Mark S. Inch in August 2016,

> To be sure, multiple audits and reviews of G-RAP have uncovered evidence of fraud, abuse, or mismanagement, and any service member committing criminal misconduct must be held accountable. However, I am concerned that innocent service members have inadvertently become targets of lengthy and disruptive investigations, or worse, have erroneously accepted administrative punishment or plea-bargain agreements simply to avoid unpredictable and time-consuming civilian or military justice proceedings.[63]

As late as May 2017, the Enlisted Association of the National Guard of the United States (EANGUS) complained that

> The program was shut down in 2012. While we acknowledge that some fraud occurred, we believe those who acted fraudulently have been identified, duly prosecuted, and punished. Furthermore, we believe those still under investigation 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.[64]

No one disputes that the Task Force Raptor's investigation into the G-RAP program led to the exposure and conviction of true wrongdoers. Tragically, however, in its zeal to uncover and punish wrongdoers, Task Force Raptor severely harassed an unknown number of innocent soldiers, damaging their careers, compelling them to incur thousands of dollars in legal expenses fending off the Government's attacks, and inflicting upon them untold mental anguish.

ing Oversight, Committee on Homeland Security and Governmental Affairs (2014) (testimony of Lieutenant General William T. Grisoli, Director of the Army Staff) (emphasis added).

61 Nat'l Guard Ass'n of the U.S., *The G-RAP Program: The Investigations and an Injection of Reality* 4.

62 Acting Secretary of the Army Robert M. Speer, Letter to Represented Mike Coffman, July 19th, 2017. *See also* Rowan Scarborough, *Army finishes 5-year investigation, but National Guard troops' careers still left in limbo*, WASH. TIMES (Aug. 30, 2017), https://www.washingtontimes.com/news/2017/aug/30/army-finishes-investigation-of-national-guard-recr.

63 Letter from Mike Coffman, U.S. Representative, to Major General Mark S. Inch, U.S. Army Criminal Investigation Command (Aug. 26, 2016).

64 Letter from the U.S. Enlisted Ass'n of the Nat'l Guard, to Senator Lindsey Graham and Senator Patrick Leahy, (May 10, 2017).

The Army has acknowledged as much, if only implicitly. In endorsing the promotion of officers whose promotions have been delayed due to their participation in G-RAP, former Secretary of the Army Mark Esper recently wrote that "like many others, [Officer X] was involved in G-RAP, a program with unclear guidance that changed several times over the years. The circumstances surrounding G-RAP are too unclear to prove known malice and blame on [Officer X]."[65] In a similar vein, National Guard Bureau recently informed this writer that "an information paper has been drafted to inform all of the Soldiers with founded allegations of the appeals process and the procedures to request an amendment of their CID records."[66] I was provided a copy of this paper.[67] As modest as these steps are, they are nonetheless remarkable for an institution not known for admitting error or tolerating any risk to its own reputation. Only the consciousness of real and palpable injustice could have prompted even as slight an admission of the possibility of error as these modest steps.

Task Force Raptor's investigation resulted in error and injustice in an unknown, though substantial, number of cases. These errors can be traced to a number of distinct but interrelated causes, including an undue willingness to find fraud, even absent clear evidence of fraudulent intent; a propensity to draw unwarranted inferences from the faded memories, or lack of thereof, of witnesses; an undue credulousness regarding testimony adverse to the subject of the investigation, together with a lack of interest in finding or crediting exculpatory evidence; rigidly construing all arguable program errors or inconsistencies identified in the investigation as fraud, without considering other plausible alternatives; and poor investigatory techniques.

In many cases, Task Force Raptor made findings of probable cause on the basis of weak and inconclusive evidence produced by a perfunctory inquiry; in nearly all of them, Task Force Raptor found probable cause without any positive evidence whatsoever of fraudulent intent on the part of the soldier under investigation. In these cases, investigators and their legal advisors generally based their conclusion that a crime had been committed upon one of two factors: (1) that one or more Prospective Soldiers recruited by the Recruiting Assistance claimed not to remember having received assistance from that RA in the recruitment process; or (2) upon a finding by the investigator that the Recruiting Assistant failed to follow G-RAP program rules in some respect. In other words, most subjects of the Task Force Raptor investigation "fall into the category of either not following the rules—or being paid for nominating soldiers who do not remember the name of their RA, eight to ten years later."[68]

A. *G-RAP Program Rules and the Task Force Raptor Investigation.*

As one activist has incisively noted, "Army Criminal Investigation Division (CID) consider[ed] it fraud if Recruiting Assistants simply did not follow the guidelines."[69] This extremely problematic position resulted in untold mischief, not least of which because a mere violation of program rules cannot, by itself, constitute fraud, much less a crime.

CID generally investigates potential violations of the Uniform Code of Military Justice (UCMJ). Only Soldiers on active duty pursuant to Title 10 of the U.S. Code are subject

[65] From a 2019 Action Memo for Secretary of Defense by Secretary of the Army Marc Esper following review of an officer's file by a Promotion Review Board (PRB), endorsing retention of the officer on the promotion list.

[66] National Guard Bureau, *supra* note 51.

[67] National Guard Bureau, Office of Legislative Liaison, letter to author, dated January 10th, 2019; and ARNG-HRH-I, Information Paper, "Guard Recruiting Assistance Program (G-RAP) Appeals Procedures," 16 August 2019.

[68] G-RAP FAQs, *Defend Our Protectors*, http://www.defendourprotectors.com/about/g-rap-faqs./, November 30th, 2019.

[69] Id.

to the UCMJ.[70] ARNG Soldiers participating in G-RAP, however, did not do so while on Active Duty orders; they did so either between drills while not on any form of military duty, or while on Full Time National Guard Duty (FTGND) pursuant to Title 32, U.S. Code.[71] As such their conduct in relation to G-RAP was not subject to the UCMJ. Any criminal conduct by ARNG Soldiers not on duty or on duty under FTNGD orders is adjudicated pursuant to State military codes (in rare instances) or Federal or state criminal law (in the vast majority of cases).[72] For this reason, the offenses alleged in G-RAP cases were violations of Federal criminal statutes rather than the UCMJ. Offenses typically charged include 18 U.S. Code § 641, Theft of Public Money; 18 U.S. Code § 1343, Wire Fraud; 18 U.S. Code § 1028, Identify Theft; 18 U.S. Code § 1028A, Aggravated Identity Theft; and 18 U.S. Code § 371, Conspiracy.

All of these are specific intent crimes; to secure a conviction on these offenses, it is not sufficient for the Government simply to prove that the accused violated G-RAP program rules or misused someone else's personal information in the course of earning their commissions: rather, the government must prove that a defendant acted **knowingly and willfully with the intent to defraud** the Government. For example, to prove a violation of 18 U.S. Code § 641, "the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law."[73] In other words, he must have intentionally done the forbidden deed, and known that it was illegal when he did it. To establish a violation of 18 U.S. Code § 1343, one must have knowingly and willfully participated in a scheme to defraud.[74] 18 U.S. Code § 1028 has a similar scienter requirement.[75] 18 U.S. Code § 1028A is a sentencing enhancement provision that mandates addition of "two years' imprisonment to the offender's underlying sentence" when that offender "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" in the course of one of a number of predicate offenses,[76] and it has its own scienter requirement. Interpreting this provision in

> Flores-Figueroa v. United States, the U.S. Supreme Court noted that "[a]ll parties agree that the provision applies only where the offender knows that he is transferring, possessing, or using something. And the Government

[70] Active duty retirees can also be recalled to Active Duty for Court-Martial, but this is rarely done except for instances of retirees living overseas near U.S. military installations. See United States v. Larrabee, 78 M.J. 107 (C.A.A.F. 2018), cert. denied, 139 S. Ct. 1164 (2019).

[71] Full Time National Guard Duty (FTNGD) is one of two forms of Active Service pursuant to 10 U.S. Code § 101(d)(3), the other being active duty. Active Duty is defined as "full-time duty in the active military service of the United States." 10 U.S. Code § 101(d)(1). While full-time National Guard duty is "means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory," 10 U.S. Code § 101(d)(5). Both active duty and full-time National Guard duty are creditable for purposes of active duty pay and allowances, benefits, and regular (active duty) retirement; however, only Soldiers on Active Duty are subject to the UCMJ. The distinction between Active Service and Active Duty is necessary due to Article I, Section 8, Clause 16 of the United States Constitution, which empowers Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States," but "reserv[es] to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art I, § 8, cl. 16.

[72] However, ARNG Soldiers in any status are subject to administrative sanctions for misconduct pursuant to Federal law, Department of Defense Instructions, and Army Regulations, as appropriate.

[73] United States. v. May, 625 F.2d 186, 190 n.2 (8th Cir. 1980). *See also Morissette v. United States*, 72 S.Ct. 240, 242 n.2 (1952).

[74] *See, e.g.*, U.S. v. Cassiere, 4 F.3d 1006 (1st Cir. 1993).

[75] *See* United States v. Jaensch, 665 F.3d 83 (4th Cir. 2011).

[76] *Flores-Figueroa v. United States*, 129 S. Ct. 1886, 1888 (2009) (quoting 18 U.S. Code § 1028A(a)(1)).

> reluctantly concedes that the offender likely must know that he is transferring, possessing, or using that something . . . without lawful authority."[77]
>
> The Court went on to observe that
>
> [I]n *Liparota v. United States,* this Court interpreted a federal food stamp statute that said, 'whoever knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards *in any manner not authorized by [law]*' is subject to imprisonment. The question was whether the word 'knowingly' applied to the phrase 'in any manner not authorized by [law].' The Court held that it did, despite the legal cliché 'ignorance of the law is no excuse'[78]

The Supreme Court has held that "the [standard] presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize otherwise innocent conduct."[79] Any other rule would "ma[d]e crimes of [many] unwitting, inadvertent and unintended" acts.[80] This presumption of in favor of scienter is of decisive importance in G-RAP cases. Most G-RAP participants were junior officers, NCOs, and enlisted Soldiers with little or no understanding of recruiting practices when they signed up to participate as Recruiting Assistants. Docupak provided these soldiers with only perfunctory training on the program rules consisting of a few online slides and quizzes, and they never gave copies of the program rules themselves to the Recruiting Assistants. Docupak made frequent rule changes over the life of the program, and they made little or no effort to keep Recruiting Assistants apprised of rule changes as they went along. Even if Docupak had consistently provided Recruiting Assistants with a copy of the program rules, these rules were so poorly organized and written, so ambiguous, so contradictory, and changed so often that such a reference would have been of little use to the Recruiting Assistants in any case. Furthermore, Recruiting Assistants received little or no guidance, supervision, or support from Docupak on staying within program guidelines, and some received none from the full-time ARNG recruiters with whom they worked either.

The case of Remsburg v. Docupak illustrates the inadequacy of Docupak's documentation and dissemination of program rules. In that case, Docupak had terminated Recruiting Assistant David Remsburg on suspicion of violating program rules by claiming credit for West Virginia Air National Guard recruits that had previously initiated contact with Air National Guard recruiters on their own, and withheld funds from Remsburg that he claimed to have earned. Remsburg responded by filing suit against Docupak under the West Virginia Wage Payment and Collection Act.[81] In the course of the litigation, it was revealed that while Docupak provided Remsburg with a "New Hire Kit contain[ing] two polo shirts that said 'Guard Recruiting Assistant' and 200 starter business cards," it never provided him with an employee handbook.[82]

Docupak designated one of its supervisors, William Allan Stewart, to testify on its behalf at deposition on November 7, 2012.[83] Mr. Stewart was the Docupak supervisor that "approved removing Mr. Remsburg" as a Recruiting Assistant.[84] Mr. Stewart testified that he gave

[77] *Id.* at 1889.
[78] *Id.* at 1891.
[79] United States v. X-Citement Video, Inc., 115 S.Ct. 464, 469 (1994) (citing Morissette v. United States, 72 S.Ct. 240, 248 (1952)).
[80] Morissette v. United States, 72 S.Ct. 240, 254 (1952).
[81] Remsberg v. Docupak, No. 12-CV-41, 2013 WL 704657, at *1 (N.D. W.Va. Feb. 27, 2013).
[82] Id. at *2.
[83] Deposition of William Allan Stewart, *see also* Remsburg v. Docupak, No. 12-CV-41, 2013 WL 704657 (N.D. W.Va. Feb. 27, 2013).
[84] Id. at 20:9-11.

Mr. Remsburg neither notice of the reasons for his termination nor opportunity to rebut, on the ground that Remsburg was an "at-will"[85] contractor, that such notice was "[n]ot required,"[86] and that providing an opportunity to rebut was "not normal practice."[87] According to Stewart, "if there's a perceived perception of impropriety, [Docupak would] end the account [sic]."[88] In Remsburg's case, the "perceived … impropriety" was Remsburg's alleged failure to acquire "personal and private" information about his recruiting prospects directly from the potential recruits.[89]

When pressed on the basis for this determination, Stewart—a supervisor with firing authority who had been with Docupak with knowledge of how G-RAP operated from its inception[90] —could provide almost no details about the actual content of Docupak's G-RAP program rules. When asked what personal information Remsburg was supposed to have provided to Docupak, Stewart, could not answer confidently. He replied:

> "If I may, the name, the Social Security number—and again, **this is coming off my memory**—the name, the Social Security number; the address. What I'm providing to you is all the information that's required for a nomination, **as best of my knowledge**. The—**I'm pretty sure** the height and weight was in there. Basically, the general information required to submit the individual --input the individual as a nominee into our system"[91] (emphasis added).

When pressed as to what rules, exactly, Remsburg had violated as a Recruiting Assistant, Stewart's reply was vague at best, as shown in the following exchange:[92]

> "Q. Okay. So, in terms of Mr. Remsberg, what specific rule of the G-RAP program did Mr. Remsberg violate, in Docupak's estimation?
>
> A. [Stewart] Do you want one specific rule, sir?
>
> Q. Well, if there are more than one, I'd like to talk about all of them, but -- I'd like to see the rule and which one he violated.
>
> A. The guideline? It centers around the origin of the nomination.
>
> Q. Which specific rule should I look at to see what—
>
> A. How you met -- how and where you most a noming.
>
> Q. Where is that rule?
>
> A. When you say "rule," I'm saying "guidelines."
>
> Q. Where is that guideline?
>
> A. I'm going to assume it's in the training, sir.
>
> Q. Is there some guideline that says the details—
>
> A. That you—
>
> Q. Specifically about how and where and what you met?
>
> A. No, to input the data—the information as to how you met the individual.
>
> Q. Does the guideline specify the level of detail required?

[85] Id. at 20:20-21.
[86] *Id.* at 20:17.
[87] *Id.* at 21:4.
[88] *Id. at* 21:4.
[89] *Id.* at 90:1.
[90] *Id.* at 56:20.
[91] *Id.* at 90:11.
[92] *Id.* at 64-66.

A. I don't—don't quote me on the exact verbiage; obviously, I'm not looking at it in front of me. But I know it mentions how you met the potential airman.

Q. How much detail is required to be provided in how you met the potential airman?

A. I think it's self—in my opinion, it's self-explanatory.

Q. So would you agree with me that there's no detail provided—or no explanation provided as to the level of detail required as to how an RA met a potential airman?

A. I think the level of detail required is there need to be specifics as to how you met the individual."

For a person's conduct to be deemed fraudulent, that person "must have had notice that the conduct [was] proscribed in order to have [had] the specific intent required for the … crime."[93] When asked about Docupak's online training for its Recruiting Assistants, Stewart characterized the purpose of that training as intended to give them "general guidelines,"[94] implying that such training was something less than comprehensive. He himself was unable to recall the specifics of the program rules with any detail at all. He admitted that while Docupak provided Recruiting Assistants with logo-bearing polo shirts and business cards,[95] Docupak did not provide them with an employee handbook.[96] In short, Docupak fell far short of providing its Recruiting Assistants the training and information they needed to stay within program rules; as such, it is hardly just to impute fraudulent intent to them merely on the strength of failing to adhere to those rules.

Docupak's rules were presumably intended to protect Recruiting Assistants and prevent confusion. Unfortunately, these "rules" were poorly written, poorly organized, unclear, and frequently changed. When they did change Docupak failed to disseminate the changes and or to ensure that Recruiting Assistants were aware of the changes and understood them. In fact, Docupak's formulation and dissemination of G-RAP program rules was so dilatory and negligent that the rules served more as a stumbling block and a snare for well-intentioned but poorly informed Recruiting Assistants than as credible management controls, creating more problems than they solved.

Docupak issued five different versions of the Rules over the life of the program. The first version was in effect from December 2005 through October 2007;[97] the next was in force from November 2007 through August 2009;[98] the third ran from September 2009 through December 2010;[99] the fourth iteration was in effect from January—November 2011;[100] and the final version was in effect from December 2011 through termination of the program.[101] These rules were so confusing and changed so often that in 2013 CID agent Special Agent (SA) Julie A. Thurlow performed a survey of the G-RAP Rules, resulting in a 20-page synopsis summarizing each version of the Rules as they evolved over time; SA Thurlow's report documented at 59 rule changes and additions over the life of the program.[102] Even something as basic as program eligibility was

93 *United States v. Gilliam*, 975 F.2d 1050, 1056 (4th Cir.1992) (internal citations omitted).

94 Deposition of William Allen Stewart, *Remsburg v. Docupak*, (2013) (No. 3:12-cv-00041-GMG-JES), page 60.

95 *Id.* at 34:8.

96 Remsberg v. Docupak , No. 12-CV-41, 2013 WL 704657 (N.D. W.Va. Feb 27, 2013).

97 *G-RAP Overview*, December 2005.

98 *G-RAP V2 Training Modules*, November 2007.

99 *G-RAP Overview*, September 2009.

100 *G-RAP Recruiting Assistant Training Modules*, January 2011.

101 *G-RAP Recruiting Assistant Training Modules*, December 2011.

102 SA Julie A. Thurlow, *Review of Documents (G-RAP Training)*, Raptor Task Force, US Army Criminal Investigation Com-

unstable and constantly fluctuating. Eligibility for A-RAP—the Active Army version of the program—remained unchanged throughout the short life of that version of the program.[103] Eligibility for AR-RAP—the Army Reserve version of the program—likewise remained largely stable, with one important exception: Active Guard & Reserve (AGR) officers were initially eligible to participate in AR-RAP in June 2007, but not thereafter, creating the danger that officers initially participating may have continued to do so, not knowing that they were no longer eligible. As for the primary Recruiting Assistance Program—G-RAP—its eligibility rules were less stable. Eligibility was limited to drilling ARNG Soldiers and retirees until January 2009, when the program was opened to enlisted AGR personnel, enlisted Soldiers on Active Duty for Operational Support (ADOS), and Military Technicians.[104] Eligibility reverted back to drilling Guardsman and retirees only in February 2009, with enlisted AGR and ADOS Soldiers being reinstated for eligibility in May 2009 until the end of the program, and mobilized enlisted Soldiers being eligible from May 2009 through January 2011.[105] The problem is that these dates do not track with the dates upon which new versions of the G-RAP Rules were created, giving rise to the concern that Docupak or the Army National Guard may have been making rule changes on a rolling basis but only incorporating them into the formal "Rules" only sporadically. Given that neither the base Rules nor the changes were reliability distributed to the field, this portended a major stumbling block for program participants.

While several versions of these program rules were styled "Training Modules" and SA Thurlow styled them "G-RAP Training," this is a misnomer, for these Rules were never used by Docupak for training purposes, nor widely distributed among recruiters or Recruiting Assistants—in fact, it is doubtful whether the vast majority of G-RAP participants ever knew they existed at all. In reality, Recruiting Assistant training consisted of nothing more than a series of online dialog boxes that applicants would read and click through, with periodic "quizzes" along the consisting of further dialog boxes containing with "Yes" or "No" questions or multiple choice questions with radio buttons. Once the prospective Recruiting Assistant had completed this brief online course of instruction, they were enrolled in the program. They were never given a copy of the underlying program rules, and they had no further access to the online training course that they had completed upon enrollment. Thus, the only training most Recruiting Assistants ever received was informal, likely incomplete, and ephemeral.

Even if Recruiting Assistants had ready access to these Rules, it is by no means clear that the Rules would have been of great help to them. These Rules were nothing like the Army Regulations to which Recruiting Assistants would have been accustomed. Army Regulations are thorough and well-organized. They are broken down into discrete and separately enumerated chapters, paragraphs, and subparagraphs. They have detailed tables of contents directing readers to material at the paragraph level. They set forth the rules governing military personnel in clear, direct language. Docupak's G-RAP Rules, by contrast, conveyed a sense of informality, having the appearance of something just banged out on a word-processor. They are not paginated; bereft of chapter or paragraph numbers; and devoid of anything like an index or table of context. Key rules that Recruiting Assistants would later be accused of violating are contained in unlikely places under inappropriate headings.

mand (USACIDC), Quantico VA 22134, November 22nd, 2013.

[103] *Army RAP Eligibility*, Septem

[104] Reserve Component personnel paid as civil servants during the week who also participate as drilling Guard and Reserve personnel. In the Army National Guard, Military Technicians (MILTECHs) where their military uniforms and are referred to by their military ranks at all times, whether working in a Technician or drilling status.

[105] RA Eligibility by Status, 10 July 2012.

An example of the problematic way in which the G-RAP rules were formulated is the prohibition against the wear of military uniforms while performing Recruiting Assistant duties. All versions of the Rules contained some version of this statement: "Can I wear my uniform while I am doing RA Work? No. Your civilian contractor provides you with appropriate Guard wear (casual)."[106] Unfortunately, what sounds like a straightforward prohibition becomes ambiguous in light of what immediately follows: "You are never allowed to represent yourself as a Soldier working in a paid military status, nor should you portray yourself as a Recruiting and Retention NCO"[107] (a full time Recruiter). Thus, notwithstanding the initial categorical proscription against wearing the uniform during any contact with a prospective Soldier, the context indicates that it is the misrepresentation of one's status that Docupak actually meant to prohibit. This inference became stronger later. From November 2007, all versions of the rules cited "**[a]ctively** recruiting in uniform" (emphasis added) as an example conduct that could result in suspension or termination from G-RAP. Note the emphasized word—*actively*. "[this] word[]cannot be meaningless, else [it] would not have been used."[108] The Surplusage Canon provides that "[i]f possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored."[109] Thus, it would appear that Recruiting Assistants were allowed to engage recruiting functions while in uniform when wear of the uniform was incidental to the activity rather than integral to it. Philip Crane, President of Docupak throughout the G-RAP program, implicitly endorsed this interpretation in testimony in a state court criminal proceeding against Recruiting Assistant MSG Jerry Wilson in the District Court of Adams County, Colorado, in September 2015. Initially in his testimony, Crane testified categorically that Recruiting Assistants "[were] not" permitted to wear their uniforms,[110] and that such was "disallowed in the program."[111] But pressed, he conceded that the rule might not be so categorical after all:

> "Q. Would it be fair to say that an RA—well, an RA could not wear their uniform when they are contacting a potential nominee; is that fair?
>
> A. [Philip Crane] That is correct, with the exception of when some of the rules were altered slightly throughout the program.
>
> Q. Can you elaborate a little bit on that? What some of these rules—
>
> A. It was when the AGRs were allowed to participate briefly. And I don't recall how long they were allowed to participate. But if they were in a full-time AGR spot, they would have been in uniform."[112]

Implicit in Crane's testimony is the fact that AGR Soldiers must travel about, to and from their military duties, in uniform, and that therefore some carrying on of Recruiting Assistant functions while in uniform, incidental to such movements, was permissible. But every Recruiting Assistant would find themselves in this situation at some time or another—even traditional, drilling Soldiers generally travelled to their monthly drills in uniform. Yet CID

[106] *G-RAP Overview*, December 2005 and *G-RAP V2 Training Modules*, November 2007 contain this exact language; later versions contain a slightly modified version.

[107] All versions of the Rules contain this language.

[108] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 174 (2012) (quoting *United States v. Butler*, 297 U.S. 1, 65 (1936)).

[109] *Id.*

[110] Transcript of Testimony of Philip Crane at 78-10, *People v. Wilson*, No. 14CR327 (September 1, 2015) .

[111] *Id.* at 9:12.

[112] *Id.* at 138:4.

investigators and Army adjudicators have been known to interpret the uniform rule categorically, declaring Recruiting Assistants guilty of fraud for being in uniform during any interactions with prospective Soldiers.

The uniform rule is but one example of the pitfalls that awaited Soldiers participating in G-RAP. And great these pitfalls were, as Task Force Raptor investigators tended to view any even arguable deviation from G-RAP's "murky rules"[113]—as understood by them—not as attributable to ignorance or honest error, but as conclusive proof, in and of themselves, of fraud on the part of the Recruiting Assistant receiving the payment, irrespective of whether the Recruiting Assistant willfully broke the rules or was even aware of the rule at all.

It is true that "[f]raudulent intent may be inferred from the totality of the circumstances and need not be proven by direct evidence,"[114] as can the existence of a "conspiratorial agreement."[115] But Task Force Raptor investigators went well beyond drawing reasonable inference about fraudulent intent from the totality of the circumstances; TF Raptor effectively excised the scienter element from the crimes charged altogether. But as the prolific Judge Richard Posner learned to his cost, excision of a required element of the offense is simply not permissible. Posner was a well-known and oft-published circuit judge on the U.S. 7th Circuit Court of Appeals. "Posner believe[d] appellate judges should have trial experience, and sitting by designation as a trial judge is a good way to get that experience."[116] Toward that end, he sat by designation as trial judge in the trial of Enkhchimeg Ulziibayar "Eni" Edwards on charges of witness tampering.[117] Edwards was charged with violating 18 U.S. Code § 1512(b)(3), "which imposes criminal penalties on a person who "knowingly … **corruptly** persuades another person, or attempts to do so … with intent to … hinder, delay, or prevent the communication to a law enforcement officer … of information relating to the commission or possible commission of a Federal offense"[118] (emphasis added). Rejecting the pattern jury instructions used in the 7th Circuit for this charge, Posner excised the word "corruptly" from his own proposed jury instructions, *sua sponte*,[119] proposing instead the formulation "[t]he defendant attempted to persuade another person to interfere with the government's investigation or prosecution of illegal activity, without justification for interfering," where "'[w]ithout justification' was meant to convey the meaning of 'corruptly.'"[120] He ultimately omitted even the "without justification" formulation at the insistence of the Government, which had objected that "no justification for such an interference had been suggested."[121] Posner mocked Defense counsel's objection to removal of the word "corruptly," arrogantly suggesting that "leaving out the word would not harm the defense, 'unless you're counting on obscurantism in leading [the jury] to acquit.'"[122] In the end, Posner's jury instructions had the effect of depicting the charge against Edwards as a strict liability offense, in which the Defendant's intentions are irrelevant, which it categorically is not. Edwards appealed and, in what must have

[113] Rowen Scarborough, *Army National Guard Recruitment Fraud Case Rests on Murky Rules*, The Washington Examiner (May 22, 2017), https://www.washingtontimes.com/news/2017/may/22/army-national-guard-recruitment-fraud-case-rests-o/.

[114] U.S. v. Ham, 998 F.2d 1247, 1254 (4th Cir. 1993).

[115] U.S. v. Cassiere, 4 F.3d 1006, 1015 (1st Cir. 1993) (quoting *U.S. v. Boylan*, 898 F.2d 230 (1st Cir. 1990)).

[116] Debra Cassens Weiss, *Posner rejects pattern jury instruction while sitting as trial judge and gets reversed*, ABA Journal (Aug. 28 2017), http://www.abajournal.com/news/article/posner_rejects_pattern_jury_instruction_while_sitting_as_trial_judge_and_ge.

[117] *Id.*

[118] United States v. Edwards, 869 F.3d 490 (7th Cir. 2017).

[119] Weiss, *supra* note 116.

[120] United States v. Edwards, 184 F.Supp.3d 635, 643 (N.D. Ill. 2016).

[121] *Id.*

[122] Weiss, *supra* note 116.

been a humiliating rebuke for Posner, his own Circuit reversed, holding that

> "The instructions given at trial failed to include the corruption element. They could have allowed the jury to convict Edwards of engaging in conduct that… did not constitute corrupt persuasion and therefore did not amount to criminal witness tampering."[123]

As the Court observed,

> "certain forms of interference with an investigation are not inherently malign. Consider, for instance… a mother who suggests to her son that he invoke his right against compelled self-incrimination, or a wife who persuades her husband not to disclose marital confidences. Nor is it necessarily corrupt for an attorney to persuade a client with intent to ... cause that client to withhold documents from the Government."[124,125]

By the same token, a Recruiting Assistant's failure to follow program rules in the course of recruiting a prospective Soldier can only be deemed a criminal offense if the Recruiting Assistant *knew* he was breaking the rules and did so intentionally for the purpose of committing fraud. While such a deviation, absent fraudulent intent, might constitute a breach of his contract with Docupak, it would not constitute a violation of the criminal law. In fact, many of the rules violations alleged by AAA or Task Force Raptor likely fail even to reach the level of a *material* breach of contract actionable in a civil suit.[126]

The G-RAP program rules were created by Docupak—a privately owned enterprise—to govern the activities of Recruiting Assistants as 1099 contractors of Docupak. They cannot, therefore, be said to constitute military orders. Nonetheless, they may be considered analogous to regulations issued by military authority, and the treatment of regulations under military law is illuminating as to the fundamental unfairness of stigmatizing Recruiting Assistants as having committed fraud based upon purported technical violations of G-RAP program rules. Under military law, violation of an order or regulation may be prosecuted irrespective of the defendant's knowledge thereof if it "be general in application;"[127] but where an order is not generally applicable to everyone in the command, the charge of violation of a lawful order requires both allegation and proof that the defendant knew of the order.[128] G-RAP program rules can hardly be said to be of general applicability to all ARNG Soldiers, and it is clear that not all the Soldiers to whom those rules did apply—those working as Recruiting Assistants—knew about all of these rules. Thus many of the charges leveled against Recruiting Assistants by Task Force Raptor investigators could not have survived in a military law context.

[123] Edwards, *supra* note 118 at 493.

[124] *Id*. at 498 (quoting *Arthur Andersen LLP v. United States*, 544 U.S. 696, 125 S.Ct. 2129, 161 L.Ed.2d 1008 (2005)).

[125] For an analogous ruling in military law, see *United States v. Fleig*, 16 C.M.A. 444, 445 16 USCMA 444, 37 C.M.R. 64 (1966) (stating "A specification is required to allege every essential element of the offense charged, or it is fatally defective. It need not aver the elements expressly, but it must at least do so by necessary implication" (internal citations omitted)). Posner's jury instructions, as actually issued, failed to allege the scienter requirement either expressly or implicitly.

[126] A material breach is "a failure to do something that is so fundamental to the contract that the failure to perform that obligation defeats an essential purpose of the contract." *Mathews v. PHH Mortg. Corp*., Supreme Court of Virginia, 724, 732 S.E.2d 196 (2012) (quoting *Countryside Orthopaedics, P.C. v. Peyton*, 261 Va. 142 (2001) and *Horton v. Horton*, 254 Va. 111 (1997)). A Recruiting Assistant merely speaking to a potential recruit while wearing uniform, without more, would hardly have defeated any "essential purpose" of the Recruiting Assistant's contract with Docupak.

[127] *United States v. Koepke*, 18 C.M.A. 100, 102 18 USCMA 100, 39 C.M.R. 100 (1969).

[128] *Id* at 103.

B. *Human Memory, Tunnel Vision, and Other Investigative Errors.*

As galling as Task Force Raptor's treatment of technical violation of G-RAP rules was, the great bulk of injustice caused by this investigation actually stems from the unduly credulous treatment of the ancient memories of the Prospective Soldiers recruited under G-RAP. Task Force Raptor investigators often interviewed these Prospective Soldiers years after their last contact with their Recruiting Assistants. Naturally, memories faded during the passage of time between the recruitment and the interviews by investigators, resulting in memory gaps, errors, and inconsistencies among the testimony of the various witnesses. Task Force Raptor investigators seemed never to have taken into consideration the basic frailty of human memory in evaluating this testimony. Rather they often uncritically accepted such testimony when adverse to the Recruiting Assistant, treating inconsistencies and omissions almost as attributable only to fraud. But this assumption is plainly unwarranted. The Army itself is well aware of the fragility of human memory and of the hazards of relying upon it overmuch as evidence; its own authority on criminal investigations, FM 3-19.13, *Law Enforcement Investigations*, has said as much:

> "Although testimonial evidence can be the most beneficial evidence in many investigations, it is also the least reliable form of evidence. It does require investigators to maintain a greater level of objectivity and skill than many other forms of evidence identification, collection, and preservation. There are several factors that contribute to the lesser degree of reliability in testimonial evidence. Some of these factors are the fragility of human memory and the fact that people have the ability and, on occasion, the inclination to lie. The observations or perceptions of others may conflict due to the fact that people observe a single event from various vantage points. Although peoples' observations are factually accurate, they may be skewed by perception."[129]

The fragility and unreliability of human memory has been shown to be a key factor in the tragic phenomenon on wrongful convictions of innocent persons. Mark A. Godsey, director of the Ohio Innocence Project, has written about the problem of human memory and allegations of crime. Mr. Godsey is a former career federal prosecutor who was strongly skeptical of claims that innocent persons had been convicted of crimes, until entering academia and encountering the Innocence Movement there. Mr. Godsey addresses the problem of faulty memory, and its role in sustaining unjust accusations and convictions, in his book *Blind Justice*:

> "ENCODING, STORAGE, AND RETRIEVAL
>
> In general, memory involves three stages: encoding, storage, and retrieval. Encoding occurs when the witness experiences the event. But, given limitations in our cognitive abilities, we simply cannot encode everything that we take in during an event, no matter how important the event is to us. Rather, "we integrate fragments of a new experience into memory by combining it with what we already know or what we are expecting in a situation," as one memory expert has noted. In other words, the mind encodes some of the new information, but provides shortcuts for the rest, supplying information from previous memories or filling in the blanks with our assumptions. For example, if you go to a child's birthday

[129] Department of the Army, FM 3-19.13, *Law Enforcement Investigations* (2005) at 2-4.

party, you probably will not encode what the birthday cake looked like unless for some reason the appearance of the cake was particularly important to you. Instead, you may combine the image of the cake with preexisting memories of children's birthday cakes and save the fresh encoding space in your brain for something that mattered most to you, like where the cake was purchased if the taste was particularly delicious, or the fact that your ex showed up at the party unexpectedly. The less important details surrounding the event, such as who else was at the party or the color of the balloons, may not have been encoded but combined with some previous memory or a bias as to who you expected or assumed would be at the party, or what you think balloons at a child's birthday party are supposed to look like. In one sense, therefore, the brain helps us by not forcing us to encode everything that we encounter, allowing us to borrow from past memories and our expectations to create shortcuts. But, in another sense, the brain cheats us by creating inaccurate memories about many of the details we experience in everyday life. Sometimes details may seem minor or trivial when we experience them, like whether a person we barely know named Dave was at the birthday party, and thus we do not encode them cleanly. But this same fact can become very important later when we suddenly realize that our testimony as to whether Dave was present or not at the birthday party could mean the difference between whether he is convicted or acquitted of the murder of his wife, which occurred at the same time as the party. We may feel that we have a strong memory as to whether or not Dave was present, but in reality, unless our brain encoded that information correctly on that day, we cannot know if the memory is accurate."[130]

This phenomenon was illustrated by the statement to this author by an Army civilian paralegal about a G-RAP investigation referred to his command for review:

> "While [the subject of the other G-RAP investigation] was a company commander in the … battalion, [he] was accused of having previously committed misconduct relating to his participation in the ARNG G-RAP program … [The paralegal] related that when the case file came in for review, the people in the office discussed it among themselves, and the question they asked themselves was, in essence, **who remembers the recruiter who put them in the Army? [The paralegal] said that none of them did, and they all concluded that if they didn't remember their recruiter, how were they going to remember somebody else who they met with outside the recruiting office**? It did not seem credible to them"[131] (emphasis added).

Aggravating the undue weight given to old and uncorroborated memories was the fact that over the course of the investigation, Task Force Raptor investigators seem to have fallen victim to the ever present danger of tunnel vision, "a single-minded and overly narrow focus on a particular investigative or prosecutorial theory, so as to unreasonably color the evaluation of information received and one's conduct in response to the information."[132] "Tunnel vision distorts

[130] Mark Godey, *Blind Justice: A Former Prosecutor Exposes the Psychology and Politics of Wrongful Convictions*, 125-126 (University of California Press 2017).

[131] Interview conducted with Army paralegal, by the author.

[132] Federal/Provincial/Territorial Heads of Prosecutions Committee, *The Path to Preventing Wrongful Convictions*, at 43 (2011) (quoting Kaufman, 1 Morin Inquiry Report 479).

the perception of evidence"[133] "as police and prosecutors assigned to a case interact without critically assessing the evidence or testing the investigative theory."[134]

If there were any doubt that such distortion is a ubiquitous hazard in law enforcement, we need look no further than the recently released and long anticipated U.S. Department of Justice report on the beginnings of "Crossfire Hurricane," the investigation into interference by the Russian Federation in the 2016 U.S. Presidential election. Writing about the conduct of the Federal Bureau of Investigation—the preeminent law enforce agency, not only in the United States, but probably in the world—Department of Justice Inspector General Michael E. Horowitz wrote that

> "we concluded that case agents … did not give appropriate attention to facts that cut against probable cause, and that as the investigation progressed and more information tended to undermine or weaken the assertions in the FISA applications, the agents … did not reassess the information supporting probable cause."[135]

IG Horowitz could just as well have been describing the work of Task Force Raptor. Nor is this a uniquely American problem. Referring to the notorious 1959 wrongful conviction of Steven Murray Truscott in Ontario, Canada,[136] Canadian journalist and barrister Gary Botting described what he called "the classic Truscott scenario: once the police and Crown start barking up the wrong tree, it is often next to impossible to redirect their attention to other nearby trees where the true perpetrators may be hiding."[137] Also, as Botting further observed, "[p]olice and the prosecution are all too eager to wrap up a case as quickly as possible, becoming convinced of the guilt of a suspect who simply was in the wrong place at the wrong time, or was the last known contact of the victim."[138]

These phenomena are evident in Task Force Raptor's work. As the inquiry wore on, investigators streamlined their interrogation of witnesses by adopting a standardized form created by the aforementioned SA Julie Thurlow. This "Thurlow form" was customized for the G-RAP investigation upon which the investigator would annotate information provided by witnesses and served, in effect, as script for their interviews. It contained a series of questions, some yes or no, inquiring into whether the witness knew about G-RAP, whether anyone had helped them join the ARNG, whether they knew that person as a Recruiting Assistant, etc. These documents are often the only original record of these interviews, and they were often filled out in the most skeletal fashion. The manner in which TF Raptor investigators reacted to the minimal information recorded in these forms speaks volumes about their predisposition. For example, in some cases on the Thurlow Forms the answers indicate that the witness *did* receive assistance from the target of the investigation in enlisting in the ARNG, but witness would say that they did not know what the Recruiting Assistance Program (RAP) was or that they did not know the target as a Recruiting Assistant. Often, instead of interpreting the witness's testimony as indicating that the RA did perform his duties as Recruiting Assistant by helping the witness to join ARNG, but that

[133] *Id.* at 43.

[134] *Id.* at 43 (quoting Keith A. Findley & Michael S. Scott, *The Multiple Dimensions Of Tunnel Vision in Criminal Cases*, 291 Wis. L. Rev. 327-330 (2006).

[135] Office of the Inspector General, *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, U.S. Department of Justice, at 413 (2019)

[136] *See Truscott (Re)*, 2007 ONCA 575; *Reference Re: Steven Murray Truscott*, [1967] S.C.R. 309. *See also;* Isabel Le Bourdais, *The Trial of Steven Truscott*, J.B. Lippincott Company, (1966) (providing an early, comprehensive treatment of the Truscott case).

[137] Gary Botting, *Wrongful Conviction in Canada*, at 25 (LexisNexis 2010).

[138] *Id.* at 9.

the witness simply did not remember the details of the G-RAP program, the investigator would ignore the testimony establishing that the subject did assist the witness in joining the ARNG, and instead seize upon the witness's denial that they knew about G-RAP or knew that the subject was a Recruiting Assistant as evidence that the subject had committed fraud. Task Force Raptor investigators would also effectively ignore the testimony of persons who did remember G-RAP and *did* remember the subject has having helped them as a Recruiting Assistant. If even one or two of the Prospective Soldiers did not remember the subject's assistance or did not remember it having been given within the context of G-RAP, investigators would conclude that the Recruiting Assistant had committed fraud, even if a much larger number provided testimony indicating that the subject had been performing his Recruiting Assistant duties diligently.

Task Force Raptor was manned, to a large extent, by investigators called up from the Army Reserve for the specific purpose of investigating G-RAP cases; as such, funds had to be specially earmarked to fund the pay and allowances of these investigators, as well as Task Force Raptor's operating costs. This funding stream was neither unlimited nor permanent, and the rush to conclude their work before the expiration of their funding shows. As the investigation progressed, Task Force Raptor investigators seemed to have narrowed the focus of their interviews to the Prospective Soldiers recruited by the Recruiting Assistants under investigation only, and no one else. At least in Task Force Raptor's later stages, investigators often made no effort to either corroborate the testimony of the Prospective Soldiers or to invalidate it. In some cases, Task Force Raptor investigators never even contacted the full time recruiters with whom the Recruiting Assistants worked to verify either the claims of the Recruiting Assistants themselves or of Task Force Raptor's other witnesses. This is an egregious error, for while the Prospective Soldier has only one experience with his Recruiting Assistant—his own enlistment—the full time recruiters with whom the Recruiting Assistants worked encountered these RAs multiple times and were in a much better position to evaluate the honesty and reliability of the Recruiting Assistants being investigated; in fact, full time recruiters were at the center of some of the G-RAP cases that were prosecuted. Yet as the investigation reached its later stages, Task Force Raptor investigators omitted this crucial step. This was a tragic omission, as in some cases the testimony of these recruiters was firmly exculpatory, including in cases where the investigators concluded that the Recruiting Assistant had committed fraud.

"Tunnel vision at its worst may lead the police and prosecutors to 'cheat' by deliberately withholding evidence that might be helpful to the defense. The police may well regard certain evidence in their possession as irrelevant and therefore not worth disclosing …"[139] The insidious impact of this phenomenon on Task Force Raptor's work becomes unavoidably obvious as the testimony of its witnesses is more closely examined. In many instances, the Thurlow Form documenting a given witness interview would record an unequivocal denial of the witness having received any assistance from the Recruiting Assistant in joining the ARNG. However when these witnesses or others who knew them were re-interviewed by the Recruiting Assistant's defense team, a completely different picture would emerge. In some cases the witness would provide information on re-interview establishing without doubt that the Recruiting Assistant had helped that witness in attempting to join the ARNG; in other cases where CID had characterized a witness as having denied receiving such assistance, on re-interview the witness would reject that characterization and testify instead that they simply did not remember whether or not they received such assistance, or even admit it was possible that the Recruiting Assistant had helped

[139] *Id.* at 11.

them. In other cases defense interviews produced information that clearly discredited the witness' prior testimony to CID, such as indicators of the witness being mentally ill, or having strong motive to lie about the Recruiting Assistant. The Task Force Raptor report on their investigation of the case would be completely bereft of any such nuance or exculpatory information.

IV. TF Raptor's Unseen Victims: Soldiers Titled but not Charged

Task Force Raptor investigators made probable cause findings in numerous cases where no charges were ever brought. In some cases, charges were not preferred on the pretext of the statute of limitations having expired; in other cases the subject's chain of command simply did not find Task Force Raptor's evidence persuasive, which is hardly surprising given the weakness of the evidence in many instances. Unlike in civil life, however, a decision not to proceed with the case does not end the matter for a Soldier. For a Soldier, merely having once been the subject of a criminal investigation by CID, even absent prosecution, can profoundly disrupt his life and severely damage his career. This reason is a process, unique to the Armed Forces, called *Titling*.

A. *What is "Titling"?*

At its simplest, a Soldier is "Titled" when a CID investigator places his name in the subject line of an open criminal investigation; but the Titling a Soldier is a far more significant event than this implies, for Titling triggers the Soldier's indexing in Army CID's database and, much more importantly, in the Defense Central Index of Investigations, or DCII. The information cataloged in the DCII is available to and used by the Armed Services for purposes well beyond the scope of law enforcement, from security clearance adjudications to screening the moral qualifications of officers selected for command or promotion.

DoDI 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense*, January 27, 2012, provided at paragraph 4(3) that "[t]itling and indexing in the DCII shall be done as soon as the investigation determines that credible information exists that the subject committed a criminal offense."[140] It further defined "credible information" as "[i]nformation disclosed or obtained by a criminal investigator that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to lead a trained criminal investigator to presume that the fact or facts in question are true."[141] The current version of DoDI 5505.07, dated February 28th, 2018, contains an identical definition of "credible information" and substantially similar rules regarding Titling;[142] it further states that "[o]nce the subject of a criminal investigation is indexed in the DCII, the information will remain in the DCII, even if the subject is found not guilty of the offense under investigation, unless there is mistaken identity or it is later determined no credible information existed at the time of titling and indexing."[143]

B. *History and Purpose of Titling*

The Titling process can be traced to at least February 1966, when the Department of Defense established the DCII, pursuant to a Secretary of Defense memorandum dated December 3rd, 1965, implementing Title 5, United States Code, § 301.[144] The purpose of Titling is "to ensure

[140] U.S. Dept. of Def., Instruction 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense* (January 27, 2012), at 2.

[141] *Id.* at 4. U.S. Dept. of Def., Instruction 5505.07, *Titling and Indexing Subjects of Criminal Investigations in the Department of Defense* (February 28, 2018).

[142] *Id.* at 3.

[143] U.S. Dept. of Def., IG No. 91FBD013, *Review of Titling and Indexing Procedures Utilized by the Defense Criminal Investigation Organization,* (May 1991) at 3.

[144] *Id.* at 1.

that information contained in the report can be retrieved at some future point in time for law enforcement and security purposes."[145]

Prior to 1992, Army CID used a Probable Cause standard in making Titling decisions, while other Defense criminal investigative organizations used a variety of lower standards for Titling individuals. In 1991, "[t]he House Armed Services Committee (HASC) conducted a review of the military criminal investigative organization (MICOs)."[146] In its report on that review, the HASC recommended, not only that all MICOs adopt a uniform standard for Titling, but further that they adopt the Probable Cause standard for Titling then used by Army CID.[147]

DoD acted on the HASC's recommendation to establish a uniform standard for Titling, but it defied the HASC's request that said uniform standard be the Probable Cause standard employed by the Army. Instead, DoD established the Credible Information standard in place today, on the ground that the Probable Cause standard for Titling "is not effective for law enforcement and investigative purposes,"[148] largely because "[t]here may be too great a time delay between the time when a file is preliminarily reported to the DCII by the CID, and the time when it is finally reported in a retrievable manner following a final determination of probable cause."[149]

C. *The "Credible Information Standard" is a Dangerous Tool that Must be Used in a Careful and Restrained Manner*

It should be self-evident to any objective observer that associating the names of Soldiers with unproven—and in many cases unfounded—criminal allegations in a searchable database accessible to thousands of individuals across numerous organizations, where said information remains accessible for decades, creates a grave risk to the rights, reputations, and careers of those Soldiers.

It cannot be denied that Titling individuals on a "Credible Information" standard creates substantial investigatory and security benefits. "Titling based on credible information and subsequent indexing in the DCII is necessary so that information can be retrieved in the future for law enforcement and security purposes."[150] It is not my purpose here to challenge the "Credible Information" standard or to deny its benefits. However, using such a low bar as "Credible Information" for the indexing of subjects in the DCII virtually guarantees that the names of innocent persons will be entered into this database. This would create an inherent risk of injustice under any circumstances, but the manner in which Titling is used in the United States Army not only fails to provide safeguards against the deleterious effects of Titling individuals, but it actually aggravates those effects and creates injustice every day. In part this stems from the definition and anomalous nature of the "Credible Information" standard itself:

> "'Credible information' is an evidentiary determination peculiar to the titling area. Unlike probable cause, with a long history of judicial interpretation, 'credible information' means nothing to attorneys, who are tasked to assist investigators in the determination of whether it exists in a particular case. Trial counsel might find it a standard that is impossible to measure."[151]

[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 13.
[149] *Id.* at 14.
[150] Major Patricia A. Ham, *The CID Titling Process—Founded or Unfounded?*, The Army Lawyer, DA PAM 27-50-309 (August 1998) at 13.
[151] *Id*

D. *The Use and Abuse of Titling in the United States Army*

By far the greatest threat to the rights of innocent Soldiers who find themselves Titled is the broad array of uses—beyond investigatory and security purposes—to which the information in DCSS is put, and the vast number of people and entities which have access to that data. In pushing for the Credible Information standard, The Department of Defense Inspector General (DoDIG) asserted the limited purposes for which Titling is intended. According to the DODIG report,

> "The report of investigation is merely the repository for all those facts tending to approve or disprove the allegation, gathered through observation, interviews, and examination of documentary and physical evidence, obtained during the course of a thorough investigation. **The fact that an individual was the subject or otherwise titled during the course of an investigation should not connote guilt or innocence, nor should that fact carry with it any stigma upon which responsible individuals would initiate any inappropriate administrative action** … The primary purpose for titling an individual as the subject of a criminal report of investigation is to ensure that the information contained in the report can be retrieved at some future point I time, **for law enforcement and security purposes**"[152] (emphasis added).

Unfortunately, the information found in the DCII and in the records of the U.S. Army Crime Records Center is used for *much more* than "law enforcement and security purposes."

This data is systematically used in promotion decisions by the military and by myriad other actors in Government and in the private sector. This was forthrightly stated by the Fort Benning Office of the Staff Judge Advocate Legal Assistance Office as recently as 2018:

> "Q. Can Titling affect military AND civilian careers?
>
> A. Yes. The information contained in these databases may be used for a variety of purposes such as: making civilian employment decisions, military assignment decisions, such as battalion and brigade commander assignments, military promotion decisions and security determinations More than 27 agencies have access to the DCII and it receives approximately 35,000 requests for information a day. This information is retrievable from DCII and CRC for 40 years."[153]

The danger posed by the Army's expansive use of DCII data for purposes other than investigation and security has long been known to the Army and, in fact, the Army raised strong objections based upon this danger at the time DoDIG proposed implementing the Credible Information standard DoD-wide. MG John L. Fugh, Judge Advocate General of the Army at the time the Credible Information standard was adopted, vigorously asserted the dangers of adopting that standard. He said:

> "The Military is a unique society for which there is no civilian counterpart. I'm therefore concerned about the 'Big Brother' aspects of the DCII. Many

[152] Dept. of Def., *supra* note 143 at 3.

[153] *I've Been 'TITLED!—What Does that Mean and How Can I Fix It?,* Office of the Staff Judge Advocate Legal Assistance Office, (June 2018).

> of us have access to that system, and the information is used for personnel decision including security clearances, promotions, assignments, schooling, and even off-duty employment."[154]

The Army also raised objections to the key premise of DODIG's recommendation for adopting the Credible Information Standard—the claim that "titling and indexing are administrative functions, 'a [mere] indication[] of the historical fact that, at some point, a person became the focus of a criminal investigation.'"[155] The Army objected that

> "[t]hat concept is acceptable only if the fact of titling is not to be used for any other purpose than as a record of investigative activity and there is no negative connotation associated with being titled. **Army experience is that being titled and indexed does carry a very negative connotation**" (emphasis added).[156]

The Army's criticism went further, arguing that while the Credible Information standard may pose little risk when used only for security and criminal investigatory purposes,

> "where the outputs from the system are widely accessible to agencies or officials other than criminal or security agencies or personnel . . . and where that output is used directly to support agency actions or determinations other than subsequent criminal or security investigations, then the standard recommended by the DOD IG is grossly unfair."[157]

And DCII data is widely accessed for a variety of purposes unrelated to criminal investigation and security matters. MAJ Patricia A. Ham addressed this in 1998, and access to and use of DCII data can only be more widespread now:

> "Access to information in the DCII is widespread. The DCII receives an average of 35,000 requests per day. Twenty-seven agencies are authorized access and input to the DCII, with a total of 1179 terminals. An additional 129 terminals have "read only" capability. A working group was recently established to examine whether access should be extended to an even greater number of agencies. The information retrieved may be used to determine promotions, to make employment decisions, to assist in assignment decisions, to make security determinations, and to assist criminal investigators in subsequent investigations."[158]

The Credible Information standard for Titling continued to receive scrutiny and criticism even after the 1991 DODIG Report and subsequent adoption of the standard DOD wide. In 1993, the Advisory Board on the Investigative Capability of the Department of Defense was formed; it published its *Report of the Advisory Board on*

[154] Ham, *supra* note 150 at 10 (quoting Memorandum from MG John L. Fugh, The Judge Advocate General, U.S. Army, to Derek Vander Schaff, DOD IG, subject: Comments to Proposed DOD Instruction 5505.07 (1992)).

[155] Ham, *supra* note 150 at 10 (quoting Drafting Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Tilting and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated)).

[156] Ham, *supra* note 150 at 10.

[157] *Id.* at 10 (quoting Draft Memorandum from MG John C. Heldstab, Director of Operations, Readiness, and Mobilization, DAMO-ODL, to Assistant Secretary of the Army (Manpower and Reserve Affairs), subject: DOD Instruction 5505XA, Tilting and Indexing of Subjects of Criminal Investigations in the Department of Defense, ACTION MEMORANDUM (undated)).

[158] *Id.* at 11.

the Investigative Capability of the Department of Defense in 1994.[159] This report was harshly critical of the Credible Information standard for Titling. The Advisory Board acknowledged the DCII as a "necessary tool for effective law enforcement in DOD."[160] But it also found that

> "the current number of organizations, and thus individuals, with access to the DCII troubling, especially in light of the credible information standard for titling and the sheer number … of individuals whose identities appear in the system."[161] The Advisory Board further found that "access to closed criminal investigation indices by other than DCIO personnel may create an unacceptable risk for individuals listed as subjects in the system. DoD Instruction 5505.7 contains the restriction that [j]udicial or adverse administrative actions shall not be taken solely on the basis of the fact that a person has been titled in an investigation Although this provision acknowledges the potential for misuse of the DCII and attempts to prevent certain decisions from being made exclusively on the existence of titling information in the criminal investigation index, we are concerned that regulatory requirements may not provide sufficient protection. A hypothetical illustrates the concern. A DCIO receives what is perceived at first to be credible information that an individual has committed an offense and thus titles and indexes the subject in the DCII. This information later is deemed not credible, but the individual remains titled and in the DCII. Thus, five years later when an agency with access to the DCII conducts a search of the system on two candidates for the same critical position, the one individual is identified as the subject of a criminal investigation and the other is not. Now, at this point, the agency should request the case file from the relevant DCIO and read that no credible information was ultimately developed. As a practical matter, however, the agency is pressed for time and makes a decision to employ the individual without the DCII criminal investigation record."[162]

> "[M]any investigators and trial counsel who assist them do not understand the difference between titling an individual, founding an offense, and substantiating an offense. If there is such confusion among those who regularly deal with the system, what can be expected of commanders, promotions boards, and other entities that have access to titling information? The risk of misunderstanding and hence, misuse, is almost certain."[163]

E. *Impact of Titling on G-RAP Participants*

Notwithstanding National Guard Bureau's claims to the contrary, the Titling process has negatively impacted untold thousands of innocent Soldiers that participated in G-RAP. National Guard Bureau's claim that only 3,226 Soldiers were investigated in relation to G-RAP seems dubious,[164] not least given the testimony of Army officials cited above indicating that all 109,000 Recruiting Assistants were being screened for fraud. It becomes even more dubious in light of the letter sent to the Secretary

[159] *Id.*
[160] 1 Rep. of the Advisory Bd. on the Investigative Capability of the Dept. of Def. 1, at 44 (1994).
[161] *Id.* at 45.
[162] *Id.*
[163] Ham, *supra* note 150, at 13.
[164] *Supra* note 51.

of the Army by Colorado Representative Mike Coffman on September 18th, 2018.[165] In that letter, Rep. Coffman asked the Army to identify not only how many cases were investigated and "founded," but how many Soldiers were Titled; in how many cases probable cause was found; how many security clearance determinations were triggered by the G-RAP investigation; and how many officers had been subjected to promotion delays due to G-RAP.[166] So far as I am aware, the Army has never answered Rep. Coffman's questions, casting doubt upon the proposition that the extent of the damage done to the Recruiting Assistants was as limited as National Guard Bureau's optimistic assessment would indicate.[167]

National Guard Bureau's assurance that only in those cases where the allegations were "founded" would the investigation be considered in subsequent personnel actions is plainly false. As noted above, the allegations against a Soldier need not be founded to trigger indexing in the DCII; in fact, the investigation need not even find probable cause: A Soldier listed as the subject of a criminal investigation, and thus permanently indexed in the DCII, upon an initial finding that the Credible Information standard is met, even if the Soldier is ultimately exonerated outright. This fact alone gives rise to concern that far more than 1,684 Soldiers[168] have had their careers adversely impacted by Task Force Raptor's investigation, and that this damage will continue. This concern is all the greater considering the poor quality of Task Force Raptor's investigation into many G-RAP participants. It becomes greater still given that, based upon the G-RAP cases that I have examined, it is clear that TF Raptor Investigators were prone to find probable cause in G-RAP cases on the basis of evidence so flimsy that it would likely not even have satisfied the Credible Information standard in other cases not related to G-RAP.

National Guard Bureau's position is also plainly inconsistent with Army policy. Any CID-related "past adverse or 'Titled' event [or] any open/ongoing law enforcement investigation or report" identified during Post Board Screening can trigger referral of an officer to a Promotion Review Board (PRB) or a Command Review Board, and result in the delay or denial of promotion or removal from the Command select list, as can an "any possible connection to a major adverse news headline."[169] This is a far, far lower standard than the allegation being "founded."

Soldiers Titled by CID in G-RAP related cases have faced referral to Promotion Review Boards and delay of promotion; referral to Boards of Inquiry for possible separation from Active Duty; suspension of security clearances; loss of civilian employment; debarment from Federal contracts; and impediments to securing employment in law enforcement. Once employed in law enforcement, the presence of a probable cause determination by CID in the DCII, however weakly founded, creates a *Brady* issue impinging upon his usefulness as a witness for the prosecutions in the cases he investigates.[170] In fact, in many cases innocent Soldiers caught up in Task Force Raptor's face multiple problems caused by being Titled, one after the other.

Soldiers confronted with these adverse proceedings find themselves faced with severe damage to their careers, thousands of dollars in legal fees rebutting the allegations in defense of their careers, or both. In contemplating the potential for injustice to such Soldiers, it must be remembered that Task Force Raptor focused its efforts during the early phase of its work on the most severe instances alleged fraud. This

[165] Letter from Representative Mike Coffman, 6th District, Colorado to Secretary of the Army Mark Esper, (September 18, 2018).
[166] *Id.*
[167] *Supra* note 51.
[168] *Supra* note 51.
[169] Army Human Res. Command, *Frequently Asked Questions for Promotion and Command Review Boards*, TAGD-OPSA, (February 2019) at 3.
[170] *See generally,* Brady v. Maryland, 373 U.S. 83 (1963).

means that those instances of genuine fraud and malfeasance were likely adjudicated early in the investigation, leaving until later the weaker instances where the Government would have had difficulty proving their allegations. This latter group included many cases where CID made findings of probable cause upon the flimsiest of bases and, if the cases I have examined are any indication, almost certainly includes many, many instances of innocent Soldiers wrongly accused of fraud by CID.

It is likely that many of these innocent Soldiers saw their careers damaged or ruined in part because of their own faith in the Army itself. In my experience, the first impulse of a Soldier under investigation is to talk to the investigator in the belief that the matter can be easily sorted out—a naïve faith that can prove fatal even for innocent persons, as shown by Professor James Duane:

> "Consider the tragic case of Ronald Cotton. He spent more than ten years in a North Carolina prison for a pair of rapes he did not commit … When he first learned that police were looking for him, he foolishly did what most innocent people do under these circumstances: he went down to the police station to meet with them, answer their questions, and attempt to clear things up."[171]

Mr. Cotton was fortunate in that he was eventually exonerated by DNA evidence and freed.[172] For the innocent victims of Task Force Raptor, however, no scientific magic bullet can clear them.

Soldiers attempting to clear up unjust accusations of fraud by CID encounter another stumbling block as well. Many Soldiers, faced with some adverse proceeding triggered by having been Titled assume, at least implicitly, that the matter stems from a misunderstanding that can be resolved by a rebuttal correcting the record. Often, Soldiers provide such rebuttals only to have their effort broken on the rocks of the presumption of regularity. "The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[173] Under this doctrine, once an official action has been finalized, the burden of proof to overturn it shifts from the Army to the Soldier, who "must prove 'clearly and convincingly' that the 'presumption of regularity' in the preparation of administrative records should not apply, and that '[a]ction is warranted to correct a material error, inaccuracy, or injustice."[174] What's more, the Soldier must carry this heavy burden even where Government faced only a minimal Credible Information, Probable Cause, or Preponderance of the Evidence standard in the underlying action.

Proving official error by clear and convincing evidence is a heavy lift. Most people do not have the skills to meet this burden on their own, and require the assistance of attorneys, investigators, and perhaps even a polygraph examiner if they are to have a reasonable chance—but by no means a guarantee—of success, all of which is both costly and time consuming.

V. Public Policy Considerations Against the Culpability of G-RAP Participants

The appropriate legal defense in most G-RAP cases will be insufficiency of the evidence—a straightforward argument that the Government

[171] James Duane, *You have the Right to Remain Innocent* 49 (Little A, 2016).
[172] *Id.*
[173] Hoorwitz v. Resor, 329 F. Supp. 1050 (D. Conn. 1970) (quoting United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926)).
[174] Albino v. United States, 78 F. Supp. 3d 148, 164 (D. D.C. 2015).

has failed to prove one or more elements of the offense beyond a reasonable doubt.[175] In most of the cases that I have examined, Task Force Raptor's evidence fails at the very least to meet the scienter requirement—that is, the evidence fails to prove beyond a reasonable doubt the Soldier knowingly acted wrongfully for the purpose of acquiring funds that he was not entitled to. Other defenses have been advanced, however. These include expiration of the statute of limitations;[176] the Posse Comitatus Act;[177] violation of defendant's due process rights by excessive pre-indictment delay;[178] alleged *Brady* violations;[179] and guilty plea not being freely and intelligently given.[180]

Another defense that has been pleaded is that the Recruiting Assistants charged are not culpable because, by participating in G-RAP, they were following the orders of their commanders; at least three reported cases have noted this defense. In *United States v. Aponte-Garcia*, the court noted that the defendant had argued that "criminal liability for recruitment-related conduct cannot attach to soldiers following orders to recruit," but did not further address the argument.[181] In *United States v. Costas-Torres*, the court noted that while the defendant "alleges he cannot be held liable for any recruitment-related crimes he committed while following orders of a superior officer or public official," he did "not cite[] any legal authority in support of the argument he relie[d] on,"[182] concluding that "[i]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."[183]

In *United States v. Colon* the court observed that "the fact that [the Defendant] was ordered to implement and promote the National Guard Recruiting Assistance Program does not provide a defense for committing theft, fraud, and identity theft while implementing the program."[184] In this, the court was indubitably correct, for implicit in the orders implementing G-RAP—as with all lawful military orders—is the understanding that the orders will be implemented lawfully. Additionally, participation in G-RAP as a Recruiting Assistant was voluntary, so that a superior orders argument would likely be inapposite in most cases.

Steeped in the memory of the Nuremburg Trials and similar tribunals, not to mention influences from the popular culture such as the film *A Few Good Men*,[185] many people—perhaps most—assume that superior orders is *never* a valid defense to a criminal charge. That the majority of the public accepts such a categorical conclusion is a vindication of Alexander Pope's famous exhortation that "[a] little learning is a dangerous

[175] See, e.g., United States v. Osborne, 886 F.3d 604, 607 (6th Cir. 2018); United States v. Davis (5th Cir., 2016); United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1; United States v. Renfro, 2016 U.S. Dist. LEXIS 191056, *3 (5th Cir., 2016).

[176] United States v. Meléndez-González, 892 F.3d 9 (1st Cir., 2018*); United States v. Jucutan*, 756 Fed. Appx. 691 (9th Cir. 2018)(unpublished); United States v. Aponte-Garcia, 2016 U.S. Dist. LEXIS 176106, *3 (D. P.R., 2016); United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *2 (D. P.R., 2016); United States v. Constantino, 2015 U.S. Dist. LEXIS 140586, *1 (D. Guam, 2015); United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1 (D. Guam, 2016); United States v. Reppart, Case No. 4:15 CR 189 (Dist. Ct. N. Dist. Ohio E. Dist., Oct. 22, 2015); and United States v. Rivera-Rodriguez, 2016 U.S. Dist. LEXIS 94864, *1-2(D. P.R., 2016).

[177] United States v. Alvarado, No. 13-4064 JCH, at 6 (D. N.M., Feb. 9, 2015).

[178] *See* United States v. Aponte-Garcia, 2016 U.S. Dist. LEXIS 176106, *3 (D. P.R., 2016); United States v. Colon, *supra* note 176 ; United States v. Ngirarois, 2016 U.S. Dist. LEXIS 139641, *1 (D. Guam, 2016); United States v. Nishiie, 421 F. Supp. 3d 958, 961 (D. Haw. 2019).

[179] United States v. Costas-Torres, 255 F. Supp. 3d 322, 325 (D. P.R., 2017).

[180] United States v. Renfro, 2016 U.S. Dist. LEXIS 191056, *20-1 (5th Cir., 2016).

[181] United States v. Costas-Torres, 255 F. Supp. 3d 322, 325 (D. P.R., 2017).

[182] United States v. Zannino, 895 F.2d 1, 52 (1st Cir. 1990).

[183] United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *2 (D. P.R., 2016).

[184] *United States v. Colon* (D. P.R., 2016).

[185] *A Few Good Men* (Castle Rock Entertainment and Columbia Pictures 1992).

thing[;] Drink deep, or taste not the Pierian spring."[186] In reality, the extent to which superior orders constitutes a valid defense is a fact-based determination; where the superior has ordered his subordinates to take action that is illegal, immoral or unethical on its face, that the defendant acted under orders will ***not*** be exculpatory; on the other hand, where the conduct ordered is not facially prohibited or such that the subordinate cannot reasonably be expected to have known that it was prohibited, then the defense of superior orders may be effective. Thus, a plea of superior orders might be no defense; it might be an imperfect defense; or it might be a complete defense—all dependent upon the facts of the case. In rejecting the defendant's superior orders the *Colon* court noted the defendant "provide[d] no evidence that his superiors ordered him to commit any of these crimes. **Therefore**, Defendant['s] following orders argument fails"[187] (emphasis added). By implication, if the defendant had produced such evidence, it is conceivable that the outcome may have been different.

The superior orders defense was unsuccessful in these cases, but in raising it, these defendants evinced an instinctive awareness of the injustice of holding citizens criminally liable for conduct instigated, authorized, or otherwise encouraged by the state—considerations highly germane to the circumstances of the G-RAP program. American criminal law acknowledges this injustice and recognizes certain defenses intended to mitigate it—defenses that may not be technically available to defendants under the peculiar circumstances of the G-RAP fiasco, but whose underlying public policy bases are strongly implicated by the Army's conduct and which cast significant doubt on the fairness and equity of the Army's treatment of G-RAP participants. Two such defenses that come immediately to mind are *Entrapment* and *Mistake of Law*.

[186] Alexander Pope, *An Essay on Criticism*, pt. II (1711).

[187] United States v. Colon-Colon, 2016 U.S. Dist. LEXIS 66131, *10 (D. P.R., 2016).

A. *Entrapment*

In a highly influential concurring opinion, Justice Roberts defined entrapment as "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."[188] Two elements are necessary for a successful Entrapment defense: First, the Government must have induced the defendant to commit the crime, and second, defendant must not have been independently predisposed to committing such a crime before first contact with the government agent that induced him to commit it.[189] "A predisposed defendant is one who is ready and willing to commit an offense apart from government encouragement,"[190] and who "was disposed to commit the criminal act prior to first being approached by Government agents."[191] A defendant's assertion that he committed no crime at all does not preclude his successfully pleading Entrapment: a defendant is free to "deny one or more elements of the crime" and still argue that he has been unlawfully entrapped.[192]

Ordinarily, permissible police subterfuge becomes entrapment where it "overstep[s] the line between setting a trap for the 'unwary innocent' and the 'unwary criminal,'"[193] in which the police become "involved in the manufacture as opposed to the detection of crime" in order to "randomly test the virtue of individuals."[194] This was not the

[188] Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring).

[189] Mathews v. United States, 485 U.S. 58 (1988).

[190] United States v. Gabriel, 810 F.2d 627 (7th Cir.1987).

[191] Jacobson v. United States, 503 U.S. 540, 547 (1992)

[192] Mathews, *supra* note 189.

[193] Jacobson v. United States, 503 U.S. 540, 543 (1992), quoting *Sherman v. United States*, 356 U.S. 369 (1958).

[194] *R. v. Mack* [1988] 2 S.C.R. (Supreme Court of Canada), also cited as *Queen v. Mack*. Although a Canadian case, *R. v. Mack* is useful for American practitioners in that it provides succinct but comprehensive summary of the U.S. Supreme Court jurisprudence on the Entrapment Defense as it stood at that time.

case with respect to the G-RAP or the Task Force Raptor investigation: for all its shortcomings, the leadership of the Army National Guard and the Docupak company launched G-RAP as a good faith effort to address the Army National Guard's severe recruiting challenges of that time, and not as a cover for some criminal enterprise, and Task Force Raptor played no role in enticing Recruiting Assistants take any G-RAP-related actions, lawful or otherwise. As such, G-RAP is not the sort of case in which Entrapment would ordinarily be put forward as a defense.

Nonetheless, the essential elements for an Entrapment defense are present in the G-RAP matter: The Army National Guard marketed G-RAP aggressively in order to induce as many Soldiers as possible join the program—the vast majority of whom had no work experience in recruiting and would never have participated in any such recruiting effort but for the ARNG's intensive marketing and strong financial inducements. But the Army National Guard and the other components did more than offer financial inducements—they pressed the G-RAP program vigorously. G-RAP was promoted heavily in service publications;[195] Guard members were regaled with images of Recruiting Assistants ceremoniously receiving oversized checks from Docupak like a Publisher's Sweepstakes advertisement;[196] they were told that their "Circle of Influence [was] unlimited" for recruiting purposes;[197] and Recruiting Assistants were urged to

> "[t]alk to anyone who will listen about the Army Reserve. Don't judge a book by its cover. Never assume that a person is 'Not Qualified' at a first-glance look. Even if this person turns out to be not qualified, he or she may know someone who is qualified."[198]

They were encouraged to "[b]e creative at selling,"[199] and given tips like that of one recruiter who "told how he used to put his business card into the credit card pay slot at gas stations when he was a recruiter. It may tick off some people but others will call and want to talk about joining;"[200] they were advised to take such enterprising steps as "[b]uy[ing] advertising space in [their] local newspaper," or to "[m]ake up a flier [and] go to the colleges find the veteran's education office [and] ask if they'll allow you to post an AR-RAP flier."[201] They were offered military paraphernalia such as branded clothing, backpacks and business cards.[202] Senior officers urged Soldiers and Airman to "take the time to join the Guard Recruiting Assistant Program (G-RAP);" admonished them that "every Soldier/Airman is a recruiter," and told them that "with G-RAP, now [they could] learn to become a Recruiter Assistant" and "get paid as [they] train to help others and earn money for every recruit you assist in joining the Guard."[203]

[195] For example, see 70th RRC Management Team, *AR-RAP News*, "Tips for Recruiting Assistants," Issue IV, June 2008.

[196] For example, see *The Iowa Militiaman*, Summer 2006, at 8-9; "G-RAP Recruiter Receives Check," 32.2 *Guardlife: The Magazine of the New Jersey National Guard* 4 (May 2006); *see also* Fonda Bock, *Future Soldier Cashes in on A-RAP*, 60.7 *Recruiter Journal* 18, 18-19, United States Army Recruiting Command at 18 (July 2008). 18.

[197] "Air National Guard Recruiting Assistant Program," nd, np., attached as an exhibit at Deposition of William Allen Stewart, *Remsburg v. Docupak*, Case 3:12-cv-00041-GMG-JES, Document 38-5, Filed 12/11/12, pages 155—161.

[198] 70th RRC Management Team, *Tips for Recruiting Assistants, AR-RAP News Issue IV* (June 2008).

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] Id.

[203] Maj. Gen. Glenn K. Reith, Adjutant General, New Jersey National Guard, *TAG's Message—You, the Recruiter,* Guardlife: The Magazine of the New Jersey National Guard, at 4 (May 2006); *See also* Maj. Gen. Raymond F. Rees, Adjutant General, Oregon National Guard, *Personnel readiness a top priority for ORNG. Soldiers, Airman rewarded for recruiting efforts through G-RAP and 2-STAR*; The Oregon Sentinel, at 2 (2006); *New tool provides leads, enriches, empowers*, The Iowa Militiaman, at 8 (2006); Sgt. Chad D. Nelson, *G-RAP continues to provide Soldiers an active role in the recruiting process,* The Iowa Militiaman, at 6-7 (2008).

G-RAP was emphasized to such a degree that it became a fixture throughout the National Guard in realms far beyond recruiting. LTG H. Stephen Blum, then Chief, National Guard Bureau, touted the program in in *Joint Forces Quarterly*,[204] as did LTG Clyde Vaughn, Director of the Army National Guard, in *Army* magazine.[205] G-RAP was noted in the *Army Posture Statement* for at least the years 2007 and 2009,[206] and the ARNG *Posture Statement* in 2010;[207] it was publicized in the Army's *Stand-To* newsletter;[208] and it was cited in several U.S. Army War College Research Projects on operational readiness for the Army National Guard,[209] as well as *Military Review*, the flagship publication of the U.S. Army Combined Arms Center at Fort Leavenworth, Kansas.[210] The National Guard's commitment to G-RAP was so comprehensive that the program was even briefed at a 2007 conference on *wheeled vehicles*,[211] and its impact so widespread that the program was mentioned by the Mississippi Supreme Court in the matter of a disbarred attorney's petition for reinstatement of his law license.[212]

Having so aggressively pushed its Soldiers to participate in G-RAP, the Army National Guard then set them up for failure by establishing confusing, poorly disseminated rules; shoddy and ineffectual management controls; inadequate means to record and confirm which Recruiting Assistant referred which Prospective Soldier; and then provided them with only the most perfunctory of training—training the brevity of which appears to have been "a feature, not bug," as attested to by Iowa Army National Guard Staff Sergeant Howard Johnson, who boasted that "it only took him **35 minutes to complete the online training** [and that] [o]nce that was done, he was ready to begin prospecting" for Prospective Soldiers as a G-RAP Recruiting Assistant (emphasis added).[213]

By such means the Army National Guard induced approximately 109,000 Soldiers to take on recruiting functions that they never would have done otherwise, to the great benefit of the ARNG recruiting program. Then, when problems with the program emerged, the Army cut these Soldiers loose—men and women who had stepped forward to execute the program the Army National Guard promoted—allowing thousands of them to unjustly bear the consequences of the Army's errors. It is this that makes the doctrine of Entrapment relevant to the G-RAP debacle.

A "fundamental rule of public policy"[214] underlies the Entrapment doctrine. "[T]he integrity of the criminal justice system demands the rule,"[215] because "[p]ublic confidence in the fair and honorable administration of justice, upon

[204] H. Steven Blum, *Transforming the Guard to an Operational Force*, Joint Forces Quarterly, Issue 43 at 17 (4th Quarter 2006).

[205] Clyde A. Vaughn, *Army National Guard: An Integral Part of Army Strong*, Army, at 135-137 (October 2007).

[206] Hon. Francis J. Harvey and Gen. Peter J. Schoomaker, *A Statement of the Posture of the United States Army*, at Q2 (2007) (Addendum Q, *Additional Information on Army Related Topics*); and Hon. Pete Geren and GEN George Casey, *A Statement of the Posture of the United States Army,* at 15 (2009) (Addendum A, *Information Papers*).

[207] Gen. Craig R. McKinley, *National Guard Posture Statement 2010: America's Indispensable Force*, at 8, 15 (2010).

[208] Guard—Recruiting Assistance Program, *Stand-To* (2008).

[209] For example, see Mark J. Michie, *Synchronizing Army National Guard Readiness with ARFORGEN*, USAWC Strategy Research Project, 2007, page 5; Donald Dellinger, *Manning, the Foundation of an Operational National Guard, USACW Civilian Research Project*, 2010, pages 17 -19; Cornelius J. Kehone, *Transforming the Guard: Construct and Challenges for Operational Reserve*, USAWC Strategy Research Project, 2007, page 8; and Michael J. Woods, *Transforming the US-ARNG: Challenges in Implementing the ARFORGEN Model*, USARWC Strategy Research Project, 2009, page 23 and notes 53 and 59.

[210] Paul C. Hastings, Thomas M. Zubik, Eric K. Little, *Bringing Order to the Brigade Reset*, Military Review, at 27 fig. 4 (2011).

[211] *2007 Tactical Wheeled Vehicle Conference—"Sustaining the Current Force—Improving the Future Force,"* 4—6 February 2007, "G-RAP and the Path to 350," as of 30 JAN 07.

[212] His petition was denied for reasons unrelated to G-RAP. See Stewart v. Miss. Bar, 84 So.3d 9, 19 (Miss. 2011).

[213] *New Tool Provides Leads, Enriches, Empowers*, The Iowa Militiaman, at 9 (Summer 2006).

[214] Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring.).

[215] *Queen v. Mack*, *supra* note 194, at 921.

which ultimately depends the rule of law, is the transcending value at stake."[216] Justice Roberts set forth the proper response to such "prostitution of the criminal law" thus

> [t]he violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty.[217]

Given the unusual procedural posture and factual matrix of G-RAP, it is doubtful as to whether a criminal court would take cognizance of an Entrapment Defense if raised by a G-RAP defendant. Nonetheless, the policy concerns underpinning the defense are indisputably implicated: The Government induced tens of thousands of Soldiers to embark upon a poorly conceived and sloppily executed recruiting enterprise that they never would have entertained but for the Government's extravagant financial blandishments and its relentless marketing campaign designed to cajole them into doing so. One commentator has observed that

> [o]ne of the most common patterns seen in 'objectively' improper inducements is repeated requests, with the police typically increasing the stakes each time (in terms of reward or attempts to play on sympathy). If someone successfully resisted numerous escalating requests, it is difficult to say he was truly predisposed.[218]

TF Raptor's work may not precisely align with this description, but it comes uncomfortably close—so close that many of the Recruiting Assistants that have endured criminal and administrative sanctions and investigations can fairly be said to have been entrapped and unjustly punished as a matter of equity even if not at law.

B. *Mistake of Law*

Many will be inclined to reflexively dismiss the plight of Recruiting Assistants who unknowingly broke G-RAP program rules, on the familiar ground that it was their duty to know the rules and follow them. But such a knee-jerk response is unwarranted, not least because some of these alleged "violations" were transgressions only in the minds of the investigators. But this is hardly the only reason for skepticism about the culpability of Recruiting Assistants accused of violating program rules. In fact, the law recognizes a number of situations in which ignorance of the law *really is* an excuse. One such is the leeway that the courts allow law enforcements officers in the 4th Amendment context for mistaken, but reasonable, interpretations of the law. As the Virginia Court of Appeals recently noted, "'[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection,'"[219] where "[a] court tasked with

[216] Sherman v. United States, 356 U.S. 369, 380 (1957) (Frankfurter, J., concurring); *see also* Robert M. Bloom, *Judicial Integrity: A Call for its Re-Emergence in the Adjudication of Criminal Cases,* 84 Nw. J. of Crim. L. & Criminology 462, 499 (1993)

[217] *Sorrells v. United States*, 287 U.S. 435, 457 (1932), at 457 (Roberts, J., separate opinion).

[218] Andrew Carlon, Note, *Entrapment, Punishment, and the Sadistic State*, 93 VA. L. REV. 1081, 1094 (2007).

[219] Jones v. Commonwealth, 836 S.E.2d 710, 713 (Va. App. 2019) (quoting Heien v. North Carolina, 574 U.S. 54 (2014)).

deciding whether an officer's mistake of law can support a seizure thus faces a straightforward question of statutory construction. If the statute is genuinely ambiguous, such that overturning the officer's judgment requires hard interpretive work, then the officer has made a reasonable mistake" and evidence seized improperly as a result will not be suppressed.[220]

Ambiguity in a law can also redound to the benefit of a criminal defendant. Because "[v]ague laws invite arbitrary power . . . the most basic of due process's customary protections is the demand of fair notice,"[221] so that where a law fails to give "ordinary people . . . fair notice of the conduct it punishes,"[222] it is unconstitutionally vague and therefore void. Vagueness is certainly a real and pressing concern in G-RAP cases, given that the program rules were shot through with imprecise language, contradictory provisions, and directives subsequently interpreted as prescriptive but that were drafted in such a manner as to render them amendable to being interpreted as suggestions or recommendations. Of greater concern, however, are the types of considerations raised by the Mistake of Law doctrine. Under this doctrine "the criminal statute under which the defendant is being prosecuted cannot constitutionally be applied to the defendant without violating due process of law, where government officials have misled the defendant into believing that his conduct was not prohibited."[223] Such a defense

> is available if the defendant proves: 1) that he was assured that the conduct giving rise to the conviction was lawful; 2) that the assurance was given by a 'government official,' i.e., "a public officer or body charged by law with responsibility for defining permissible conduct with respect to the offense at issue"; and 3) that, based on the totality of the circumstances, reliance upon the advice was reasonable and in good faith.[224]

As with the Entrapment Defense, it is unclear whether a Mistake of Law Defense would be a viable defense given the peculiar circumstances of the G-RAP investigation. But it is clear that, as with the Entrapment Defense, the public policy considerations underlying the Mistake of Law Defense are strongly implicated in the G-RAP matter.

Military recruiting is a complex and highly regulated activity. In the Army National Guard, Recruiting and Retention NCOs have their own Military Occupational Specialty (MOS)—79T. The Soldier's Manual for this MOS is a 295-page document.[225] Qualifications for the award of this MOS are rigorous: Soldiers must be NCO rank (Sergeant E-5 or higher); they must successfully complete the five-week long ARNG Non-Career Recruiter Course (805B-SQI-4) at the Army National Guard's Strength Maintenance Training Center (SMTC),[226] hosted by the National Guard Professional Education Center (NG-PEC) at Camp Robinson, Arkansas; they must have successfully completed 18 months service as a full-time ARNG recruiter; as well as meeting other requirements.[227] The SMTC

[220] Heien v. North Carolina, 574 U.S. 54, 70 (2014) (Kagan, J. concurring).

[221] Sessions v. Dimaya, 138 S. Ct. 1204, 1223, 1225 (2018) (Gorsuch, J., concurring).

[222] *Id.*, at 1228 (quoting Johnson v. United States, 576 U. S. 591 (2015)).

[223] Miller v. Commonwealth, 492 S.E.2d 482, 487 (Va. Ct. App. 1997) (quoting Jeffrey F. Ghent, Annotation, *Criminal Law: "Official Statement" Mistake of Law Defense*, 89 A.L.R.4th 1026 (1991)).

[224] Branch v. Commonwealth, 593 S.E.2d 835, 837 (Va. Ct. App. 2004).

[225] Department of the Army, STP 12-79T25-SM-TG, *SOLDIER'S MANUAL AND TRAINER'S GUIDE FOR MOS 79T SKILL LEVELS 4/5 RECRUITING AND RETENTION NCO (Army National Guard)* (Apr. 2004).

[226] *See* 805B-SQ14 NON-CAREER RECRUITER, STRENGTH MAINT. TRAINING CTR., https://smtc.dodlive.mil/courses/805b-sq14-non-career-recruiter/ (last visited Jan. 3, 2020).

[227] ARNG Strength Maintenance Operational Memo (SMOM) 18-026, Assignment and Reclassification Requirements for 79T Recruiting and Retention NCO (Amended 26 Janu-

offers at least 12 courses in addition to course 805B-SQ14 mentioned above,[228] including courses on Military Entrance Processing Station (MEPS) counseling;[229] recruiting-related automation systems;[230] officer recruiting;[231] pre-command courses for recruiting battalion and company commanders;[232] personnel retention;[233] and others.

Given the complexity and challenges of military recruiting, as evinced by the extensive regulations and training programs noted above, it is self-evident that the short, 35-minute online training course provided by Docupak was simply not adequate to prepare Recruiting Assistants to perform their duties, so that it was envisioned that "[t]he triad of RRNCO, RA, and potential Soldier [would] work closely together to process the potential Soldier and move them towards accession."[234] Recruiting Assistants had a right to look to the full-time recruiters, ARNG publications, and other authorities to for guidance on how to perform their duties, and had a right to rely upon such guidance, whether given explicitly or implied by the acquiescence of these authorities in the Recruiting Assistant's actions. Where Recruiting Assistants emulated conduct celebrated in military publications, or where it was reasonably apparent that full-time recruiters and others were aware how the Recruiting Assistant was conducting himself and made no objection, then the Recruiting Assistant should have been deemed to be justified in taking the Recruiter's instructions to the RA or his acquiescence in the RA's actions that are not facially immoral, unethical, or illegal—as "assur[ance] that the conduct . . . was lawful,"[235] given the authoritative training received by those full-time Recruiters and the Recruiter's overall responsibility for the execution of the recruiting program.

VI. G-RAP and the "Mortal Enemy of Military Justice"—Unlawful Command Influence

The harm caused to large numbers of innocent Soldiers in the course of Task Force Raptor's G-RAP investigation is a serious concern in itself, but it is also illustrative of the wider problems inherent in the administration of law and order in the military context. Some of the problems that tainted the G-RAP investigation—problems like tunnel vision, undue faith in eye witness testimony, and obstinate belief in the guilt of defendants even in the face of strong exculpatory evidence[236]—are ubiquitous risks inherent in

ary 2018), ARNG Strength Maintenance Division (Jan. 26, 2018).

228 *See* Course Catalog, Strength Maint. Training Ctr, https://smtc.dodlive.mil/2015/06/18/smtc-course-catalog/ (last visited Jan. 3, 2020).

229 *Id.*, 805B-ASIV7 ARNG MEPS Guidance Counselor.

230 *Id.*; 805B-F16 (NG) ARNG Recruiting and Retention Automation NCO.

231 *Id.*; 805B-F17 (NG) ARNG Officer Strength Manager (OSM) Course.

232 *Id.*; 805B-F21 ARNG Recruiting Pre-Command [battalion] and 805B-F31 ARNG Recruiting Company Pre-Command.

233 *Id.*; 805B-F24 ARNG Unit Retention NCO Course.

234 *How does G-RAP work?*, G-RAP Rules.

235 Branch v. Commonwealth, 593 S.E.2d 835, 837 (Va. Ct. App. 2004).

236 A noteworthy example of this problem in the G-RAP context is the case of MSG Wilson, a Colorado Army National Guard Soldier charged with G-RAP related fraud, mentioned above. When Federal prosecutors declined to prosecute, CID took Wilson to state prosecutors and convinced them to prosecute. In a humiliating defeat for both CID and the state prosecutors, a Colorado jury acquitted MSG Wilson outright on all counts. But, as CBS News' *60 Minutes* observed, that "is not always good enough for the Army:" challenged on Wilson's acquittal, then-Director of the Army Staff Lt. Gen. Gary Cheek responded that "[w]e have our Army values that we're part of. So if you are found not guilty in a court of law, that really simply means-- that you are not guilty of a crime but you have done something unethical within the military for which you could receive an administrative action." In other words, *just because you're not guilty doesn't mean you're not guilty*. David Martin, *Backlash from Army's Largest Criminal Investigation*, CBS NEWS (May 22, 2016), https://www.cbsnews.com/news/60-minutes-backlash-from-army-largest-criminal-investigation/. *See also* Dennis Chapman, *LTG Cheek: Just Because You're Not Guilty Doesn't Mean You're Note*

all law enforcement contexts. But owing to the unique nature of the Armed Forces, the military justice system carries its own special challenges beyond those common in other law enforcement contexts. One of those dangers is "the mortal enemy of military justice,"[237] Unlawful Command Influence (UCI)—particularly UCI emanating from political interference in the administration of military justice.

Like other people, senior military officers loathe controversy, dread criticism, and crave public approval. Unlike most people, however, the assignments and promotions of senior military officers require Senate confirmation. This renders these officers particularly vulnerable to pressure to make charging and adjudicatory decisions consistent with the desires of powerful politicians. As one observer has noted,

> [b]etween public statements, media attention, and congressional action (both enacted and proposed), commanders can read the writing on the wall—and that writing says to obtain convictions. It becomes safer to simply refer charges in nearly all cases, even if doing so is objectively imprudent.[238]

In recent years this phenomenon has played out mostly publicly in the context of the problem of military sex assault. In that context, one expert noted

> "the need to obtain 'high prosecution and conviction rates has never been higher for a convening authority' and that UCI occurs because convening authorities have "pressure to demonstrate progress on all the metrics.' In an interview regarding UCI with two army brigade commanders who requested to remain anonymous, one stated that if a sexual assault or sexual harassment case comes across his desk, even if he thinks it is not a good case, he feels he should send it forward, err on the side of the victim, and hope that justice is served in the end. He stated that there is 'indirect UCI from the top right now.' The second brigade commander contended that the hard part is when he is told by someone that there is no case, but everyone looks to him to make the decision, and he will be scrutinized for not seeming to take the matter seriously enough if he does not opt for a court-martial. He stated that there is a lot of indirect pressure, and his concern is that a statistic will show that he did not send enough cases forward, that his name will be out there as 'someone who doesn't get it,' and that if he does not believe the victim, then he is further victimizing her. These commanders' comments and their request to remain anonymous show that UCI is a problem at ranks below the GCMCA, as commanders are fearful to make the unpopular decision to not refer a sexual assault case when they truly believe referral is not appropriate."[239]

By no means is the problem of politically motivated UCI limited to sex assault cases; however, in fact, such political intervention greatly aggravated the scope of injustice inflicted by the Task Force Raptor investigation. Senator McCaskill herself noted that G-RAP program abuse had "the potential to become a stain on

Guilty, LINKEDIN (May 24, 2016), https://www.linkedin.com/pulse/ltg-cheek-just-because-youre-guilty-doesnt-mean-dennis-chapman/.

237 United States v. Thomas, 22 M.J. 388, 393—94 (C.M.A. 1986).

238 Greg Rustico, Note, *Overcoming Overcorrection: Toward Holistic Military Justice Reform*, 102 VA. L. REV. 2027, 2046 (2016).

239 Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV 129, 149 (2014) (quoting Professor Elizabeth Hillman and two anonymous Army brigade commanders).

thousands of recruiters and National Guard members who do their jobs so well and so honorably."[240] Regrettably, this would prove a self-fulfilling prophesy, due in no small part to Senator McCaskill's own previous interventions into the military justice system, which left no doubt that she would punish any senior officer that handled a criminal case in a manner not to her satisfaction. A few months earlier, in the spring of 2013, McCaskill blocked the appointment of Lt. Gen. Susan Helms to the position of Vice Commander of the U.S. Air Force Space Command.[241] Helms, a former astronaut with five space flights to her credit,[242] incurred McCaskill's ire by overturning the sex assault conviction of an Air Force Captain at Vandenberg Air Force Base in February 2012; Helms took the action because as the approving authority she did not believe that the charges had been proven beyond a reasonable doubt.[243] Although "Helms found him guilty of the lesser offense of committing an indecent act"[244] and he "was punished and dismissed from the U.S. Air Force,"[245] McCaskill was not mollified; her appointment blocked, Lt. Gen. Helms applied for retirement after 33 years of service.[246] The destruction of Lt. Gen. Helms' career was not the first such action by Senator McCaskill in the months preceding her committee's hearing on G-RAP. Another involved the 2013 case of Air Force Lt. Col. James Wilkerson, who had been convicted at Court Martial of aggravated sexual assault after being accused of groping a sleeping houseguest at his home, and being sentenced to forfeiture of all pay and allowances, dismissal, and confinement for one year.[247]

On February 26th, 2013 Lt. Gen. Craig A. Franklin, Commander, Third U.S. Air Force, overturned the conviction and returned Lt. Col. Wilkerson to full duty.[248] Outraged, Senator McCaskill lashed out at Lt. Gen. Franklin. Characterizing his decision as "ignorance, at best, and malfeasance, at worst," McCaskill urged Secretary of the Air Force Michael Donley to "undertake an immediate review of his conduct and consider removing him from his leadership position."[249] Lt. Gen. Franklin responded with a vigorous and detailed four-page rebuttal of McCaskill's charge. Characterizing the Wilkerson case as "the most difficult court case that I have ever faced as a convening authority," he then set forth a very detailed and comprehensive 18-point recitation of the reasons for his decision. Asserting that while "it would have been exceedingly less volatile for the Air Force and for me professionally, to have simply approved the finding of guilty[,] [t]his would have been an act of cowardice on my part and a breach of my integrity."[250] Lt. Gen. Franklin concluded that "after my lengthy review and

[240] *Fraud and Abuse in Army Recruiting Contracts: Senate Hearing 1132-377, Before the Subcomm. on Fin. Contracting and Oversight of the Comm. on Homeland Sec. & Gov't Affs.*, 113th Cong. 2 (2014) (statement of Senator Claire McCaskill).

[241] Bill Lambrecht, *McCaskill blocks astronaut's promotion in drive to curb sexual assaults*, St. Louis Post-Dispatch (May 7, 2013), https://www.stltoday.com/news/local/govt-and-politics/mccaskill-blocks-astronaut-s-promotion-in-drive-to-curb-sexual/article_4a706ed3-27a7-5c48-81e0-fbbd5a1397bd.html.

[242] Erik Gregersen, *Susan Helms: American Astronaut and Air Force Officer*, Encyclopedia Britannica, https://www.britannica.com/biography/Susan-Helms (last visited Jan. 4, 2020).

[243] Jason Rhian, *Lt. Gen. Helms Departs Vandenberg Amid Controversy After Promotion Blocked*, Spaceflight Insider (Feb. 11, 2014), https://www.spaceflightinsider.com/space-centers/vafb/lt-gen-helms-departs-vandenberg-blocked-promotion-amid-controversy/.

[244] David Alexander, *Female U.S. general who overturned sex-assault ruling to retire*, Reuters (Nov. 8, 2013), https://fr.reuters.com/article/us-usa-defense-sexualassault-idUKBRE9A800A20131109.

[245] Rhian, *supra* note 243.

[246] Rhian, *supra* note 243.

[247] Nancy Montgomery, *Senator asks AF leaders to consider firing general in Wilkerson case*, Stars & Stripes (Mar. 6, 2013), https://www.stripes.com/news/air-force/senator-asks-af-leaders-to-consider-firing-general-in-wilkerson-case-1.210700.

[248] Letter from Lt. Gen. Craig A. Franklin to Michael B. Donley, Sec'y of the Air Force (March 12, 2013).

[249] Montgomery, *supra* note 247.

[250] Franklin, *supra* note 248.

deliberation of the evidence, I had reasonable doubt as to Lt Col Wilkerson's guilt," and that therefore his "court-martial action to disapprove findings and to dismiss the charges was the right, the just, and the only thing to do."[251] Lt. Gen. Franklin lost his battle with Senator McCaskill. In December 2013, the Air Force removed a sex assault case from his jurisdiction and referred it to another officer for review when Franklin declined to prefer charges following an Article 32 hearing,[252] and Franklin ultimately retired as a Major General due to insufficient time in grade as a Lieutenant General.[253]

None of this could have been lost upon the senior Army leaders facing Senator McCaskill before her committee in February 2014. Not one to rely on subtlety, however, McCaskill made her expectations of the Army clear when on February 27th 2014, she sent the Secretary of the Army a sprawling six-page letter demanding a vast amount of data. Among the items requested was information about "the Army's efforts to ensure that those who were responsible for detecting and preventing fraud, but failed to do so, are held accountable."[254] Further requested was "[t]he identity of the official(s) responsible for the [certain] decisions or duties, and any adverse action taken, if any, to hold these individuals accountable for those decisions or that performance,"[255] and "[a] list of tools and actions the Army has to hold individuals accountable who cannot or will not be prosecuted, and the number of times each has been used."[256]

In light of Senator McCaskill's prior interventions into military disciplinary matters, it is inconceivable that her zeal to hold Army National Guard Soldiers "accountable" for the failures of the G-RAP program would have failed to have a profound impact upon how the Army perceived G-RAP participants, how it approached its investigation of them, how it has treated G-RAP participants to date, and that this impact adversely affected many innocent Soldiers.

VII. Conclusion

As one commentator has noted, "a climate has developed in the military justice system that is decidedly antidefendant."[257] The risk of anti-defendant bias is present in any system of adjudicating crimes or infractions, but that risk is particularly pronounced in the military context. In the civilian criminal justice system, the prosecution, the defense, the court, the jury, and the police are all separate entities that are to some degree autonomous; but the military justice system is a vertically integrated structure in which all of the participants—even, in many cases, the defense counsel—are members of the same overarching organization, and many of whom are even answerable to the same chain of command. As concerning as this arrangement is from the perspective of the presumption of innocence, it is aggravated even further by the fact that the structure depends upon political actors with agendas and priorities all their own for its budget and operating authorities; even worse, from the perspective of the defendant, is the fact that leaders at the apex of this structure—the senior leaders making charging and disciplinary decisions—are themselves dependent upon these very same political actors for their own promotion and advancement. As a result, the system of military discipline and justice is at risk of influence, manipulation, and interference in

[251] Franklin, *supra* note 248.

[252] Nancy Montgomery, *Air Force removes Lt. Gen. Franklin from sexual assault case*, STARS & STRIPES (Dec. 18, 2013), https://www.stripes.com/news/air-force-removes-lt-gen-franklin-from-sexual-assault-case-1.258268.

[253] Nancy Montgomery, *Franklin will retire as a two-star, officials say*, STARS & STRIPES (Jan. 9, 2014), https://www.stripes.com/news/franklin-will-retire-as-a-two-star-officials-say-1261202.

[254] Letter from Senator Claire McCaskill to John M. McHugh, Sec'y of the Army (Feb. 27, 2014).

[255] *Id.*

[256] *Id.*

[257] Rustico, *supra* note 238, at 2073.

the service of interests and agendas far removed from the basic function maintaining good order and discipline within the force that the military justice system serves. In the great bulk of instances, the gravitational pull of these external interests distorts the trajectory of the system in ways detrimental to the rights of defendants. This occurred in Task Force Raptor's G-RAP investigation.

When extrinsic political actors exerting influence over the military determine that their agendas or the interests of their constituents are best advanced by demanding convictions or "accountability" for defendants in particular cases or categories of cases, Commanders "[respond] to the incentives the system has constructed to motivate them."[258] The impact on the integrity of the military justice system can be profoundly destructive. Left unchecked, it can produce what one commentator has characterized as "a state run amok,"[259] a system that "has decided that, since its unique function is the power to punish, it must pursue punishment as an intrinsic good, independent of desert . . . transforming itself into a 'punishment machine.'"[260]

Under the goading of zealous political actors, the Army's investigatory machinery did run amok in its investigation of G-RAP. That a number of G-RAP participants did abuse the program and commit fraud, is not, and cannot be, denied; but in its single minded zeal to find and punish these Soldiers, the Army damaged the careers, finances and reputation of hundreds or even thousands of innocent and loyal Soldiers—men and women who, collectively, made a great and successful effort to solve the Army National Guard's manpower shortage at a critical juncture in the Army's history.

[258] Carlon, *supra* note 218, at 1117.
[259] Carlon, *supra* note 218, at 1118.
[260] Carlon, *supra* note 218, at 1118.

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