

Broken Promises

By Amelia Gruber and Chris Strohm
cstrohm@govexec.com

On paper, a variety of legal protections ensure that lengthy and frequent deployments cause minimum disruption to military service members' lives. Military personnel can vote by absentee ballot, and reservists can rest assured that when they return from duty their employers will welcome them back.

But government agencies aren't adequately upholding these and other legal protections for service members, according to a recent report by the American Bar Association. The report is based on a year's worth of research by an ABA working group of legal experts - many of them current or retired military attorneys.

Though the Pentagon has in place a three-step procedure to allow service members to exercise basic voting rights while deployed, these procedures are cumbersome and unreliable, the working group found. The voting process can take more than 45 days, depending on where personnel are serving, and research has indicated that 40 percent of absentee ballots mailed out during 2002 general elections were never counted.

The Defense Department's absentee voting procedures are "all the more difficult and time-consuming because they are done in the same manner as they were done during World War II, via mail," the report stated. "The potential for failure is significant and unfortunately very real."

The working group recommended that Pentagon officials complete an electronic voting system for National Guard members and reservists. Defense officials planned to unveil electronic voting technology in time for the November elections, but [abandoned](#) that goal citing concerns about cyber security.

Further, the working group found that the agencies responsible for enforcing a law protecting returning service members from workplace discrimination face several challenges. The Labor Department is slow to address complaints alleging violations of 1994 Uniformed Services Employment and Reemployment Rights Act violations expeditiously, according to the report.

USERRA builds on the Veterans' Reemployment Rights law established in the 1940s. The laws require employers to immediately put returning veterans back to work and prohibit employers from denying benefits to or otherwise discriminating against military service members.

Labor's Veterans' Employment and Training Service is in charge of reviewing initial complaints of USERRA violations. If VETS fails to resolve a complaint against a federal agency, service members or veterans can ask the Office of Special Counsel, an independent agency that investigates and prosecutes prohibited personnel actions, to bring the case before the Merit Systems Protection Board.

But often Labor's investigations "drag on literally for years," the working group found. "All too often, the investigator simply accepts the employer's explanation of why the veteran is not rehired and the file is closed."

A Labor Department spokesman could not respond to a request for comment Thursday afternoon.

Returning military personnel are often equally disappointed when they turn to the OSC, according to the report. In part because of lack of funding and personnel shortages, the OSC "simply does not bring MSPB

[USERRA] complaints," the working group stated. "The OSC's policy position essentially forces federal employees to hire private counsel to bring their MSPB claims."

The working group encouraged ABA leadership to urge "speedy resolution" of USERRA complaints lodged at the Labor Department and to encourage a "more aggressive posture . . . in favor of veterans and protection of their reemployment rights." Group members also asked the bar association to look into OSC reasons for disregarding USERRA cases and to let lawmakers know if "no satisfactory reason is discovered."

But Special Counsel Scott Bloch said on Thursday that he has already set an aggressive agenda for prosecuting meritorious USERRA complaints. Aggressive prosecution is all the more important considering high levels of troop rotations, he said.

"It's the least we can do to secure [service members'] jobs and their rights to full restitution of their benefits the day they return," Bloch said.

Two months ago Bloch initiated OSC's first prosecution of a USERRA case before MSPB. In the past the agency settled USERRA complaints, in part because of staffing shortages and in part because the cases were often old by the time they reached OSC, he said.

Previously the agency only received about 10 USERRA complaints a year, Bloch said, but the office is expecting a higher volume now. OSC has started working with the Labor Department solicitor's office to "get to [more serious] cases at an earlier stage," he said.

OSC will be ready when more cases arrive, Bloch said. "This is our bread and butter to do investigations of prohibited personnel practices," he noted, explaining that often USERRA cases have other prohibited practices "thrown in."

Report of the Working Group on Protecting the Rights of Service Members, American Bar Association, August 2004

Enemy Terrain

A federal appeals court on Wednesday dismissed a complaint that the U.S. government illegally destroyed a Sudanese factory in 1998 that Osama bin Laden was purportedly using to make chemical weapons, saying the judicial branch does not have the authority to challenge what the executive branch deems as enemy property in other countries.

Former President Clinton ordered the bombing of the El Shifa pharmaceutical plant in Sudan in 1998 in response to the bombings of U.S. embassies in Kenya and Tanzania. Clinton said the strikes were needed to destroy a factory that bin Laden's network was using to produce an ingredient essential for nerve gas.

El-Shifa Pharmaceutical Industries Company and Salah El Din Ahmed Mohammed Idris filed a complaint in the Court of Federal Claims on July 27, 2000, seeking \$50 million in damages as compensation for the destruction of the plant. That court ruled in the U.S. government's favor, at which time an appeal was filed with the U.S. Court of Appeals for the Federal Circuit.

The appeals court dismissed the case on Wednesday.

The complaint challenged the government's designation of the plant as enemy property by suggesting that Clinton relied on flawed intelligence in targeting it for destruction. "It is replete with allegations contradicting the government's, indeed the president's, determination that the plant was part of Osama bin Laden's array of weapons deployed against Americans at home and abroad," the court notes.

The court, however, ruled that the Constitution does not give the judicial branch supervision over the president's power to deem private property belonging to aliens located outside the United States as enemy property.

"We cannot envision how a military commander, much less the commander-in-chief, could wage war successfully if he did not have the inherent power to decide what targets, i.e., property, belonged to the enemy and could therefore be destroyed free from takings liability," the court wrote.

"We are of the opinion that the federal courts have no role in setting even minimal standards by which the president, or his commanders, are to measure the veracity of intelligence gathered with the aim of determining which assets, located beyond the shores of the United States, belong to the nation's friends and which belong to its enemies," the court added.

The court said judicial review of a president's decision to target the plant might create a precedent under which commanders would have to vet intelligence about targets before a civil court while simultaneously waging war on the battlefield.

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