

TOP TEN ISSUES WITH THE NATIONAL GUARD G-RAP BONUS INVESTIGATIONS & PROSECUTIONS

Unfair investigations based on flawed assumptions, guilt by association and political pressure.

The G-RAP accusations and investigations have now lingered for over five years. A minimum of 90,430¹ National Guard Soldiers (88% of all G-RAP participants) have been subjected to investigations as part of a massive dragnet to recover bonuses². 125 Soldiers have been prosecuted in Federal or State Courts; at least 2633 Soldiers remain under investigation³. While a handful of unscrupulous participants took advantage of the ever changing rules of this contractor-run program, those cases were adjudicated years ago. What the Army CID is now doing, is nothing more than pursuing anyone whose G-RAP tenure spanned the years with the most rules' changes in an effort to prove up the Army's exaggerated fraud estimate.

It's hard to pick the Top 10 issues with G-RAP. The items below represent issues apparent in almost every case. This list omits, but hardly overlooks, such things as inappropriate command pressure to participate in G-RAP, forcing accused Soldiers to undergo DNA collection⁴, active surveillance of National Guard Soldiers by Army CID⁵, coercion to make reimbursements to the Army⁶ in lieu of punishment and other notable violations of Soldier's rights.

1. GUILT BY ALGORITHM.

Auditors, instead of seasoned law enforcement professionals, launched the G-RAP investigations. Rather than using any type of proper legal standard like probable cause, the Army Audit Agency assembled lists of Soldiers branded "high risk" by the auditors. The definition for "High Risk" was listed as "an inability to follow the rules." Because the rules changed 60 times in seven years, almost everyone who successfully participated in G-RAP became a target. Even Soldiers connected to the "high risk" Soldiers were in turn investigated. This self-perpetuating, system of guilt by association crushes any notion of justice and the rule of law. Years later, many of

¹ Letter to Representative Mike Coffman from Daniel M. Quinn, Chief of Staff, USACIC.

² The U.S. Army and U.S. Department of Justice consistently refers to G-RAP payments as bonuses in sworn testimony, official documents and court filings. The payments were paid by a contractor directly to the Soldier and IRS form 1099 was issued to every participant. Payments were not processed by DFAS and did not appear on a LES. Finally, Congress did not authorize a bonus related to this program. Nevertheless, Government officials consistently refer to G-RAP payments as bonuses, perhaps wishing it were true so that legal recoupment would be possible.

³ Per letter to Rep Coffman.

⁴ Via cheek swabs.

⁵ Related to an allegation of fraud which if true occurred years prior.

⁶ Possibly an illegal augmentation of appropriations in violation of the Miscellaneous Receipts statute, 31 USC §3302.

these Soldiers still are under the cloud of a CID investigation and are being forced to defend (at great financial and emotional cost) their names and careers.

2. COMPULSORY INTERROGATIONS.

Federal CID agents lack any authority to compel National Guard Soldiers (or veterans) to submit to interrogations. Unfortunately, neither CID nor most Guard Soldiers and veterans understand that they cannot be forced to appear or answer questions from Army-dispatched agents. CID agents repeatedly violate this bright line legal standard. Worse yet, some Guard Commanders aren't sufficiently knowledgeable about the law to protect their Soldiers. Once confronted with apparent military authority, many individuals, honestly believing they did nothing wrong, provide answers, later cherry picked and twisted to supposedly show guilt. The unfortunate individual is left having to prove he or she didn't say something or that the statement was taken out of context.

3. INVESTIGATORS WITH A PERSONAL FINANCIAL INCENTIVE.

The CID Investigators pursuing G-RAP allegations include Army Reserve CID Agents voluntarily on active duty orders. At a minimum, the perception exists that the Reserve Agents have a financial incentive to perpetuate the investigations. The longer the investigations continue, the longer these agents remain employed. Further compounding this problem is the very logical assumption that few agents would volunteer for active duty if it meant a pay cut from their civilian employment.

4. VIOLATIONS OF THE POSSE COMITATUS ACT.

National Guard Soldiers not mobilized into federal service, are like any other civilian citizen under the law. The Posse Comitatus Act prohibits federal military personnel from investigating and enforcing the law. Yet, that is exactly what is happening. The PCA is a federal criminal offense punishable by a term in prison. In the G-RAP investigations, federal military agents are investigating allegations of criminal violations by Guard Soldiers, who are the same as civilians under the law⁷. This is a clear violation of the PCA. Unfortunately, this flawed law requires the same prosecutors who are prosecuting Soldiers to levy charges against the same agents investigating the cases they prosecute.

5. TRAMPLING THE STATUTE OF LIMITATIONS.

In our system of justice, a statute of limitations exists to limit the Government's ability to bring charges so remote that the defendant can't reasonably mount an effective defense. In G-RAP cases, the Government is circumventing the statute of limitations with a World War II era tolling statute. Most applicable criminal offenses have a 5 year statute of limitations. Since G-RAP ended in 2012 the statute of

⁷ See *Perprich vs. Department of Defense*, 496 U.S. 334 (1990).

limitations has long expired in most cases. However, in G-RAP investigations and prosecutions the Government is relying on the Wartime Suspension of Limitations Act⁸ to continue to bring criminal cases. First enacted in 1948, the WSLA is designed to protect the Country from fraud during times of war. This law likely made sense during World War II, the Korea and Vietnam conflicts. However, the nature of warfare has changed. The current war against terrorism and global extremist groups will continue indefinitely. Relying on the outdated WSLA during today's conflicts effectively terminates the deeply rooted equitable concept of a statute of limitations.

6. SPENDING \$40 MILLION -TO COLLECT \$3 MILLION.

Our Government has spent at least an estimated \$40 million dollars⁹ to investigate Soldiers. The ensuing recoupment actions and prosecutions have recovered, at most \$3 million dollars¹⁰. Army CID agents have repeatedly conducted full field investigations to determine if a Soldier's single \$2,000.00 bonus was righteous¹¹. In an era of constrained defense spending with persistent and emerging global terrorist threats, this massive boondoggle sets a new record for fraud, waste and abuse. The CID agents' limited time and resources would be much better spent working to prevent the next Fort Hood terrorist attack.

7. INACCURATE TESTIMONY TO CONGRESS & POLITICAL PRESSURE

The entire G-RAP controversy is based on inaccurate and irresponsible testimony to Congress. During Senate hearings chaired by Senator Claire McCaskill¹², Army General Officers testified that the total G-RAP fraud could be as high as \$99 million¹³. This estimate was wildly inaccurate¹⁴. To date, the Government has only collected \$3 million in fraudulent payments. Senator McCaskill, immediately branded these Soldiers as criminals despite their Constitutional right to be presumed innocent¹⁵. Many have speculated that the hearings and estimates of widespread fraud were designed to embarrass the National Guard during budget battles. Others suggest that it was an attempt to appease this powerful member of the Senate Armed Services Committee and self styled "accountability advocate." Still others contend that the hearings were an attempt to shift focus from sexual assaults in the military. Whatever the reason, the McCaskill hearing set off a chain of events

⁸ 18 USC §3287

⁹ This is a conservative estimate which includes the personnel cost associated with bringing the USAR agents onto duty status.

¹⁰ This figure is also an estimate based on all federal cases reported in the Pacer.gov system and media reports from around the country.

¹¹ At least one National Guard officer is currently under indictment for a single G-RAP recruitment.

¹² United States Senate Hearing: Fraud and Abuse in Army Recruiting Contracts, February 4, 2014.

¹³ Id.

¹⁴ It appears that this testimony has never been revised, amended or updated to correct the record.

¹⁵ Id.

abrogating the presumption of innocence justice toward service members and veterans.

8. AT LEAST 60 CHANGES TO THE “RULES.”

In the eyes of CID, violations of the program “rules,” indicates intentional fraud worthy of criminal investigation. However, the G-RAP “rules” changed at least 60 times during the life of the program¹⁶. Understanding the “rules” of G-RAP at any given point in time requires a detailed analysis based on a significant review of multiple documents¹⁷. In the vast majority of cases, if the Soldier violated the “rules,” it is more likely due to confusion rather than a deliberate desire to cheat the system. With unrelenting intensity, CID doesn’t investigate an alleged crime; rather, CID gathers slanted “evidence” to prove that a crime was committed. CID, in fact, has been responsible for elevating an inability to follow the rules of a program run by a private contractor to the level of a crime. One example: at various times full time members of the National Guard were authorized to participate in G-RAP, at other times they were ineligible. If a Soldier entered G-RAP when full time members were allowed, but submitted data for payment months later when full time members were not allowed, that Soldier is investigated for fraud.

9. “SPHERE OF INFLUENCE” AND OTHER VAGUE GUIDANCE.

Soldiers participating in G-RAP received instruction to recruit from their “sphere of influence.” This term was never defined. It’s unclear if the intent of this language was to limit recruitment to pre-existing relationships. Regardless of NGB’s intent, the Soldiers received a very different message. For example, once hired by Docupak, Soldiers were provided marketing items such as t-shirts with the message “ask me about the National Guard.” None of the marketing items provided would have been necessary to recruit people already known to the Soldier. Now, these same Soldiers are investigated and some prosecuted for recruiting outside their sphere of influence. Likewise, Soldiers were told that they “shouldn’t” wear their uniform when conducting recruiting activities. If this were truly a prohibited action worthy of investigation, the “rule” would have been written as “you are prohibited from wearing your uniform.”

10. “I DON’T REMEMBER = GUILTY.”

When CID agents track down and contact recruits many years after their enlistment into the National Guard, most don’t remember the details of their interaction with the recruiting assistant. To the CID agents, this means the RA committed misconduct. The alternative explanation is unfathomable to the agents: the recruit, 7 years later, just doesn’t remember. This is especially problematic since Government prosecutors use this lack of memory to charge the Soldier with

¹⁶ See Agent’s Investigation Report, CID Special Agent Julie Thurlow, November 22, 2013.

¹⁷ National Guard Bureau changed the rules via a contract change order sent to Docupak.

Aggravated Identity Theft¹⁸, a charge that carries a mandatory minimum term of prison sentence of two years.

“EXTRA CREDIT:” CID KNEW ABOUT ALLEGED FRAUD FOR FIVE YEARS BEFORE TAKING ACTION.

On May 22, 2007, five years before G-RAP was shut down, Agents from Army CID, Air Force OSI, and Defense Criminal Investigative Service (DCIS) met with Docupak to discuss potential fraud in the program¹⁹. A representative of the United States Department of Justice²⁰ was also in attendance. The agents specifically instructed Docupak not to notify the State Adjutant Generals, National Guard Bureau, or the contracting officer regarding alleged fraud. This effectively cut off any ability to clarify confusing rules and or enhance fraud prevention measures. Importantly, it also prevented Governors and Adjutants General to execute their Constitutional duty of regulating their National Guard force and apply appropriate discipline²¹. Likewise, notification the responsible contracting officer at NGB would have triggered remedial action. Instead, the CID sat on this information for five years, causing a relatively minor amount of confusion to escalate into what we have now – another major bonus scandal ensnaring thousands of junior Soldiers facing accusations.

CONCLUSION

Few Soldiers have the financial resources to mount a proper defense to federal criminal charges. Faced with the possibility of prison time, many take a plea bargain to avoid the risk of prison, financial ruin or deepening emotional trauma to themselves and their families. Even if the accused Soldiers are not prosecuted, the collateral consequences seem never ending. The investigation will continue to haunt them for years to come. Security clearances will be revoked or suspended, and the Government will initiate proceedings to “debar” the Soldier from future employment as a government contractor. Eventually, the case file will be forwarded to the State National Guard headquarters for military justice or administrative action. The range of administrative sanctions includes separation boards, official reprimands and being required to rebut CID’s flawed conclusions to a promotion review board. The administrative flag on their personnel file will continue until all military administrative actions are complete²². Finally, many of

¹⁸ 18 USC § 1028A.

¹⁹ 2014 Inspector General Report, page 40, paragraph g, and footnote 142.

²⁰ Presumably a licensed attorney.

²¹ The Governor’s and TAG’s Constitutional authority to regulate and discipline Guard members included the full time recruiting force in each state, some of whom were suspected of misconduct. These Soldiers operate under the exclusive military jurisdiction of the relevant State Military Code of Justice.

²² A “flag” prevents any favorable action including re-enlisting, awards, and promotions. The flag does not prevent orders to deploy overseas (again). Flags as a result of G-RAP investigations have been in place for four or more years at this point.

these same Soldiers, never prosecuted in a court of law will have a federal criminal history created as a result of being investigated, “titled” and “founded” by CID.

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