

**DUAL STATUS NATIONAL GUARD TECHNICIANS  
SHOULD BE BARRED FROM BRINGING CIVIL SUITS  
UNDER TITLE VII**

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I. Introduction

At no time in our history has America depended more on dual status National Guard technicians (DSTs). The strength of the National Guard is derived from the caliber of these Citizen-Soldiers and Airmen who are employed as DSTs. Significant contributions by DSTs during the 9/11 al-Qaeda attacks on the United States and the 2005 Gulf Coast devastation wrought by Hurricanes Katrina and Rita prove that the National Guard remains an effective provider of well-trained, highly equipped warfighting units to combatant commanders throughout the Army and Air Force. However, judicial review of DSTs' Title VII challenges seriously impedes the military's performance of its vital national security duties.<sup>2</sup> Congress must amend the National Guard Technician Act of 1968<sup>3</sup> (Technician Act) to explicitly exclude Title VII<sup>4</sup> claims by DSTs.<sup>5</sup>

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<sup>2</sup> The author limits the analysis in this paper to National Guard technicians and the Technician Act and does not consider the impact on Reserve technicians. Another approach to this matter could be to amend Title VII in order to capture both groups of servicemembers, but the author leaves that as of yet unexplored option for a different paper.

<sup>3</sup> National Guard Technician Act, Pub. L. No. 90-486, 82 Stat. 755 (1968) (codified at 32 U.S.C. § 709 (2006)).

<sup>4</sup> Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-16, *as amended* by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

<sup>5</sup> Dual status technicians are full-time civilian employees of the National Guard whose salaries are paid in full by the federal government. See Major Michael J. Davidson & Major Steve Walters, *Neither Man nor Beast: The National Guard Technician, Modern Day Military Minotaur*, *ARMY LAW*, Dec. 1995, at 49. All DSTs are required to hold

Title VII is silent regarding the application of its protections to DSTs, leaving resolution in the hands of the courts. A split still exists in the federal circuit courts over whether DSTs should be allowed to bring claims against the military under Title VII. Although the Eleventh Circuit Court of Appeals has yet to specifically hold that National Guard military technicians' positions are "irreducibly military in nature," the majority of circuit courts of appeals that have examined the issue have so concluded.<sup>6</sup> It is well-established law that members of the armed forces are precluded from suing the United States for alleged constitutional violations.<sup>7</sup> The Ninth Circuit has also ruled that discrimination actions are personnel actions integrally related to the military's structure.<sup>8</sup> The Supreme Court, however, has not yet ruled on whether DSTs may sue the U.S. government under Title VII. The field is now open for Congress to intervene and enact legislation amending the Technician Act to explicitly exclude DSTs from Title VII coverage.

Barring DSTs from bringing suit in federal court will not leave them without a venue to seek redress for unlawful acts of discrimination. In lieu of civil suits, discrimination complaints brought by DSTs would be handled exclusively within the National Guard Military Discrimination Complaint System (NGMDCS).<sup>9</sup> The NGMDCS provides due process protections for DSTs similar to those afforded active duty members of the Army through the Department of Defense (DoD) Equal Opportunity (EO) Program.<sup>10</sup>

Congress should amend the Technician Act to explicitly exclude DSTs from Title VII coverage because their positions are "integrally related" to the unique structure and mission of the armed forces.<sup>11</sup> The

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concurrent National Guard membership as a condition of their civilian employment. *Id.* A DST's civilian duty position skills must relate directly to the skills required of the technician's military position and training. *Id.*

<sup>6</sup> Paulk v. Harvey, 2006 U.S. Dist. LEXIS 70169, at \*11 (M.D. Ala. 2006).

<sup>7</sup> See Chappell v. Wallace, 462 U.S. 296, 305 (1983).

<sup>8</sup> Mier v. Owens, 57 F.3d 747, 748 (9th Cir. 1995).

<sup>9</sup> U.S. DEP'T OF ARMY & U.S. DEP'T OF AIR FORCE, NAT'L GUARD REG. 600-22/AIR FORCE NAT'L GUARD INSTR. 36-3, NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM para. 1-7(A) (30 Mar. 2001) [hereinafter NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM].

<sup>10</sup> U.S. DEP'T OF ARMY, REG. 600-20, EQUAL OPPORTUNITY PROGRAM (Mar. 18, 2008) [hereinafter AR 600-20].

<sup>11</sup> Lockett v. Bure, 290 F.3d 493, 499 (2d Cir. 2002) While this case stands for the proposition that Title VII protections extend to discrimination actions brought by military personnel in hybrid jobs entailing both civilian and military aspects, except when the

DSTs hold a “hybrid”<sup>12</sup> position that is more akin to a military position than to a civilian job. As such, DSTs should be treated like military personnel and explicitly excluded from Title VII coverage.

Section II of this article provides a brief history of the origins of the National Guard. Section III explains the military nature of the DST position and the vital role DSTs perform in contributing to our national defense. Section IV reviews Supreme Court decisions that bar military personnel from bringing Title VII claims against the military. Section V describes the split among the federal circuit courts regarding the justiciability of Title VII claims filed by DSTs. Section VI proposes that Congress adopt a three-prong approach to resolving the controversy, including requiring DSTs to use the NGMDCS to reconcile discrimination allegations. Section VII demonstrates that the NGMDCS provides adequate due process protections for DSTs who file discrimination complaints and concludes by explaining how amending the Technician Act and directing DSTs to pursue intraservice remedies through the NGMDCS to resolve discrimination complaints would promote judicial efficiency and fundamental fairness within the armed services. Finally, amending the Technician Act would prevent courts from second-guessing personnel decisions made by military commanders.

## II. The Role of the National Guard

### A. The National Guard as the “Militia”

“The National Guard is the modern Militia reserved to the States by [Article I, Section 8, Clauses 15 and 16] of the Constitution.”<sup>13</sup> Since the days of the Minutemen of Lexington and Concord until just prior to World War I, the militias of the various states embodied the concept of a citizen army.<sup>14</sup> The enactment of the National Defense Act in 1916 altered the status of the militias by establishing them as the National

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challenged conduct is integrally related to the military’s unique structure, the author asserts that such a distinction is impossible since all such positions are integrally related.

<sup>12</sup> *Id.*

<sup>13</sup> *Maryland v. United States*, 381 U.S. 41, 46, *vacated and modified on other grounds*, 382 U.S. 159 (1965). *See generally* Frederick B. Wiener, *The Militia Clause of the Constitution*, 54 HARV. L. REV. 181 (1940).

<sup>14</sup> *Maryland*, 381 U.S. at 46. *See generally* Wiener, *supra* note 13.

Guard.<sup>15</sup> The National Guard occupies a unique position in the United States' federal structure because the daily operation of National Guard units remains under the authority and control of the states.<sup>16</sup> However, since the passage of the National Defense Act, the National Guard has been equipped and funded by the federal government and trained pursuant to federal standards.<sup>17</sup>

In accordance with the National Defense Act, as amended in 1933, the National Guard is also a component of the U.S. Army Reserve, and officers appointed to the National Guard receive corresponding commissions in the Army Reserve Corps.<sup>18</sup> As a vital and essential reserve component of the Armed Forces of the United States, the National Guard is available to serve with regular forces in time of war.<sup>19</sup> In addition to its role under state control, the National Guard may also be called to federal service to assist in controlling civil disorder.<sup>20</sup>

#### B. National Guard of the United States—Reserve Component of the Armed Forces

The Armed Forces of the United States consists of the Army, Navy, Marine Corps, Air Force, and Coast Guard.<sup>21</sup> Each of the services is supported by a reserve component.<sup>22</sup> The purpose of each reserve component is to provide trained military units as well as qualified individuals to supplement the active duty armed forces “in time of war or national emergency, and at such times as the national security may require.”<sup>23</sup>

Since the 1933 amendments to the National Defense Act, all individuals who have joined a state National Guard unit have simultaneously enlisted in the National Guard of the United States (NGUS).<sup>24</sup> Under this “dual enlistment” system, Guardsmen retain their

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<sup>15</sup> National Defense Act of 1916, 39 Stat. 166.

<sup>16</sup> *Illinois Nat'l Guard v. Fed. Labor Relations Auth.*, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

<sup>17</sup> *Maryland*, 381 U.S. at 47.

<sup>18</sup> *Illinois Nat'l Guard*, 854 F.2d at 1398.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see also *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973).

<sup>21</sup> 10 U.S.C.S. § 101(4) (LexisNexis 2008); 32 U.S.C.S. § 101(2) (LexisNexis 2008).

<sup>22</sup> 10 U.S.C.S. § 10,101.

<sup>23</sup> *Id.* § 10,102.

<sup>24</sup> *Perpich v. Dep't of Def.*, 496 U.S. 334, 346 (1990); see also 32 U.S.C.S. § 301.

status as members of a state Guard unit, unless and until ordered to active duty in the Army.<sup>25</sup> Members of the NGUS who are ordered to active duty are relieved from duty in the National Guard of their state.<sup>26</sup> Congress may order the NGUS to active duty if it determines that such units are required for national security.<sup>27</sup> Likewise, the President or Congress may order NGUS units to active duty upon the declaration of a national emergency.<sup>28</sup>

### C. Federal Authority Over the National Guard

Article I, Section 8, Clause 15 of the Constitution grants Congress power to “provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions . . . .”<sup>29</sup> Additional power over the National Guard is granted to Congress in Clause 16, where Congress has the authority to make appropriations 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, reserving to the states respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . .”<sup>30</sup> Congress has the legislative authority to promulgate laws that regulate military life, including whether DSTs should be excluded from Title VII coverage to promote the efficiency of the military. This authority is further supported by the Supreme Court ruling in *Chappell v. Wallace*.

In *Chappell*, the Supreme Court advised that “the Constitution contemplated that the Legislative Branch has plenary control over the rights, duties, and responsibilities in the framework of the Military Establishment.”<sup>31</sup> The Supreme Court has further emphasized that Congress has the authority to “regulate military life, taking into account the special patterns that define the military structure.”<sup>32</sup>

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<sup>25</sup> *Perpich*, 496 U.S. at 346.

<sup>26</sup> 32 U.S.C.S. § 325; *see also* 10 U.S.C.S. § 10,106.

<sup>27</sup> 10 U.S.C.S. § 10,103.

<sup>28</sup> *Id.* § 12,302.

<sup>29</sup> U.S. CONST. art. 1, § 8, cl. 15.

<sup>30</sup> *Id.* art. 1, § 8, cl. 16.

<sup>31</sup> 462 U.S. 296, 301 (1983).

<sup>32</sup> *Id.* at 302.

In exercising its explicit authority over the National Guard, Congress has promulgated legislation ordering the organization and composition of the National Guard to be the same as that prescribed for the Army and Air Force.<sup>33</sup> In addition, Congress has established eligibility criteria for original enlistment in the National Guard.<sup>34</sup> Congress requires that those who qualify for service take an oath to support and defend the Constitution of the United States and the constitutions of their own states against all enemies, as well as to obey orders of the President of the United States and of the governor of their state.<sup>35</sup> If a state requests federal assistance to control domestic violence, the President may authorize the use of the militia and armed forces to render assistance to the state.<sup>36</sup> Whenever the President determines that during a period of unlawful obstruction or rebellion against the authority of the federal government it has become impracticable to enforce the laws of the United States, the militia may be authorized for use to enforce federal law.<sup>37</sup>

Further, Congress requires each company, battery, squadron, and detachment of the National Guard to assemble for drill and instruction at least forty-eight times per year and to participate annually in fifteen-day training camps.<sup>38</sup> If a state fails to comply with the prescribed requirements for federal recognition (i.e., adherence to military standards or regulations authorized by Congress), the National Guard of that state will be barred, in whole or in part, from receiving federal aid, benefits, or privileges authorized by law.<sup>39</sup> The National Guard plays a vital role in America's national defense; it must be trained and prepared to respond to both peacetime and wartime missions.

The 9/11 terrorist attacks brought new meaning to the need for well-trained National Guard units. In the immediate wake of the attacks on the World Trade Center, the New York Army and Air National Guard mobilized over 8000 personnel to secure the grounds and to conduct rescue and recovery operations.<sup>40</sup> Following the attacks of 9/11,

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<sup>33</sup> 32 U.S.C.S. § 104(b).

<sup>34</sup> *Id.* § 313.

<sup>35</sup> *Id.* § 312.

<sup>36</sup> 10 U.S.C.S. § 331.

<sup>37</sup> *Id.* § 332.

<sup>38</sup> *Id.* § 502(a).

<sup>39</sup> *Id.* § 108.

<sup>40</sup> The National Guard—About the National Guard, <http://ngb.army.mil/About/default.aspx> (last visited Nov. 19, 2008).

President George W. Bush authorized the mobilization of National Guard units in Title 32 status (federally funded, but state-controlled) to reinforce security at airports.<sup>41</sup> By mid-December, over 50,000 Guardsmen nationwide were mobilized in support of homeland defense and the war in Afghanistan.<sup>42</sup> In 2005, the largest deployment ever of National Guard troops responded to the devastation caused by Hurricane Katrina and Hurricane Rita in the Gulf Coast.<sup>43</sup> At the peak of deployment levels, over 50,000 Army and Air Guard members responded to these disasters, while nearly 80,000 were simultaneously deployed on active duty in Iraq and elsewhere in the world.<sup>44</sup>

In sum, the mission of the National Guard is to maintain well-trained, well-equipped units available for immediate mobilization for both wartime missions and national emergency operations.<sup>45</sup> To this end, the purpose of the DST program is to ensure that DSTs are trained and logistically supported to meet the demands of homeland security missions and waging war.<sup>46</sup> Dual status technicians' duties may correspond with those of other civilian employees; however, DSTs are also required to serve as Guardsmen and must perform military related duties.<sup>47</sup> The next section will discuss the importance of the DST to the overall mission of the armed forces.

### III. The Role of Dual Status National Guard Technicians

Dual status technicians "occupy a unique position in the federal personnel system, maintaining a dual status as civilians and [S]oldiers while serving in a hybrid state/federal organization."<sup>48</sup> The unique status of DSTs is the source of confusion surrounding how they should be treated under Title VII. The status of National Guard employees is unusual and somewhat complicated.<sup>49</sup> The National Guard employs full

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> ARMY NATIONAL GUARD, NATIONAL GUARD FACT SHEET (FY2005) (3 May 2006) [hereinafter NG FACT SHEET], available at [http://www.ngb.army.mil/media/factsheets/ARNG\\_Factsheet\\_May\\_06.pdf](http://www.ngb.army.mil/media/factsheets/ARNG_Factsheet_May_06.pdf).

<sup>46</sup> *Simpson v. United States*, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

<sup>47</sup> *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982).

<sup>48</sup> Davidson & Walters, *supra* note 5, at 49.

<sup>49</sup> *Illinois Nat'l Guard v. Fed. Labor Relations Auth.*, 854 F.2d 1396, 1398 (D.C. Cir. 1988).

time National Guard (Title 32 Full-Time National Guard Duty),<sup>50</sup> part-time purely military personnel,<sup>51</sup> and full-time civilian workers, known as DSTs, who provide the day-to-day administrative support, training requirements, equipment maintenance, and logistic needs of the National Guard.<sup>52</sup> While many of their duties correspond directly to those of other civilian employees, DSTs traditionally have been required to serve simultaneously as members of the National Guard, and must perform even their civilian tasks “in a distinctly military context, implicating significant military concerns.”<sup>53</sup>

Under the National Defense Act, Congress authorized the employment of National Guard technicians.<sup>54</sup> Since 1916, the role of technicians has grown from caretakers and clerks with limited duties of maintaining National Guard supplies and equipment.<sup>55</sup> Technicians are now responsible for maintenance of National Guard military equipment during their regular military training periods.<sup>56</sup> Further, DSTs are now serving in positions ranging from supervisory aircraft pilots to commanders of National Guard fighter groups.

Prior to the Technician Act, all technicians served as federally funded state employees.<sup>57</sup> Under the Technician Act, technicians were converted to federal civilian employee status, providing them a uniform system of federal salary schedules, retirement plans, fringe benefits, and clarification of their status under the Federal Tort Claims Act.<sup>58</sup> As members of the National Guard, these technicians hold dual status.<sup>59</sup> The DSTs are required to be military members of the state National Guard, and if they lose membership in the National Guard, they must be terminated from employment as technicians.<sup>60</sup> The DSTs serve as

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<sup>50</sup> Full-time National Guard duty means training or other duty, other than inactive duty, performed by a member of the National Guard. NG FACT SHEET, *supra* note 45.

<sup>51</sup> *Illinois Nat'l Guard*, 854 F.2d at 1396.

<sup>52</sup> *Simpson v. United States*, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

<sup>53</sup> *New Jersey Air Nat'l Guard v. FLRA*, 677 F.2d 276, 279 (3d Cir. 1982).

<sup>54</sup> *Davidson & Walters*, *supra* note 5, at 49.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 51.

<sup>59</sup> *Id.*

<sup>60</sup> Major Michael E. Smith, *Federal Representation of National Guard Members in Civil Litigation*, ARMY LAW., Dec. 1995, at 41.



federal civilian employees, except during normal military periods (one weekend per month and two weeks per year).<sup>61</sup>

The DSTs serve concurrently in three ways: (1) they perform full-time civilian work in their units, as provided in Title 32, U.S. Code; (2) they perform military training in their units, as provided for in Title 32, U.S. Code; and (3) they are available to enter active federal service anytime their units are called.<sup>62</sup> The DSTs' employment is conditioned on current membership in the National Guard.<sup>63</sup> The DSTs must meet military compatibility requirements "because the technician's civilian and military functions are integrated."<sup>64</sup>

In sum, DSTs play a vital role in the mission of the armed forces. Since the enactment of the National Defense Act, the role of DSTs has grown from caretaker to direct contributor to the Global War on Terror and homeland defense missions.<sup>65</sup> The DSTs fill purely military related occupations and are required to maintain membership in the National Guard. Recognizing the importance of filling dual status slots with personnel immediately available for military operations, Congress has

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<sup>61</sup> *Id.*

<sup>62</sup> *Simpson v. United States*, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

<sup>63</sup> Military "compatibility" is defined as the condition in which the duties and responsibilities of a military technician's full-time civilian position is substantially equivalent to the duties and responsibilities of the technician's military assignment (MTOE/TDA/UMDA). U.S. DEP'T OF ARMY & U.S. DEP'T OF AIR FORCE, TPR 303, MILITARY TECHNICIAN COMPATIBILITY para. 1-1 (24 Aug. 2005). Compatibility ensures that a highly skilled and trained cadre is available when units are deployed. *Id.* Compatibility also ensures that a continuity of operation exists before, during, and after deployment periods, leading to enhanced unit readiness as mandated by the Technician Act of 1968.

<sup>64</sup> *Simpson*, 467 F. Supp. at 1124; *see also* AFGE Local 2953 v. FLRA, 730 F.2d 1534, 1544-46 (D.C. Cir. 1984); 32 U.S.C. § 709 (2006).

<sup>65</sup> CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE NATIONAL MILITARY STRATEGY OF THE UNITED STATES OF AMERICA—A STRATEGY FOR TODAY; A VISION FOR TOMORROW (2004), *available at* <http://www.defenselink.mil/news/Mar2005/d20050318nms.pdf>.

The attacks of 11 September 2001 demonstrated that our liberties are vulnerable. The prospect of future attacks, potentially employing weapons of mass destruction, makes it imperative we act now to stop terrorists before they can attack again. . . . This mission requires the full integration of all instruments of national power, the cooperation and participation of friends and allies and the support of the American people.

*Id.* at iv.

elected to continue the trend of eliminating non-dual status technician positions by requiring that all military technician positions be occupied by DSTs.<sup>66</sup> This increase in the number of positions occupied by DSTs could potentially lead to additional Title VII lawsuits by DSTs against the military. The barring of military personnel from bringing Title VII claims against the armed services<sup>67</sup> is the subject of Section IV.

#### IV. Barring Title VII Claims Brought By Military Personnel

This section examines Supreme Court holdings that military personnel are barred from bringing claims against the military, their superiors, or other military personnel for wrongs arising incident to military service.<sup>68</sup> For example, under the *Feres* doctrine servicemembers are barred from bringing suits against the military—“the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.”<sup>69</sup> Courts refrain from reviewing these personnel actions because the “relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the military establishment.”<sup>70</sup> The *Feres* doctrine<sup>71</sup> is applicable to the federal government and federal officers as well as to state governments and state officers.<sup>72</sup>

In *Chappell v. Wallace*, five enlisted servicemembers sought recovery from their commanding officer, four lieutenants, and three noncommissioned officers for unjust treatment based on racial discrimination and for conspiracy to deprive them of their statutory

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<sup>66</sup> *Id.*

<sup>67</sup> *Fisher v. Peters*, 249 F.3d 433, 443 (6th Cir. 2001).

<sup>68</sup> Notice of Proposed Amendment, National Guard Technician Act, 32 U.S.C. § 709 (2000) (on file with author).

<sup>69</sup> *Feres v. United States*, 340 U.S. 135, 146 (1950).

<sup>70</sup> *Mier v. Owens*, 57 F.3d 747, 749–50 (9th Cir. 1995) (quoting *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)).

<sup>71</sup> Under the *Feres* doctrine, members of the armed forces may not bring an action against the Government or armed services personnel for injuries during activity under the control or supervision of a commanding officer. *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (citing *McGowan v. Scoggins*, 890 F.2d 128, 132 (9th Cir. 1989)); see *Feres*, 340 U.S. 135.

<sup>72</sup> See *Bowen v. Oistead*, 125 F.3d 800, 804–05 (9th Cir. 1997) (noting that “[t]he overwhelming weight of authority indicates that state National Guard officers are protected from suit by fellow Guardsmen by the *Feres* doctrine”).

rights.<sup>73</sup> The servicemembers alleged that because of their minority race, the petitioners failed to assign desirable duties, issued threats against them, gave them low ratings on performance evaluations, and imposed penalties of unusual severity.<sup>74</sup> The Court was “[concerned] with the disruption of the ‘peculiar and special relationship of the soldier to his superiors’ that might result if the soldier were allowed to hale his superiors into court.”<sup>75</sup> The Court held that servicemembers are barred from bringing *Bivens*<sup>76</sup> claims in civilian court alleging unlawful racial discrimination by their superiors.<sup>77</sup>

In *United States v. Stanley*, the Court did not find that the superior-subordinate relationship was crucial and broadened the *Chappell* holding to bar *Bivens* actions against military members who were not within the plaintiff’s chain of command.<sup>78</sup> In *Stanley*, the Army secretly administered doses of lysergic acid diethylamide (LSD) to the Soldier as part of a plan to study the effects of the drug on humans.<sup>79</sup> The Soldier claimed that as a result of the LSD exposure, he experienced severe personality disorders that led to his discharge and the dissolution of his marriage.<sup>80</sup> Subsequently, the Soldier filed a lawsuit under the FTCA alleging negligence in the disposition of the experimental program.<sup>81</sup> The district court granted the Government summary judgment on the grounds that the suit was barred by the *Feres* doctrine.<sup>82</sup> Although it concurred with this holding, the court of appeals remanded the case after concluding that the Soldier had a colorable constitutional claim under the *Bivens*<sup>83</sup> doctrine, “whereby a violation of constitutional rights can give rise to a damages action against the offending federal officials even in the absence of a statute authorizing such relief, unless there are ‘special

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<sup>73</sup> *Chappell*, 462 U.S. 296.

<sup>74</sup> *Id.* at 298.

<sup>75</sup> *Id.* at 304 (quoting *Stencel Aero Eng’g Corp. v. United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)).

<sup>76</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). *Bivens* established the general proposition that victims of a constitutional violation perpetrated by a federal actor may sue the offender for damages in federal court despite the absence of explicit statutory authorization for such suits. *Id.*

<sup>77</sup> *Chappell*, 462 U.S. at 304.

<sup>78</sup> *United States v. Stanley*, 483 U.S. 669, 680 (1987).

<sup>79</sup> *Id.* at 671.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 672.

<sup>82</sup> *Id.*

<sup>83</sup> *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

factors counseling hesitation’ or an ‘explicit congressional declaration’ of another, exclusive remedy.”<sup>84</sup> The Soldier then amended his complaint to add *Bivens* claims.<sup>85</sup> In reaffirming the reasoning of *Chappell*, the Supreme Court cited the special factors which included counseling hesitation, the unique disciplinary structure of the military establishment, and Congress’s activity in the field as a basis for deciding to abstain from inferring *Bivens* actions as extensive as the exception to the FTCA established by *Feres*.<sup>86</sup> The Court held that a *Bivens* remedy is unavailable to servicemembers for injuries that “arise out of or are in the course of activity incident to service.”<sup>87</sup>

The Supreme Court holdings in *Chappell* and *Stanley* signify how civilian courts have exercised judicial restraint before entertaining suits that ask courts to interfere with military personnel matters—matters that are at the core of the necessarily unique structure of the military establishment.<sup>88</sup> In ruling to bar military personnel from bringing most suits against the military, the Supreme Court noted the disruptive effect such suits would have on the maintenance of good order and discipline in the military.<sup>89</sup> The Court has warned that “the special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined response by enlisted personnel—would be undermined”<sup>90</sup> if a judicially created remedy exposed officers to personal liability at the hands of their subordinates.<sup>91</sup>

The federal circuits courts of appeal have taken heed of the Supreme Court’s rulings in *Feres*, *Chappell*, and *Stanley*. Pursuant to the Supreme Court’s rationale in those cases, the federal circuits have held that Congress did not intend to provide military personnel with a judicial remedy under Title VII for claims of unlawful discrimination.<sup>92</sup> Despite

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<sup>84</sup> *Stanley*, 483 U.S. at 672 (citing *Bivens*, 403 U.S. 388).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 684.

<sup>87</sup> *Id.* at 685.

<sup>88</sup> *Chappell v. Wallace*, 462 U.S. 296, 299 (1983).

<sup>89</sup> *United States v. Brown*, 348 U.S. 110, 112 (1954).

<sup>90</sup> *Chappell*, 462 U.S. at 304.

<sup>91</sup> *Id.*

<sup>92</sup> See *Spain v. Ball*, 928 F.2d 61, 62 (2d Cir. 1991) (precluding Navy applicant’s claims of race and gender discrimination); *Roper v. Dep’t of Army*, 832 F.2d 247, 248 (2d Cir. 1987); *Randall v. United States*, 95 F.3d 339, 343–44 (4th Cir. 1996), *cert. denied*, 519 U.S. 1150 (1997) (precluding Army officer’s claim of racial discrimination); *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978), *cert. denied*, 439 U.S. 986 (1978) (precluding Army applicant’s claim of racial discrimination); *Hodge v. Dalton*, 107 F.3d

the fact that 42 U.S.C. § 2000e-16(a), Civil Rights Equal Employment Opportunities Act, forbids discrimination in all personnel actions affecting employees or applicants for employment in military departments,<sup>93</sup> the courts have consistently held that Congress did not intend to provide military personnel with a judicial remedy under Title VII.<sup>94</sup> The Equal Employment Opportunity Commission (EEOC) followed suit by excluding uniformed members of the military from Title VII coverage.<sup>95</sup> Some federal courts have extended this prohibition to technicians.<sup>96</sup>

The Supreme Court has held that military personnel are precluded from bringing Title VII claims against the military.<sup>97</sup> The Court has exercised judicial restraint on issues related to military personnel matters and noted the disruptive effect such suits would have on the military.<sup>98</sup> The federal circuits have followed the Supreme Court's rationale and barred military personnel from bringing claims under Title VII for unlawful discrimination. The split among federal circuits regarding the justiciability of Title VII claims brought by DSTs is the subject of the next section.

#### V. Split Among Federal Circuit Courts Regarding Justiciability of DSTs' Title VII Claims

Even among those circuits that hold DSTs' Title VII suits may be reviewable, a conflict exists regarding how to determine justiciability. Generally, the federal circuits take one of three approaches when

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705, 707–08 (9th Cir. 1997), *cert. denied*, 522 U.S. 815 (1997) (precluding Marine servicemember's claim of racial discrimination); *Gonzalez v. Dep't of Army*, 718 F.2d 926, 927–29 (9th Cir. 1983) (precluding Army officer's claims of racial discrimination); *Stinson v. Hornsby*, 821 F.2d 1537, 1539–40 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988) (precluding National Guard member's claim of racial discrimination).

<sup>93</sup> 42 U.S.C.S. § 2000e-16(a) (LexisNexis 2008).

<sup>94</sup> Notice of Proposed Amendment, National Guard Technician Act, 32 U.S.C. § 709 (2000) (on file with author).

<sup>95</sup> 29 C.F.R. § 1614.103(d)(1) (2008) (excluding uniformed members of the military departments from Title VII's purview).

<sup>96</sup> *See Fisher v. Peters*, 249 F.3d 433, 443–44 (6th Cir. 2001) (holding that a National Guard technician's position is irreducibly military in nature; hence, a National Guard Technician's Title VII claim is non-justiciable); *Taylor v. Jones*, 653 F.2d 1193, 2000 (8th Cir. 1981); *Roper*, 832 F.2d 247.

<sup>97</sup> *Chappell v. Wallace*, 462 U.S. 296, 304 (1983).

<sup>98</sup> *Id.*

addressing Title VII actions: (1) inseparable nature of the dual status technicians;<sup>99</sup> (2) technicians fall within Title VII's coverage except when the challenged conduct is "integrally related to the military's unique structure",<sup>100</sup> or (3) technician Title VII claims are nonjusticiable because their position is "irreducibly military in nature."<sup>101</sup> These differing opinions have the potential to confuse the issue and open the door for continued judicial infringement upon military personnel decisions, specifically the disposition of Title VII claims within military channels.

#### A. Inseparable Nature of Dual Status Technicians

In *Wright v. Park*, the First Circuit held that technician positions are encompassed within a military organization and require the performance of duty directly related to the defense of the United States.<sup>102</sup> In *Wright*, the plaintiffs, military technicians in the Air National Guard, brought civil rights actions against military officers in their chain of command.<sup>103</sup> The court noted that "the record reflects that fully one-half of appellant's outfit, the 101st Air Refueling Wing, served in Operation Desert Storm or Desert Shield."<sup>104</sup> The court concluded that "since National Guard technicians' positions are encompassed within a military organization and require the performance of work directly related to national defense, such positions are themselves military in nature."<sup>105</sup> Given the inseparable nature of the technician's civilian and military role, the court found that the plaintiffs' claims were nonjusticiable.<sup>106</sup>

#### B. Challenged Conduct "Integrally Related to the Military's Unique Structure"

Conversely, the Second Circuit distinguished between the military and civilian aspects of a technician position and instead focused on

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<sup>99</sup> *Wright v. Park*, 5 F.3d 586, 589 (1st Cir. 1993).

<sup>100</sup> *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995); *Lockett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002).

<sup>101</sup> *Fisher*, 249 F.3d at 443.

<sup>102</sup> *Wright*, 5 F.3d at 589.

<sup>103</sup> *Id.* at 586.

<sup>104</sup> *Id.* at 588.

<sup>105</sup> *Id.* at 588-89.

<sup>106</sup> *Id.* at 589.

whether the challenged conduct is related solely to the civilian position or “integrally related to the military’s unique structure.”<sup>107</sup> In *Lockett v. Bure*, Hugo Lockett served as both a sergeant and civilian technician in the U.S. Army Reserve (USAR).<sup>108</sup> As a condition of employment, civilian military technicians were required to maintain membership in the USAR unit in which they were employed.<sup>109</sup>

In September 1999, Lockett’s deputy commander initiated proceedings to separate him for misconduct and failure to make progress on the weight control program.<sup>110</sup> Following a board of inquiry, Lockett was transferred to the Individual Ready Reserve.<sup>111</sup> Consequently, he was discharged from his position as a civilian military technician.<sup>112</sup> The court found that the employee’s discrimination claims related primarily to his transfer and to actions taken by his military supervisors.<sup>113</sup> As such, the court held that the claims were not justiciable because they were integrally related to the military’s unique structure.<sup>114</sup>

The Fifth Circuit takes a similar view, holding that “claims that originate from [a technician’s] military status . . . are not cognizable.”<sup>115</sup> In *Brown v. United States*, a technician’s discharge from the U.S. Air Force Reserve caused him to lose his civilian position because he was unable to meet the position’s requirements, namely, maintaining continuing reserve duty status in the Air Force.<sup>116</sup> Subsequently, the technician brought a Title VII racial discrimination claim against the U.S. Air Force.<sup>117</sup>

In order to determine if Brown’s injury arose from activities incident to service, the district court used the three-part test enunciated in *Parker v. United States* which considered the following factors: duty status of the servicemembers, where the alleged injury occurred, and what function the servicemember was performing at the time of the alleged

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<sup>107</sup> *Lockett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002) (quoting *Mier v. Owens*, 57 F.3d 747, 749 (9th Cir. 1995)).

<sup>108</sup> *Id.* at 496.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 499.

<sup>114</sup> *Id.*

<sup>115</sup> *Brown v. United States*, 227 F.3d 295, 299 (2000).

<sup>116</sup> *Id.* at 297.

<sup>117</sup> *Id.*

discrimination.<sup>118</sup> The Fifth Circuit reasoned that “claims arising purely from an ART’s [Air Reserve Technician’s] civilian position are provided for under Title VII; claims that originate from an ART’s military status, however, are not cognizable.”<sup>119</sup> The court barred Brown’s discrimination claim, finding that the military personnel decision (while having a civilian component, in that his discharge made him ineligible for his civilian position) was taken within the military sphere.<sup>120</sup>

The Seventh Circuit appears to follow the rationale of the Second and Ninth Circuits. In *Bartley v. U.S. Department of the Army*, technicians (in their civilian status) alleged, *inter alia*, harassment and retaliation, and sought relief through the military discrimination complaint system.<sup>121</sup> The Seventh Circuit dismissed the plaintiffs’ claim because they failed to use the civilian complaint system and failed to exhaust their administrative remedies.<sup>122</sup> The court reasoned that as it pertains to “Title VII cases, . . . we are required to differentiate the civilian and military positions associated with a dual-status job . . . because Title VII specifically provides for claims against the government for civilian employees in the military departments.”<sup>123</sup>

In *Mier v. Owens*, the Ninth Circuit recognized the dual military and civilian status of technicians and held that Title VII does not apply to technicians “when the challenged conduct is integrally related to the military’s unique structure.”<sup>124</sup> In *Mier*, the appellant, a Hispanic civil service technician employed in the Arizona Army National Guard, filed a complaint under Title VII alleging discriminatory personnel actions (i.e., denial of military promotions and suspension from civilian employment) were taken against him on account of race, color, and national origin.<sup>125</sup> The Ninth Circuit held that “[m]ilitary promotion is . . . a personnel action that is integrally related to the military’s structure. . . . Title VII does not allow this court to review decisions regarding the military

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<sup>118</sup> *Id.* (citing *Parker v. United States*, 611 F.2d 1007, 1013 (5th Cir. 1980)).

<sup>119</sup> *Id.* at 299.

<sup>120</sup> *Id.*

<sup>121</sup> *Bartley v. U.S. Dep’t of the Army*, 221 F. Supp. 2d 934 (C.D. Ill. 2002).

<sup>122</sup> *Id.* at 947.

<sup>123</sup> *Id.* at 954 (quoting *Brown*, 227 F.3d at 299 n.4).

<sup>124</sup> *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), *cert. denied sub nom. Mier v. Van Dyke*, 517 U.S. 1103 (1996). *But see Brown*, 227 F.3d 295. The Fifth Circuit suggested that technicians are not inherently military, and therefore, Title VII’s application may depend on whether plaintiff’s allegations arise from his position as a civilian employee of a military department or his position as a uniformed servicemember. *Id.*

<sup>125</sup> *Mier*, 57 F.3d at 751.



promotion of individuals serving as Guard technicians.”<sup>126</sup> The Ninth Circuit concluded that the suspension from civilian promotion was “integrally related to the military’s structure and nonjusticiable.”<sup>127</sup>

### C. Irreducibly Military Federal Employees

In *Leistiko v. Stone*, the Sixth Circuit held that the hybrid position occupied by DSTs “are irreducibly military in nature.”<sup>128</sup> Colonel Leistiko, a DST serving as a Supervisory Aircraft Pilot in the Ohio National Guard, suffered an apparent grand mal seizure during a helicopter flight resulting in medical disqualification from further aviation service.<sup>129</sup> Leistiko sued alleging, among other things, that the Secretary of the Army violated the Rehabilitation Act.<sup>130</sup> The Sixth Circuit noted that “every court having the occasion to consider the capacity of National Guard technicians has determined that capacity to be irreducibly military in nature,”<sup>131</sup> and thus the plaintiff’s claim was nonjusticiable.

The Sixth Circuit held in *Fisher v. Peters* that a National Guard technician’s Title VII claim is nonjusticiable because technician positions are “irreducibly military in nature.”<sup>132</sup> In *Fisher*, the plaintiff sought promotions to three different posts while serving as a DST in the Tennessee Air National Guard (TANG) but was denied each time.<sup>133</sup> Following each promotion denial, she filed administrative complaints with the EO office alleging gender discrimination.<sup>134</sup> Finally, the plaintiff filed a civil suit in federal district court, alleging violations of Title VII of the Civil Rights Act of 1964.<sup>135</sup> The court held that technicians’ claims are nonjusticiable and their sole channel for relief in

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> 134 F.3d 817, 820–21 (6th Cir. 1998).

<sup>129</sup> *Id.* at 819.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 821; *see also* *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993).

<sup>132</sup> *Fisher v. Peters*, 249 F.3d 433, 443 (6th Cir. 2001) (quoting *Leistiko*, 134 F.3d at 75).

<sup>133</sup> *Id.* at 434–36.

<sup>134</sup> *Id.* at 436.

<sup>135</sup> *Id.* at 437.

discrimination cases is within the military<sup>136</sup> because technician positions are “irreducibly military in nature.”<sup>137</sup>

In sum, federal circuit courts of appeal are split over the justiciability of Title VII claims brought by DSTs. Several circuits give more weight to whether the claim is based on unlawful conduct solely related to the civilian status of the technician in determining the justiciability of the claim. Other circuits view DSTs as military personnel. Congressional actions excluding DSTs from Title VII coverage would end the confusion over the justiciability of DSTs’ discrimination claims. Courts should not have to wrestle over this uniquely military personnel matter. Deference should be given to the military to make personnel decisions regarding DSTs and the disposition of their discrimination claims. The Supreme Court has yet to rule on the matter. The following proposal would resolve the question of the justiciability of DSTs’ complaints of unlawful discrimination.

#### VI. Proposed Resolution to the Controversy

In order to alleviate the serious problem of discrimination in the military, a balance must be reached between maintaining the courts’ traditional approach of denying review of claims concerning the military and protecting the due process rights of aggrieved DSTs. A possible solution is the implementation of a system whereby jurisdiction over a personnel matter that is uniquely military in nature is resolved within military channels. This article contends that a three-pronged approach should be taken to address disposition of DSTs’ discrimination complaints.

First, all DSTs must be specifically excluded from Title VII coverage. The DSTs serve in hybrid positions that are more akin to military than to civilian positions. As previously discussed, this military status is in line with congressional intent. Therefore, DSTs should be treated like military personnel for Title VII purposes.

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<sup>136</sup> These complaints would be filed with either the National Guard Military Discrimination Complaint System or the National Guard Civilian Complaint System depending on the status of the technician and the nature of the challenged conduct.

<sup>137</sup> *Fisher*, 249 F.3d at 443 (quoting *Leistiko*, 134 F.3d at 75) (holding that a National Guard technician’s sole channel for relief in discrimination cases is within the military).

Second, all unlawful discriminatory acts directed toward a DST must be defined as occurring while in the DST's military capacity.<sup>138</sup> DSTs are employed by the federal/state government to carry out duties directly related to military service.<sup>139</sup> Under the compatibility doctrine, all DSTs must hold positions that are compatible to their military position and training.<sup>140</sup> Simply stated, at all times, no matter their status, technicians are carrying out a military mission. Therefore, any unlawful discriminatory acts against a DST must be deemed as occurring while in their military capacity.

Third, discrimination complaints submitted by DSTs must be processed exclusively through the NGMDCS. This approach will promote fairness and foster positive unit morale. Allowing DSTs to continue to submit complaints to the EEOC and ultimately file suit in federal district court may adversely affect unit cohesion and readiness. For example, a DST, serving in her capacity as a civilian federal employee, may bring a complaint to the EEOC alleging discrimination based on race and sex concerning her performance rating, her termination as a DST, her failure to receive a bonus, and her nonselection for a civilian position. If the EEOC finds in favor of the DST, she may receive up to \$300,000 in compensatory damages, reinstatement, assignment to her desired position, and other remedial damages.<sup>141</sup> A uniformed member of the military, or a DST serving in her military capacity in the same or similar job and in the same unit, is precluded by law from filing discrimination complaints with the EEOC. Consequently, the uniformed servicemember or military-status DST is barred from receiving the same monetary and compensatory awards that her civilian-status DST counterparts may receive. Such inequities may create resentment among uniformed servicemembers and DSTs, resulting in an adverse impact on morale, unit cohesion, and military readiness.<sup>142</sup>

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<sup>138</sup> The author recognizes that Title VII does not define discriminatory acts as occurring in any specific capacity. This change could occur either by making a minor amendment to Title VII or through judicial interpretation. In whatever way the change is effected, however, the dual status technician must still be found to be in the scope of employment to preclude prosecutions for serious acts, such as sexual assault.

<sup>139</sup> *Simpson v. United States*, 467 F. Supp. 1122, 1124 (S.D.N.Y. 1979).

<sup>140</sup> 10 U.S.C.S. § 10216(d) (LexisNexis 2008).

<sup>141</sup> Civil Rights Act of 1991, 42 U.S.C. § 1981a (2006).

<sup>142</sup> That dual status technicians and uniformed servicemembers currently work alongside civilian employees across the DoD is of no movement. It is inevitable that disparate treatment of similarly situated groups may create tensions that could fester and impact morale. Whether this impact could impact readiness is for the reader to decide.

The utilization of NGMDS will promote consistency in disposition of unlawful discrimination cases. By having a single appellate authority (i.e., Chief, National Guard Bureau (NGB)) within the NGMDCS, complainants and respondents will be privy to past rulings. This information could be used to promote early settlement of cases. Strict adherence to the procedural rules of the NGMDCS will minimize judicial interference with the military on matters related to discrimination complaints filed by DSTs. The fundamental due process rights of DSTs will be guarded by strict adherence to the requirements of the NGMDCS. Complaints will be processed, complainants will be allowed to submit appeals, and a final ruling will be issued. All DSTs will have equal access to the same remedies for redress of unlawful discriminatory acts or practices. Therefore, courts will have no need to interfere with matters related to disposition of discrimination complaints filed by DSTs.

In sum, DSTs should be treated like military personnel for Title VII purposes. Any unlawful discriminatory acts against DSTs must be deemed as occurring while in their military capacity. Discrimination complaints submitted by all DSTs must be processed through the NGMDCS. Strict adherence to the procedural rules of the NGMDCS will support the courts' continued deference to the military on matters that impact discipline and efficiency in the armed forces. The next section will provide an explanation of the current discrimination complaint procedures and emphasize the benefits of designating the NGMDCS as the required system for processing discrimination complaints filed by DSTs.

#### VII. Adequate Due Process Protection Provided under Existing Discrimination Complaint Procedures

The current discrimination complaint procedures provide adequate due process protection to DSTs. If Congress amends the Technician Act to specifically exclude DSTs from Title VII coverage, the current discrimination complaint procedures will fill the gap and provide a venue for disposition of discrimination complaints. The NGMDCS's due process protections available to DSTs compare favorably to those provided to active duty military personnel.

In order to compare the due process protections of the NGMDCS and the DoD EO program, this section divides the elements of their respective protections into parts. For sake of comparison, this article will

use the Army EO Program. Part A explains those policies and procedures established under each system to ensure fair, equitable, and non-discriminatory treatment of all members and employees of the National Guard and active duty servicemembers. Part B provides a description of the personnel responsible for ensuring the integrity of the NGMDCS and the Army EO Program in processing, managing, and adjudicating discrimination complaints. Part C sets forth the intake process for discrimination complaints. Part D explains how informal complaints are investigated and processed. Part E compares how each system investigates formal complaints. Part F discusses how final decisions are issued by the NGB and the general court-martial convening authority (GCMCA) for active duty formal complaints. This section concludes by asserting that the NGMDCS provides adequate due process protections for DSTs comparable to those available to active duty military personnel, thereby negating the need to permit DSTs to file civil suits under Title VII in federal district court.

#### A. Policy—NGMDC and Army EO Program

The policy of the National Guard is to improve morale and productivity through the fair, equitable, and non-discriminatory treatment of all members, employees, or applicants for membership in the National Guard.<sup>143</sup> This policy is designed to foster unit cohesion and increase the combat effectiveness of the National Guard.<sup>144</sup> The National Guard has established and implemented the NGMDCS as a mechanism to enforce its stated policies and to provide a fair and equitable venue for redress of aggrieved persons in accordance with applicable laws and regulations.<sup>145</sup>

The NGMDCS is governed by National Guard Regulation 600-22/NGR (AF) 30-3 (NGR 600-22).<sup>146</sup> “This regulation establishes policies and procedures for filing, processing, investigating, settling, and adjudicating discrimination complaints in the Army National Guard (ARNG) and Air National Guard (ANG).”<sup>147</sup> It establishes a uniform complaint system for both National Guard legal and administrative

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<sup>143</sup> NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1-7(a).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* para. 1-7(c).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* para. 1-1.

reviews, as well as a final administrative decision by a neutral and detached final decision authority.<sup>148</sup>

The Army EO policy applicable to active duty Army personnel is similar to the National Guard policy. The policy of the EO program in the Army is to provide equal opportunity and fair treatment for military personnel regardless of race, color, national origin, or gender,<sup>149</sup> and to provide a working environment free of discriminatory practices and offensive behavior.<sup>150</sup> Under the Army EO Program, Soldiers have the right to file discrimination complaints with the chain of command without fear of intimidation, reprisal, or harassment.<sup>151</sup>

#### B. Assets

The overall direction of EO program within the National Guard is set by the Chief, NGB, who provides the final level of appeal and issues final decisions in all complaints of discrimination administratively processed within the NGMDCS.<sup>152</sup> The Directors, Army and Air National Guard, NGB, implement EO within their respective components and forward with comments formal discrimination complaints to the Chief, NGB, for final decision.<sup>153</sup> The Chief, EO, NGB, provides overall guidance for the NGMDCS and issues final decisions on behalf of the Chief, NGB.<sup>154</sup>

In addition, the Chief, EO, is tasked with establishing policies and procedures for efficient processing, proper management, and effective adjudication of discrimination complaints.<sup>155</sup> The Judge Advocate, NGB, conducts legal reviews of discrimination complaints and ensures that discrimination files and reports of investigation (ROI) comply with all provisions of the Privacy Act and Freedom of Information Act.<sup>156</sup>

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<sup>148</sup> *Id.* para. 1-7.

<sup>149</sup> AR 600-20, *supra* note 10, app. D-4(a).

<sup>150</sup> *Id.* para. 6-2(a).

<sup>151</sup> *Id.* para. 6-9(a)(1).

<sup>152</sup> NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1-4.

<sup>153</sup> *Id.* para. 1-4(b).

<sup>154</sup> *Id.* para. 1-4(c).

<sup>155</sup> *Id.* para. 1-4(c)(3).

<sup>156</sup> *Id.* para. 1-4(d).

State Adjutants General (AG) implement and manage the NGMDCS at the state level.<sup>157</sup>

Commanders at all levels ensure that EO policies and applicable regulations are adhered to in their organizations.<sup>158</sup> These commanders will conduct inquiries whenever an allegation of discrimination is brought to their attention.<sup>159</sup> If the inquiry substantiates a finding of discrimination, the commander will resolve the matter at the lowest appropriate level.<sup>160</sup>

Under the Army EO Program, significant personnel assets are committed to the investigation and processing of EO complaints. In addition to the unit chain of command, complainants may submit EO complaints through alternative agencies including the Inspector General; chaplain; provost marshal; chief, community housing referral and relocation services office; staff judge advocate (SJA); and medical agency personnel.<sup>161</sup> Initial actions by these agencies on informal complaints are similar to those taken on formal complaints.

### C. Intake of Complaints

Dual status technicians serving in their military status who believe they have been unlawfully discriminated against in National Guard technician employment must process such complaints through the NGMDCS.<sup>162</sup> The technician's chain of command will serve as the primary channel for resolving the allegations.<sup>163</sup> The lowest appropriate command will assist the technician by investigating the matter, taking corrective action, and attempting to resolve the complaint to the technician's satisfaction, where possible.<sup>164</sup>

Time constraints have been established to ensure that discrimination complaints are processed expeditiously and to ensure the availability of

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<sup>157</sup> *Id.* para. 1-4(e).

<sup>158</sup> *Id.* para. 1-4(f)(1).

<sup>159</sup> *Id.* para. 1-4(f)(4).

<sup>160</sup> *Id.*

<sup>161</sup> AR 600-20, *supra* note 10, app. D-1(2).

<sup>162</sup> NATIONAL GUARD MILITARY DISCRIMINATION COMPLAINT SYSTEM, *supra* note 9, para. 1-4(i)(1).

<sup>163</sup> *Id.* para. 1-7(f).

<sup>164</sup> *Id.*

information and material witnesses needed to effectively resolve the complaints.<sup>165</sup> A discrimination complaint “must be filed within 180 calendar days from the date of the alleged discrimination or the date that the individual became aware or reasonably should have become aware of the discriminatory event or action.”<sup>166</sup> This factor is important because if the complainant fails to meet this filing period, the complaint may be dismissed as untimely.

The Army EO complaints processing system investigates allegations of unlawful discriminatory acts or practices on the basis of race, color, religion, gender, and national origin.<sup>167</sup> Under the Army EO complaints processing system, Soldiers have the right to file discrimination complaints to the chain of command without fear of intimidation, threat of reprisal, or apprehension of harassment.<sup>168</sup> Commanders should make every attempt to resolve the problem at the lowest appropriate level within the organization.<sup>169</sup>

#### D. Informal Complaints

An informal complaint may be expressed orally to a member of the technician’s chain of command. The NGMDCS requires commanders to expeditiously process allegations of discrimination in compliance with rigorous administrative procedures. In brief, commanders have thirty calendar days or through the next drill period to complete all required actions on an informal complaint.<sup>170</sup> The sole mechanism available to a technician for appealing the disposition of an informal complaint is to file a formal complaint.<sup>171</sup>

Under the Army EO Program, an informal complaint is considered any complaint that a Soldier elects not to file in writing.<sup>172</sup> These complaints may be resolved directly by the Soldier with the assistance of another unit member, the commander, or other person in the Soldier’s

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<sup>165</sup> *Id.* para. 1-6(a).

<sup>166</sup> *Id.* para. 1-8(a).

<sup>167</sup> AR 600-20, *supra* note 10, app. D-1.

<sup>168</sup> *Id.* para. 6-9(a)(1).

<sup>169</sup> *Id.* app. D-1.

<sup>170</sup> *Id.* para. 1-8(b).

<sup>171</sup> *Id.* para. 1-7(f).

<sup>172</sup> *Id.* app. D-1(a)(1).



chain of command.<sup>173</sup> Informal complaints are typically resolved through discussion, problem identification, and clarification of the problem.<sup>174</sup> There is no time suspense for resolution of informal complaints.<sup>175</sup>

#### E. Formal Complaints

Under the NGMDCS, a formal complaint must be submitted in writing. The lowest level command has sixty calendar days from receipt of a formal complaint to complete all required action on the complainant.<sup>176</sup> If the complainant is not satisfied with the resolution, the complaint will be forwarded to the next level of the chain of command.<sup>177</sup> Each intermediate level command has thirty calendar days (after receipt of the complaint from the subordinate commander) or through the next drill period to complete all required actions on the matter.<sup>178</sup>

The supervisory chain is required to provide adequate and appropriate feedback to the complainant on the status of the complaint.<sup>179</sup> If the matter is unresolved at one level and submitted to the next higher level, the complainant will be given a copy of the inquiry report and may submit an appeal with the next level.<sup>180</sup> If deemed appropriate, the next level will initiate an additional inquiry and attempt to resolve the matter and/or send to the next higher level.<sup>181</sup> If unresolved, the complaint will be forwarded to the AG level for disposition.<sup>182</sup>

The AG implements and manages the NGMDCS at the state level. The AG has ninety calendar days (after receipt of the case file from the subordinate commander) to investigate and take all required action on the case file.<sup>183</sup> The goal of the NGMDCS is to issue a final decision not

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* para. 1-8(c).

<sup>177</sup> *Id.* para. 1-8(d).

<sup>178</sup> *Id.* para. 1-8(e).

<sup>179</sup> *Id.* para. 1-9(e).

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* para. 1-8(f).

later than one year after the filing of a complaint.<sup>184</sup> When discrimination complaints cannot be resolved to the satisfaction of the complainant at the AG level, the AG will request a final decision from the NGB.<sup>185</sup> This is important because it provides DSTs with post-decisional due process rights and a final administrative decision on the matter.

Under the Army EO Program, formal EO complaints require more documentation than informal complaints, and are subject to time constraints.<sup>186</sup> The complainant files a written complaint (using a DA Form 7279, EO Complaint Form) and swears to the accuracy of the information contained in the complaint.<sup>187</sup> Soldiers must file a formal complaint within sixty days from the date of the alleged incident with the commander at the lowest echelon of command.<sup>188</sup>

An alternative agency may elect not to investigate a complaint, but to refer the matter to another agency or to the appropriate commander for initiation of an investigation.<sup>189</sup> All formal complaints must be reported to the first GCMCA in the chain of command.<sup>190</sup> Periodically, the commander must submit reports to the GCMCA on the status of the investigation until completion.<sup>191</sup> The commander will either appoint an investigating officer (IO) in accordance with the provisions of Army Regulation 15-6 or personally investigate the complaint.<sup>192</sup> The commander will establish a detailed plan to ensure that the complainant, witnesses, and the subject of the investigation are protected from acts of reprisal.<sup>193</sup>

Upon completion of the investigation, the IO will make factual findings and provide the appointing authority with disposition recommendations that are consistent with the findings.<sup>194</sup> The appointing authority will forward the ROI to the SJA for a legal review.<sup>195</sup> If the

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<sup>184</sup> *Id.* para. 1-8(g).

<sup>185</sup> *Id.* para. 1-4(e)(4).

<sup>186</sup> *Id.* app. D-1(5)(b)(1).

<sup>187</sup> *Id.* app. D-1(5)(b)(2).

<sup>188</sup> *Id.* app. D-1(5)(b)(5), (6).

<sup>189</sup> *Id.* app. D-2.

<sup>190</sup> *Id.* app. D-4(a).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* app. D-4(b).

<sup>193</sup> *Id.* app. D-4(c).

<sup>194</sup> *Id.* app. D-6(i).

<sup>195</sup> *Id.* app. D-7.

SJA determines that the ROI is legally sufficient, the appointing authority will take action on the investigation.<sup>196</sup>

If the complaint is approved, the commander will take remedial action to restore benefits and privileges lost due to unlawful discrimination or sexual harassment.<sup>197</sup> In addition, the commander will take corrective action to prevent future occurrences of discriminatory practices and to address organizational deficiencies that gave rise to the complaint.<sup>198</sup> These actions may be either administrative or punitive.<sup>199</sup> If the complaint is unresolved to the complainant's satisfaction, the complainant may appeal to the next higher commander. The appellate commander has fourteen calendar days to act on the appeal.<sup>200</sup>

#### F. Final Decision Authority

Under the NGMDCS, within eight months of the formal filing the complaint will be forwarded to NGB for review and final decision.<sup>201</sup> The NGB will conduct a review of discrimination complaints when: “[1] a complaint is dismissed, in whole or in part; [2] after a formal investigation has been conducted and the AG and the complainant have been unable to resolve the complaint; [3] a resolution of the complaint is reached; and [4] a complainant withdraws his/her complaint.”<sup>202</sup> The complaints will be reviewed for adherence to applicable laws and regulations as well as to assess the merits of the case.<sup>203</sup>

The NGB EO will conduct a review of the entire case file and coordinate the matter with the SJA, NGB, and the Army or Air Directorate, NGB.<sup>204</sup> Following this review, the AG will be advised on whether a dismissal is appropriate and whether the complaint case file and procedures are both administratively and legally sufficient.<sup>205</sup> The NGB will issue a final decision on the case file using a preponderance of

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<sup>196</sup> *Id.* The appointing authority may approve all or part of the findings and recommendations, or order further investigation into the matter. *Id.*

<sup>197</sup> *Id.* app. D-7(a).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* app. D-7(a)(1).

<sup>200</sup> *Id.* app. D-8(c).

<sup>201</sup> *Id.* para. 1-8(f).

<sup>202</sup> *Id.* para. 2-9(a)(1)–(4).

<sup>203</sup> *Id.* para. 2-9(b).

<sup>204</sup> *Id.* para. 2-9(c).

<sup>205</sup> *Id.* para. 2-9(d)(1), (2).

evidence standard.<sup>206</sup> This significant legal standard further emphasizes the level of due process provided to complainants. “All relevant evidence of the record will be scrutinized using principles and case law implemented under Title VII.”<sup>207</sup>

Both the AG and complainant will receive copies of the final decision.<sup>208</sup> In addition, the AG or designee will notify any person(s) named in the case file as a responsible party for the discriminatory act(s) of the final decision issued by NGB.<sup>209</sup> If a complaint is administratively closed or a final decision is issued by NGB, the administrative process established under the NGMDCS regulation is exhausted—there are no further appeals.<sup>210</sup> The last step in the process is to implement any binding terms of the resolution or any terms directed in the final NGB decision.<sup>211</sup>

Under the Army EO Program, complaints that are unresolved at the brigade level may be forwarded to the GCMCA.<sup>212</sup> The only exception is where organizations have published a memorandum of understanding delegating Uniform Code of Military Justice authority to local commanders.<sup>213</sup> Decisions at the GCMCA or delegated local command levels are final.<sup>214</sup>

In sum, the NGMDCS offers DSTs due process protections comparable to those provided by the Army’s active duty EO program. Under both systems, significant personnel assets are committed to processing discrimination complaints. All complaints are investigated within established timelines. If the complainant is not satisfied with the resolution, the complaint may be forwarded to high levels within the command for investigation. Under both systems, discrimination complaints are investigated and the complainant receives a final decision.

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<sup>206</sup> *Id.* para. 2-10.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* para. 2-11.

<sup>212</sup> *Id.* app. D-9.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

Mandating the use of the NGMDCS by DSTs to resolve discrimination complaints will promote fundamental fairness and equal treatment among all military personnel.

### VIII. Conclusion

For purposes of Title VII, DSTs should be considered members of the armed forces. Although the federal circuit courts may differ in their holdings regarding whether DSTs can bring Title VII claims, the circuits are consistent in their rationale that DST positions are military in nature and vital to the military's unique structure. As such, DSTs, like military personnel, should be barred from bringing Title VII discrimination suits against the military.

Treating DSTs like members of the armed forces for Title VII purposes will not deprive them of a remedy. The DSTs could seek redress for unlawful discrimination complaints through the NGMDCS. The NGMDCS provides sufficient due process protections for DSTs, including a final decision on the merits of the case by a neutral and detached appellate authority.

By having a single system, the appellate authority will issue decisions on all DST cases. These rulings will create precedents, which may be reviewed and considered by complainants and subjects alike for settlement purposes, creating even more efficiency within the NGMDCS. In addition, a uniformed complaint system for all DSTs provides consistency in disposition of cases and ensures that servicemembers are confident in the system's credibility.

The NGMDCS provides DSTs remedies analogous to those available within the Army EO Program. Complainants receive full adjudication of formal complaints no later than one year after submission through the NGMDCS. In comparison, if the matter goes through the EEO system which allows complainants to file a civil suit in federal district court after exhausting the administrative process, the matter may take well over a year to resolve. In short, justice is neither delayed nor denied<sup>215</sup> when

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<sup>215</sup> Letter from Martin Luther King, Jr., to his fellow clergymen (Apr. 16, 1963), available at [http://www.stanford.edu/group/King/popular\\_requests/frequentdocs/birmingham.pdf](http://www.stanford.edu/group/King/popular_requests/frequentdocs/birmingham.pdf) (stating that "justice too long delayed is justice denied").

DSTs' unlawful discrimination complaints are processed through the NGMDCS.

Limiting DSTs' redress to the NGMDCS will simply make explicit what is already implicit in Title VII and its legislative history. Unless a bright-line rule is established for disposition of unlawful discrimination complaints filed by DSTs, courts will continue to tread on decisions that regulate military life and infringe upon matters that define the military structure. Amending the Technician Act to exclude DSTs from Title VII coverage would resolve the matter once and for all.