Beyond Snowden

Understanding the Military Whistleblower Protection Act

BY LIEUTENANT COLONEL AARON JACKSON

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In today's military environment, the word "whistleblower" is commonly used but rarely understood. Hearing it may invoke images of the twenty-something intelligence analyst who, in 2013, leaked highly classified information from the **National Security Agency**. This understanding of the "government whistleblower," however, only scratches the surface. Whistleblowers go far beyond **Edward Snowden** and touch nearly every organization in the armed forces. In 2018, the Air Force alone received 369 whistleblower cases—a sixty percent increase in annual cases since 2015.[1] The rising frequency, high-level visibility, and criminal implications of whistleblower cases demand the attention of every JAG office and demonstrate the need for judge advocates to maintain a firm grasp on this important area of law. As a result, this article provides a quick guide for attorneys facing military whistleblower cases – in the forms of restriction and reprisal – to better understand this complex, fascinating, and growing area of law.

WHAT CONSTITUTES "RESTRICTION"

The Military Whistleblower Protection Act (MWPA) provides the legal foundation for whistleblower cases in the Department of Defense (DoD) and protects against two things: reprisal and restriction.[2] Turning first to "restriction," the more basic of the two concepts, the MWPA states, "No person may restrict a member of the armed forces in communicating with a Member of Congress or an Inspector General."[3] From a high-altitude perspective, this provision ensures that members of the armed forces feel safe communicating with his or her congressperson or an Inspector General (IG), two entities with a specific interest in ensuring the health and stability of the armed forces. Individuals who act to prevent or deter communication with these entities endanger the greater organization by limiting one's ability to report and correct issues.[4]

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There are several important things to remember regarding restriction cases. **First**, restriction within the MWPA only protects communications with an IG or Congress. Efforts to deter engagement with other persons or entities, while possibly an abuse of authority, does not amount to restriction under the MWPA.[5] **Second,** the MWPA only protects *lawful* communications with the Inspector General or Congress.[6] Unlawful communications, such as releasing classified materials to non-classified sources, is not protected by the MWPA.[7] **Third**, restriction includes attempts to restrict. That the military member ultimately communicated with an IG or member of Congress does not negate earlier efforts to restrict, and the offender may still be found in violation of the MWPA. **Fourth**, in addition to direct actions taken to restrict a member from communicating with an IG or Congress, restriction also includes any actions that produce an unnecessary "chilling effect."[8] While someone may not directly impede an individual from communicating with an IG or Congress, indirect actions that reasonably deter one's ability to freely engage with either entity may still amount to restriction.[9] **Fifth**, restriction is not a specific intent crime. Restriction includes negligent communications and/or behavior that would lead a reasonable person to believe they were being restricted.[10]

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There is no bright-line test for analyzing restriction cases. Rather, **Air Force Instruction 90-301** provides the following two elements to consider: (1) How did the responsible management official (RMO)[11] limit or attempt to limit the member's access to an IG or a Member of Congress?; and (2) Would a reasonable person, under similar circumstances, believe he or she was actually restricted from making a lawful communication with an IG or a Member of Congress based on the RMO's actions?[12] Investigating Officers (IOs) and advising/reviewing attorneys must consider the totality of the circumstances to determine whether the preponderance of the evidence demonstrates that an individual was either directly or indirectly restricted from contacting the IG or Congress. If a reasonable person would have felt restricted under similar circumstances, the allegation should be substantiated.

While restriction considers efforts to restrict prior to a member's lawful communication with the IG or Congress, reprisal protects military members once a protected communication has been made.

"REPRISAL" & THE FOUR-PART ELEMENTS TEST

Reprisal is—by far—the most common whistleblower allegation.[13] The MWPA states, "No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for making or preparing or being perceived as making or preparing [a protected communication]."[14] While restriction considers efforts to restrict prior to a member's *lawful* communication with the IG or Congress, reprisal protects military members once a *protected* communication has been made. Reprisal generally exists any time a member of the armed forces faces negative repercussion for making a protected communication.[15] To assist IOs and judge advocates in analyzing reprisal allegations, the Air Force Complaints Resolution Program Supplemental Guide (AFCRPSG) provides the following four-part "elements test"[16]:

Element 1, Protected Communication (PC):

Did Complainant make or prepare to make a protected communication, or was Complainant perceived as having made or prepared to make a PC?[17]

There are several points to remember for this element. Unlike restriction, reprisal does not focus solely on communications with the IG or Congress. PCs within the MWPA's reprisal provision are much more extensive and include, among others, communications with DoD audit, inspection, investigation, or law enforcement organizations; court-martial proceedings; and/or statements provided to members of the chain of command.[18] While all lawful communications with the IG or Congress are considered PCs,[19] communications with other identified agencies/organizations must specifically identify violations of law or regulation; gross mismanagement, waste of funds, abuse of authority; or dangers to public health or safety, or threats to kill or cause serious bodily injury or damage to property.[20] Not all communications are considered PCs for reprisal purposes,[21] but the MWPA casts a fairly broad net.[22]

Element 2, Personnel Action (PA):

Was an unfavorable personnel action taken or threatened against Complainant, or was a favorable personnel action withheld or threatened to be withheld from Complainant?[23]

AFI 90-301 defines a PA as "[a]ny action taken on a member of the armed forces that affects or has the potential to affect that military member's current position or career…."[24] It is important to remember that PAs include unfavorable and favorable actions. Examples of unfavorable PAs may include administrative action (e.g. Letters of Reprimand[25]), nonjudicial punishment, and/or removal from a position.[26] Withholding favorable PAs, such as removing a member's award package from consideration or halting a favorable change in position, are also included in the MWPA.[27] Favorable PAs are particularly tricky, as an individual may claim some right to a favorable action in which he or she was never entitled and/or considered. As a result, judge advocates must carefully assess whether the evidence demonstrates that a favorable action was actually withheld as a result of an earlier PC. Also, do not forget that PAs also include threats to take a PA.[28] That the PA did not actually occur—or was at some point rescinded—is irrelevant so long as the threat was made.

Element 3, Knowledge:

Did the responsible management official(s) know that Complainant made or prepared to make protected communication(s) or perceive Complainant as having made or prepared to make protected communication(s)?[29]

The alleged RMO must know that the member made a PC prior to administering a PA. An individual cannot reprise against someone if they never knew the person made a PC. While an inappropriate PA without RMO knowledge may still amount to abuse of authority,[30] it is not reprisal. It is also important to remember that the military member does not have to actually make a PC to satisfy the knowledge element. Knowledge of an individual's preparation to make a PC, alone, is enough so long as the RMO knew of such preparation.[31] Further still, preparation is not actually necessary, as the RMO need only perceive that the individual made—or prepared to make—a PC. That such communication or preparation never actually took place is therefore immaterial in determining whether this element is satisfied.

Of the four reprisal elements, causation is the most complex and will likely require the most time and attention for the IO and advising attorney.

Element 4, Causation:

Would the same personnel action(s) have been taken, withheld, or threatened absent the protected communication(s)?[32]

Of the four reprisal elements, causation is the most complex and will likely require the most time and attention for the IO and advising attorney. It is important to remember that

reprisal/restriction cases adopt the preponderance of the evidence standard, and it is here that IOs will most likely seek your advice. There are many different ways to explain this element to the (often perplexed) IO. The easiest approach is to merely ask the IO what he or she thinks more likely than not happened based on the evidence. If the IO believes that an RMO more likely than not took a PA based on a member's prior PC, the causal element has been satisfied. In most cases, there is some stated reason (other than reprisal) for taking a PA against the complaining member, as there are often other underlying issues that contribute to the decision. In many cases, the underlying factors demonstrate that the PA was appropriate, leading the IO to reasonably conclude that the PA would have taken place regardless of any PC. Such cases do not demonstrate reprisal based on the lack of causation (i.e. the PC did not cause the PA). If, however, the IO concludes that, despite the underlying factors, what most likely tipped the scales in deciding to administer a PA was the member's prior PC(s), the causation element has been met.

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To reach a conclusion on the causation element, the IO *must* specifically address four factors within the Report of Investigation (ROI): Reasons, Timing, Motive, and Disparate Treatment.[33] What were the *reasons* for the RMO taking a certain PA?[34] Was the *timing* between the member's PC and the PA close, or was there a gap in time that may remove any suspect nature of the action? Did the alleged RMO have any *motive* to reprise against the member?[35] Finally, were the RMO's actions in this situation consistent with his or her response to prior, similar situations, or was this member *disparately treated* in comparison to the past? The IO must specifically—and clearly—address each of these factors within the ROI. Ensure the IO fully explains all four factors using the preponderance of the evidence standard, citing specific evidence as justification for his or her findings. The clearer the analysis, the easier the report—and legal review—will be.[36]

There are generally two legal roles in whistleblower cases: the legal advisor (to the IO) and the legal reviewer (to the appointing authority).

A WORD ON PROCESSING THE CASE & JAG ROLES

In addition to understanding the law, it is important for judge advocates to understand the full process of whistleblower cases.[37] Once an individual makes a complaint alleging reprisal/restriction (and the IG determines that an investigation is warranted),[38] the appointing authority—typically the wing commander—appoints an IO to conduct an official investigation. A judge advocate should be assigned at this point to directly assist the IO.[39] After conducting a full investigation, the IO will produce an ROI that, once approved by the appointing authority, [40] is forwarded to the MAJCOM and SAF levels before final review and—hopefully—approval by the DoD.

Judge advocates play a vital role in this extensive process. There are generally two legal roles in whistleblower cases: the legal advisor (to the IO) and the legal reviewer (to the appointing authority).[41] Both are extremely important. Legal advisors remain in close communication with the IO throughout the process. Whistleblower cases are often complex in both investigation and law, and IOs are generally unfamiliar with either. As a result, judge advocates must work closely to ensure that all aspects of the investigation and resulting ROI are met. Legal advisors should work with the IO on the investigation plan, help prepare interview questions, sit in during difficult interviews, discuss the evidence in detail, explain the evidentiary standard, and ensure the IO provides a full and accurate final report. While the IO is responsible for making his or her own findings and conclusions, the lawyer should help the IO throughout the process. In short, advising on a whistleblower case is not a "one-and-

done" situation that allows for minimal legal oversight.[42] Given its high-visibility at the DoD level—and sometimes beyond—whistleblower cases require extensive legal support and review. Legal advisors must keep the communication flowing and ensure a strong relationship with the IO.

> Remember, legal reviewers are not writing the legal review for the local base; legal reviews are written for the Air Force and DoD.

The legal reviewer is equally important, as the legal review provides the capstone to an investigation and ROI that generally takes months—if not years—to complete. The legal review should provide a full description of the case and offer an independent legal analysis. Failure to do so may render the entire product insufficient, resulting in either more work for you or (even worse) additional—sometimes extensive—corrective effort at the higher levels of review. The DoD provides an extensive review of every case. The legal review, therefore, should reflect the seriousness of the allegations and review process, providing a full discussion and analysis of law and fact. Remember, legal reviewers are not writing the legal review for the local base; legal reviews are written for the Air Force and DoD.

CONCLUSION

Whistleblower cases provide a fascinating look into the inner workings of Air Force organization, leadership, and command. I highly encourage judge advocates to jump at any opportunity to take part in this important area of law. While this article cannot replace a full review of AFI 90-301 and the MWPA, it provides lawyers and judge advocates with a quick primer on how to review and process these interesting and complex cases. Whistleblower cases are generally few when stretched across the Air Force, but their numbers are on the rise, making it more likely that one may eventually reach your office. In the event a whistleblower case does come across your desk, you will hopefully be ready—and excited—to begin.

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EXPAND YOUR KNOWLEDGE:

EXTERNAL LINKS TO ADDITIONAL RESOURCES

- **DoD IG Whistleblower Program**
- **No Fear Act**
- **TEDx**: How Whistleblowers Shape History (April 2017, 11:51)
- **TED Talks**: NSA Responds to Edward Snowden's TED Talk (March 2014, 33:19)

ENDNOTES

[1] This statistic comes from internal tracking within the Office of the Air Force Inspector General, Complaints Resolution Directorate.

[2] *See generally* 10 USC § 1034(a)-(b) (2017). U.S. Dep't of Air Force, Instr. 90-301, Inspector General Complaints Resolution (28 December 2018) [hereinafter AFI 90-301] provides the service-specific guidance for reprisal/restriction cases.

[3] 10 USC § 1034(a)(1).

[4] There is no statute of limitations on restriction allegations. Incidents occurring years prior may still require full investigation and analysis.

[5] One recent case centered on whether a squadron superintendent's "milling about" while Airmen completed an Equal Opportunity (EO) climate assessment amounted to restriction under 10 USC § 1034. The Air Force and DoD concluded that such actions did not equal restriction. While Airmen may have felt restricted from providing honest feedback on the EO climate assessment survey, a reasonable Airman would not conclude that they were deterred in any way from communicating with the Inspector General or Congress.

[6] *See generally* 10 USC § 1034(a)(1).

[7] *See* 10 USC § 1034(a)(2).

[8] AFI 90-301, *supra* note 1, at Attachment 1 defines chilling effect as "[T]hose actions, through words or behavior, that would tend to prevent an individual(s) from taking a proposed course of action."

[9] For example, during an all-call a squadron commander may haphazardly tell his Airmen that they must use the chain of command to address all problems and any efforts to go outside the chain of command will result in disciplinary action. While the squadron commander is likely not at all thinking of an Airman's right to contact the IG or Congress, his communication may lead a reasonable Airman to believe that they are inhibited from communicating with either entity. As a result, though unintentional, the squadron commander's actions may create a "chilling effect" that amounts to restriction.

[10] Negligent acts most often take place in the scenario provided directly above. While leaders can—and should—encourage using the chain of command, they must also never forget to include the caveat that the IG and Congress are always acceptable reporting options.

[11] For restriction purposes, an RMO is generally the individual named in the allegation that restricted, or attempted to restrict, a member from communicating with the IG or Congress. In reprisal cases, the RMO is the alleged individual that either took a personnel action (PA), influenced the decision to take a PA, or approved a PA against an individual that made, prepared to make, or was perceived as having made a protected communication. See AFI 90-301, *supra* note 1, at Attachment 1, for a full definition of RMO.

[12] AFI 90-301, *supra* note 1, at Table 6.1. The newest version of AFI 90-301, dated 28 December 2018, removed a third question regarding RMO intent, which separately required consideration of the reasons, reasonableness, and motive of the RMO's actions. This question was removed to avoid IO confusion and acknowledge that a "chilling effect" amounting to restriction may arise from unintentional, negligent words or behavior.

[13] In 2018, 81.6% of all Air Force whistleblower allegations were based on reprisal.

[14] 10 USC § 1034(b)(1).

[15] Unlike restriction, which has no statute of limitations, reprisal allegations are generally limited to one year from the time the member learns about a PA. *See* AFI 90-301, *supra* note 1, at para. 2.5.2.

[16] The new "elements test" adopts the DoD standard for analyzing reprisal cases.

[17] U.S. Dep't of Air Force, Air Force Complaints Resolution Program Supplemental Guide Attachment 16 (28 December 2018) [hereinafter AFCRPSG].

[18] *See* 10 USC § 1034(b)(1)(B).

[19] For example: walking into the IG office to ask the location of the nearest water fountain is considered a PC. *Any* communication with the IG or Congress, regardless of topic, is a PC.

[20] *See* 10 USC § 1034(c)(2).

[21] For example: a member's general complaints to his Airman roommate would likely not amount to a PC because the roommate is not in the member's direct chain of command. Additionally, such complaints must allege actual violations of law or regulation. While an Airman need not specifically cite the law or regulation violated in a given scenario, standard "gripes" are generally insufficient to establish a PC.

[22] PCs are not the same as privileged communications. Judge advocates must carefully review 10 USC 1034(b)(1)(A-C) and (c)(2) in determining whether a communication is a PC.

[23] AFCRPSG, *supra* note 16, at Attachment 16.

[24] *See* AFI 90-301, *supra* note 1, at Attachment 1, 142.

[25] Letters of Counseling are often *not* considered an unfavorable PA based on their minimal nature and rehabilitative purpose. Judge advocates must look to the totality of the circumstances for each potential PA and assess whether the action actually affects—or has the potential to affect—the member's position or career.

[26] Not all changes in position amount to an unfavorable PA (e.g. change in position/lateral move at the appropriate time in one's career, positions of enhanced leadership/responsibility, etc.). Again, judge advocates must consider the totality of the circumstances in determining whether an individual's removal from position has the potential the negatively affect his or her military career. *See* U.S. Dep't of Def., Inspector General Guide to Investigating Military Whistleblower Reprisal and Restriction Cases, at 1-4 (18 April 2017) [hereinafter DoD Guide].

[27] *See id.* at 1-5.

[28] *See* 10 USC § 1034(b)(2)(A)(i).

[29] AFCRPSG, *supra* note 16, at Attachment 16.

[30] *See* AFCRPSG, *supra* note 16, at Attachment 17.

[31] For example, an Airman may tell their supervisor, first sergeant, or commander they intend to contact the IG or Congress. Such communication would satisfy the knowledge element.

[32] AFCRPSG, *supra* note 16, at Attachment 16.

[33] *See id.*

[34] The IO must assess the evidence and determine the actual reason(s) for the RMO's actions.

[35] Being named within the PC often provides evidence of an RMO's motive to reprise. The opposite may also be true.

[36] IOs, like lawyers, should "make their money" in the analysis section.

[37] While this article provides a general foundation for approaching these cases, it is important to closely review AFI 90-301 and the MWPA for further details.

[38] The IG elects either to dismiss or investigate the allegation(s) through a 30-Day Determination document. In this document, the IG conducts an informal analysis to determine whether the complainant's allegation meets the prima facie for reprisal/restriction.

[39] If a specific judge advocate is not identified in the appointment memorandum, the legal office should directly appoint a lawyer to advise the IO throughout the investigation.

[40] At this point, the legal reviewer (discussed below) will conduct an extensive legal review in order to advise the appointing authority on whether to approve the ROI as legally sufficient or return the report for further action.

[41] The same judge advocate may assume both roles in certain circumstances. Legal offices, however, should provide separate attorneys, if at all possible, to avoid any actual or perceived conflicts of interest.

[42] Given the average IO's inexperience in the law, the legal advisor will almost assuredly find numerous errors within the ROI. As a result, legal advisors should review drafts of the ROI prior to document completion and work with the IO to ensure a strong final product. Waiting to review the ROI at the final hour risks a poor—or legally insufficient—product with no anticipated time to correct prior to the IO resuming regular duties.