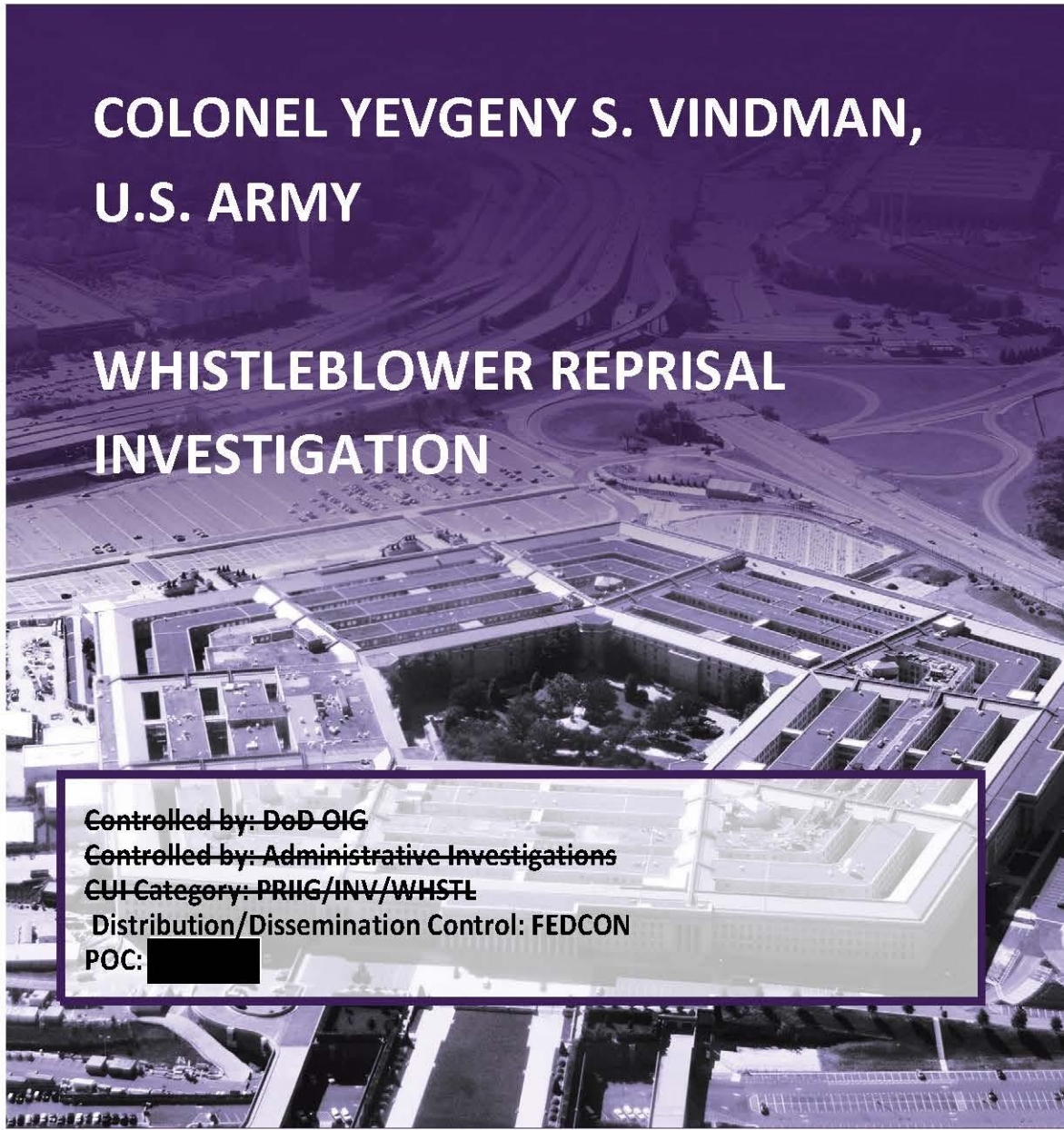


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INSPECTOR GENERAL

U.S. Department of Defense

May 18, 2022



**COLONEL YEVGENY S. VINDMAN,
U.S. ARMY**

**WHISTLEBLOWER REPRISAL
INVESTIGATION**

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WHISTLEBLOWER REPRISAL INVESTIGATION

LIEUTENANT COLONEL YEVGENY S. VINDMAN

NATIONAL SECURITY COUNCIL

WASHINGTON, D.C.

Executive Summary

We conducted this investigation in response to a complaint filed with the DoD Hotline on August 18, 2020, alleging that various administration officials, including former President Donald J. Trump, took actions against Lieutenant Colonel (LTC) Yevgeny Vindman (the Complainant), U.S. Army, while he was serving at the National Security Council (NSC), Washington, D.C., in reprisal for his protected communications. The complaint alleged that the following personnel actions were taken or withheld:

- Mr. Michael Ellis, the Complainant's direct supervisor, former NSC Deputy Legal Advisor and Special Assistant to the President, Senior Associate White House Counsel; and Mr. John Eisenberg, former Assistant to the President, Deputy White House Counsel and NSC Legal Advisor, gave him an adverse (referred) Officer Evaluation Report (OER) for the rating period June 1, 2019, through February 7, 2020.¹
- Mr. Robert O'Brien, former Assistant to the President for National Security Affairs (APNSA), also known as the National Security Advisor, and Mr. Alexander Gray, former Deputy Assistant to the President and NSC Chief of Staff, Mr. Ellis and Mr. Eisenberg significantly changed his duties and responsibilities to a level inconsistent with his grade.
- Mr. O'Brien and Mr. Gray removed him from his position at the NSC.
- Mr. Ellis and Mr. Eisenberg did not recommend him for an end of tour award after he completed his NSC tour.²

The Complainant alleged that the officials named above reprised against him because he made protected communications and because of his association with his twin brother's protected communications to Members of Congress.

While serving at the NSC, the Complainant made protected communications alleging that former President Trump violated U.S. laws when President Trump asked a foreign government to investigate allegations against former Vice President and Democratic presidential candidate Joseph R. Biden Jr., his political opponent. The Complainant made additional protected communications when he reported that NSC officials engaged in sexist behavior, misused their positions, and misused NSC staff by asking them to perform personal errands. Finally, the Complainant made protected communications when he reported that NSC officials violated the

¹ Army Regulation 623-3, "Evaluation Reporting System," June 14, 2019, states that OERs will be "referred" if they contain entries about unsatisfactory performance or derogatory information; the rater evaluation is marked "CAPABLE"; the senior rater evaluation is marked "NOT QUALIFIED" or "UNSATISFACTORY"; or OERs are issued for "Relief for Cause."

² Although the complaint identified President Trump as a "Responsible Management Official," the complaint did not specify President Trump's involvement in the four alleged actions taken or withheld.

Antideficiency Act.³ The Complainant's protected communications included several to his chain of command.

We found, based on a preponderance of the evidence, that the Complainant was the subject of unfavorable personnel actions from administration officials, as defined by section 1034, title 10, United States Code (10 U.S.C. § 1034), "Protected communications; prohibition of retaliatory personnel actions."⁴ Furthermore, we concluded based on a preponderance of the evidence, that these actions would not have occurred or been withheld absent the Complainant's protected communications.

We make no recommendation with respect to the Complainant, who has been promoted to the rank of Colonel and whose performance record has been corrected. We make no recommendation with respect to the various White House officials, who did not work in the DoD, named in this report. These administration officials have departed their positions in the White House.

⁴ Under 10 U.S.C. § 1034, a protected communication is any lawful communication to a Member of Congress, an Inspector General, or an authorized recipient for any reasonably believed violation of law or regulation.

Background

The National Security Council is the President's principal forum for national security and foreign policy decision making with national security advisors and cabinet officials. It is also the President's principal arm for coordinating these policies across Federal agencies.

The NSC, through the detail of DoD personnel to duty outside the DoD, requested the Complainant's assignment to the Legal Affairs Directorate. According to the Complainant's statement of duties, the assignment gave him an opportunity to collaborate with interagency counterparts at the highest levels and to gain additional subject matter expertise in strategic outreach as well as policy-making processes. The DoD's support to the NSC builds on the close working relationship between the civilian and military spheres, and infuses DoD's unique perspective into White House and NSC decision making processes to protect our Nation's security.

During the time of the events discussed in this report, the Complainant's direct supervisor and rater was Mr. Michael Ellis, then NSC Deputy Legal Advisor, Special Assistant to the President, and Senior Associate White House Counsel.⁵ Mr. John Eisenberg, the Assistant to the President, Deputy White House Counsel, and NSC Legal Advisor, was the Complainant's second-line supervisor and senior rater.⁶

Mr. Robert O'Brien was the Assistant to the President for National Security Affairs, also known as the National Security Advisor, and Mr. Alexander Gray was Deputy Assistant to the President and also served as the NSC Chief of Staff. Although not part of the Complainant's supervisory or rating chain, Mr. O'Brien and Mr. Gray had routine involvement in high-level decisions pertaining to NSC personnel matters by virtue of their positions as National Security Advisor and NSC Chief of Staff.

The Complainant

The Complainant is an active duty U.S. Army judge advocate who currently serves as the Staff Judge Advocate, Headquarters, U.S. Army Communications-Electronics Command, Aberdeen Proving Ground, Maryland. The Complainant and his identical twin brother, LTC Alexander Vindman, U.S. Army, were both assigned to work at the NSC beginning in July 2018.⁷ LTC Alexander Vindman served as the NSC Director for Eastern Europe and Russia.

The Complainant served as the Deputy Legal Advisor and Ethics Counsel for the NSC from July 23, 2018, to February 7, 2020, and in this position was responsible for advising the NSC, the National Security Advisor, the Assistant and Deputy Counsel to the President, NSC committees, and NSC staff

⁵ On March 1, 2020, Mr. Ellis became the NSC Senior Director for Intelligence Programs.

⁶ AR 623-3 identifies raters and senior raters as members of the rating chain who correspond as nearly as practicable to the chain of command or supervision, and have specific responsibilities with respect to completing OERs for their subordinates.

⁷ The Complainant was promoted to Colonel on June 15, 2021. The Complainant's brother, LTC Alexander Vindman, retired from active duty on July 31, 2020. All titles, ranks, and status (retired) identified pertain to the positions held at the time the incident took place and do not necessarily reflect an individual's current rank or title.

on ethics, administrative law, national security, and foreign relations. Specifically, his duties were to:

- draft and review presidential and National Security Advisor correspondence, speeches, and policies;
- facilitate legal review of presidential documents;
- coordinate legal advice for NSC Principals, Deputies, and Policy Coordination Committees and prepare papers on legal matters arising in senior interagency meetings
- serve as the primary legal advisor to the African Affairs, Records and Access Management, International Organizations, Situation Room, and Resource Management directorates of the NSC; and
- advise the NSC Executive Secretary regarding the operations of NSC staff.

Ms. Joan O'Hara, NSC, Deputy Assistant to the President and NSC Executive Secretary, appointed the Complainant to be the NSC Alternate Designated Agency Ethics Official (ADAEO) in April 2019.⁸

On July 6, 2018, the NSC requested the Complainant's detail to the NSC as a Deputy Legal Advisor and Ethics Counsel from the DoD Executive Secretary. On July 17, 2018, and in accordance with DoD Instruction 1000.17, "Detail of DoD Personnel to Duty Outside the Department of Defense," the DoD Executive Secretary approved the NSC's request, effective from July 2018 to January 2019. On October 18, 2018, [REDACTED] granted the Complainant a tour extension from January to July 2019. The Complainant later received a second tour extension for 12 months, extending his assignment at the NSC through July 2020. Therefore, the Complainant's total tour with the NSC was a period of 2 years from July 2018 through July 2020.

During the Complainant's time at the NSC, Mr. Ellis and Mr. Eisenberg evaluated his performance in two annual OERs, the first for the period May 30, 2018, through May 31, 2019 (2019 OER), and the second for the period June 1, 2019, through February 7, 2020 (2020 OER).⁹ The Complainant's 2019 OER was highly favorable to him, with Mr. Eisenberg noting he was "a top 1% military attorney and officer," while the Complainant's 2020 OER was adverse. These OERs are shown in Appendixes A and B.

Scope and Methodology

This investigation covered the period from July 23, 2018, the date of the Complainant's arrival at the NSC, through January 14, 2021, the date the U.S. Army granted an exception to Army Regulation 623-3 concerning the Complainant's revised 2020 OER. We interviewed the Complainant and relevant witnesses, and reviewed documentary and testimonial evidence, including the Army's Commander's Inquiry (CI) into the Complainant's OER and Army personnel records.

The Inspector General Act of 1978, as amended, grants the DoD Inspector General broad authority to conduct and supervise investigations involving personnel, programs, and operations within the DoD. The complaint identified multiple subjects working in the NSC responsible for various

⁸ ADAEO, as defined in title 5 Code of Federal Regulations (CFR) section 2638.603, is an officer or employee who is designated by the head of the agency as the primary deputy to the DAEO in coordinating and managing the agency's ethics program in accordance with the provisions of 5 CFR sec. 2638.104.

⁹ The OER covered the full 12-month period, including the 2 months before the Complainant's arrival at the NSC and exceeds one year, reflecting a start date overlapping with the Complainant's previous 2017-2018 OER.

personnel actions alleged to have occurred in reprisal for making protected communications, resulting in unfavorable or withheld favorable personnel actions.

We examined the alleged actions of Mr. Ellis, who served as the Special Assistant to the President, Senior Associate White House Counsel, and NSC Deputy Legal Advisor, and then NSC Senior Director for Intelligence Programs. Mr. Ellis served in the NSC in various executive schedule civilian positions from 2017 through 2020. Mr. Ellis was appointed NSA General Counsel in January 2021, was placed on administrative leave, and then resigned from that position on April 16, 2021.

Despite our extensive efforts, we were unable to interview any of the former White House administration officials as part of our investigation. Mr. Ellis, through his counsel, raised various concerns regarding our request to interview him, including concerns about executive privilege. We contacted the White House Counsel's Office (WHCO) on March 2, 2021, regarding our efforts to schedule an interview with Mr. Ellis, and officials from the WHCO did not object to our interest in the matter.¹⁰ On April 15, 2021, through Mr. Ellis's attorney, we asked to schedule an interview with Mr. Ellis; on April 16, 2021, Mr. Ellis resigned from his position as the NSA General Counsel. We contacted his attorney on April 19, 2021, and July 21, 2021, to reiterate our interview request. Mr. Ellis did not cooperate with this investigation.

We examined the alleged actions of Mr. Eisenberg, who served as the Assistant to the President, Deputy White House Counsel and NSC Legal Advisor. We made repeated requests through Mr. Eisenberg's counsel from April through July 2021 for an interview. Citing concerns about executive privilege because the matters under investigation occurred during the prior presidential administration, Mr. Eisenberg's attorney consulted with current and former WHCO officials. On June 10, 2021, the Office of General Counsel, DoD Office of Inspector General, contacted Mr. Eisenberg's counsel to again express our interest in interviewing his client. The WHCO notified us on July 16, 2021, that we would hear from Mr. Eisenberg's counsel regarding our interview request. Mr. Eisenberg did not cooperate with this investigation.

We also examined the alleged actions of Mr. O'Brien, who served as the National Security Advisor, and Mr. Gray, who served as the NSC Chief of Staff and Deputy Assistant to the President. On April 28, 2021, we requested through Mr. O'Brien's counsel an interview with Mr. O'Brien on the matter. We requested through Mr. Gray's counsel, on April 28 and April 29, 2021, to interview Mr. Gray. Neither Mr. O'Brien nor Mr. Gray consented to an interview with us, and, therefore, did not cooperate with this investigation.

We notified the WHCO that we intended to pursue interviews with NSC officials, including an employee in the NSC Resource Management Directorate, but WHCO officials said that we could interview that employee only if an attorney from the WHCO attended the interview. It is our policy not to allow agency counsel to attend interviews. Despite our inability to conduct a detailed interview with the NSC employee, we were able to rely on information the employee elected to share with us during a phone call before we sought WHCO coordination; at the time of our phone call we did not know the individual was a current NSC employee.¹¹

¹⁰ According to the White House Counsel's Office, it did not object to the interviews with prior NSC officials because some of these NSC officials had already given interviews to Army investigators on the same topics.

¹¹ We also reviewed a summarized statement that the NSC employee provided in an Army CI.

Whistleblower Protection Under the Military Whistleblower Protection Act

The DoD Office of Inspector General conducted this whistleblower reprisal investigation pursuant to the Military Whistleblower Protection Act, under section 1034, title 10, United States Code (10 U.S.C. § 1034), “Protected communications; prohibition of retaliatory personnel actions,” which is implemented by DoD Directive 7050.06, “Military Whistleblower Protection,” April 17, 2015 . The Military Whistleblower Protection Act prohibits any person from taking or threatening to take an unfavorable personnel action or withholding or threatening to withhold a favorable personnel action from a member of the Armed Forces in reprisal for making a protected communication. A protected communication is any lawful communication to a Member of Congress, an Inspector General, or an authorized recipient for any reasonably believed violation of law or regulation. This includes:

- a law or regulation prohibiting rape, sexual assault, or other sexual misconduct, sexual harassment, or unlawful discrimination;
- gross mismanagement;
- a gross waste of funds;
- an abuse of authority;
- a substantial and specific danger to public health or safety; or
- a threat by another member of the Armed Forces or employee of the U.S. Government that indicates a determination or intent to kill or cause serious bodily injury to members of the armed forces or civilians, or damage to military, Federal, or civilian property.

To be protected, such communications must be made to a recipient authorized under 10 U.S.C. § 1034. Authorized recipients are:

- Members of Congress;
- Inspectors General;
- members of a DoD audit, inspection, investigation, or law enforcement organization;
- any person or organization in the chain of command;
- a court-martial proceeding;
- any other person or organization designated pursuant to regulations or other established administrative procedures for such communications;
- any person or organization testifying or participating in or assisting in an investigation or proceeding related to a protected communication under the statute; or
- any person or organization filing, causing to be filed, participating in, or otherwise assisting in an action brought under the statute.

Under the Military Whistleblower Protection Act, a preponderance of the evidence must establish a causal connection between the protected communications and the unfavorable or withheld favorable personnel actions. A causal connection may be established by weighing the closeness in timing between the protected communications and the personnel actions; the presence of retaliatory animus—the intent or motive to retaliate for protected communications; and the treatment of the Complainant compared to similarly situated military members. Together, this evidence is weighed to determine whether the personnel action would have been taken, threatened, or withheld absent the protected communication. The complaint is substantiated if the personnel action would not have been taken, threatened, or withheld absent the protected communication. Conversely, if the evidence establishes, again by a preponderance of the evidence, that the

personnel action would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated.

Findings

Overview of the Protected Communications

The Complainant made a series of three protected communications, two of which concerned President Trump's phone call to Ukrainian President Volodymyr Zelensky. The Complainant made two protected communications to both Mr. Eisenberg and Mr. Ellis, and another protected communication to only Mr. Eisenberg.

First Protected Communication: Conversation With Mr. Ellis and Mr. Eisenberg About the July 25, 2019 Phone Call

On May 20, 2019, Volodymyr Zelensky was sworn in as the President of Ukraine, and on July 25, 2019, President Donald J. Trump had a 30-minute phone call with him in which President Trump congratulated President Zelensky on his election, asserted that the United States had been very good to Ukraine, and asked that he, as a favor, open an investigation into former Vice President and Democratic presidential candidate Joseph R. Biden Jr., his political opponent. LTC Alexander Vindman, the Complainant's brother, was one of the individuals on the phone call. According to the Complainant, upon the conclusion of the telephone call, LTC Alexander Vindman walked to the Complainant's office to discuss his concern that President Trump had violated U.S. laws by asking a foreign government to interfere in a U.S. presidential election.

The Complainant made a protected communication when he and LTC Alexander Vindman then went to the office of Mr. Eisenberg, an authorized recipient, to report that President Trump might have violated U.S. law during his phone call with President Zelensky. Mr. Ellis, an authorized recipient, joined the meeting shortly after their arrival and LTC Alexander Vindman described the phone call. Both LTC Alexander Vindman and the Complainant reported their concerns about the possible illegalities of President Trump's conduct, namely that he asked President Zelensky to investigate a political rival, former Vice President Biden.

Moreover, in an October 29, 2019 deposition before a joint session of multiple U.S. House of Representatives committees, specifically the Permanent Select Committee on Intelligence, the Committee on Oversight and Reform, and the Committee on Foreign Affairs, in connection with the impeachment inquiry into President Trump discussed later in the report, LTC Alexander Vindman testified that both he and the Complainant had reported concerns about the President's phone call to Mr. Ellis and Mr. Eisenberg on July 25, 2019. Therefore, based on the available evidence, Mr. Ellis and Mr. Eisenberg were aware of the Complainant's July 25, 2019 communication.

We have no evidence upon which to conclude that Mr. O'Brien or Mr. Gray would have known that the Complainant reported these concerns to Mr. Ellis and Mr. Eisenberg.

A complaint of a violation of law or regulation or one of the other violations set forth in section 1034, when made to an authorized recipient, is a protected communication under the statute. Mr. Ellis and Mr. Eisenberg were authorized recipients as defined by section 1034 because they were persons in the Complainant's chain of supervision as rater and senior rater. The

evidence indicates that at the time of his first protected communication, the Complainant believed that President Trump's request might have been a violation of law or regulation. The Complainant's first communication was protected under section 1034.

Conversations With Mr. Eisenberg

The Complainant had two more conversations with Mr. Eisenberg about the July 25, 2019 phone call. The first followup conversation occurred on August 1, 2019. The Complainant told us that during this conversation with Mr. Eisenberg, he did not convey any violations of law or regulation, but rather sought to clarify with Mr. Eisenberg their role and obligations as attorneys, and whether as attorneys they were duty-bound to represent the Office of the President of the United States or the individual serving as President. The Complainant did not report any violations of laws or regulations during the August 1, 2019 conversation; as a result, this communication was not protected.

Second Protected Communication: Conversation With Mr. Eisenberg on August 5, 2019

The Complainant made a second protected communication to Mr. Eisenberg on August 5, 2019, when he conveyed his concern that President Trump's request that President Zelensky investigate President Trump's political rival may have violated the Federal Bribery Statute, the Foreign Corrupt Practices Act, and Federal election laws. The Complainant reported what he believed to be Presidential misconduct and impeachable offenses. The Complainant stated that he believed that President Trump's request was a violation of law or regulation, and during his second conversation with Mr. Eisenberg, an authorized recipient, he cited specific laws that he believed might have been violated.

Mr. Eisenberg was aware of the Complainant's August 5, 2019 communication, as it was made directly to him. We have no evidence upon which to conclude that Mr. Ellis, Mr. O'Brien, or Mr. Gray had any knowledge of this protected communications.

Because the Complainant's second communication was a complaint of a violation of law or regulation and because it was made to an authorized recipient, it was a protected communication under 10 U.S.C. § 1034.

Fall 2019: Impeachment Inquiry, Related Hearings, and Trial

U.S. House of Representatives Speaker Nancy Pelosi announced the launch of an impeachment inquiry led by the House Intelligence Committee, in conjunction with the House Committee on Oversight and Reform and the House Committee on Foreign Affairs, on September 24, 2019. According to Speaker Pelosi, she initiated the inquiry because of allegations that President Trump pressured President Zelensky to investigate presidential candidate Biden a few days after President Trump ordered staff to freeze nearly \$400 million dollars in aid to Ukraine.

From September to November 2019, the U.S. House of Representatives conducted an inquiry, concluding that President Trump abused the powers of the Presidency by, in part, soliciting the interference of Ukraine, a foreign government, in the 2020 U.S. presidential election. The U.S. House of Representatives voted on December 18, 2019, to impeach President Trump for abuse of

power and obstruction of Congress. The Senate trial began on January 16, 2020, and the Senate voted to acquit President Trump on February 5, 2020.

Association With LTC Alexander Vindman's Protected Communications in a Congressional Proceeding, October Through November 2019

On October 29, 2019, the Complainant's brother, LTC Alexander Vindman, provided sworn testimony in a closed deposition before a joint session of multiple U.S. House of Representatives Committees, specifically, the Permanent Select Committee on Intelligence, the Committee on Oversight and Reform, and the Committee on Foreign Affairs, in connection with the impeachment inquiry into President Trump. *The Washington Post* released a full transcript of the closed deposition on November 11, 2019.

Around the time the Complainant's brother provided sworn testimony, congressional staff conveyed through LTC Alexander Vindman's counsel their interest in discussing with the Complainant his knowledge of the facts and circumstances of the President's phone call, the transcript of the phone call, and how the NSC managed the phone call. The Complainant testified to us that the same day his brother's counsel notified him of the congressional interest in his knowledge, he personally notified Mr. Eisenberg; Mr. Michael Purpura, Deputy White House Counsel; and Ms. Sue Bai, NSC Legal Advisor, of Congress's interest in speaking to him.

LTC Alexander Vindman testified before the House Intelligence Committee's public impeachment inquiry on November 19, 2019. The Complainant traveled with his brother to the Committee hearing and sat directly behind him during his testimony. Moreover, the Complainant reviewed and provided some factual input into his brother's opening statement to Congress. According to the Complainant, he requested authorization from Mr. Eisenberg to accompany his brother to the hearing. The Complainant told us that Mr. Eisenberg was not going to give permission; instead, Deputy White House Counsel Pat Philbin authorized his attendance. Televised broadcasts and news articles across multiple media sources referred to LTC Alexander Vindman as a key impeachment witness. In the televised hearing, the Complainant was prominently seated one row behind his brother, LTC Alexander Vindman. Media outlets identified the Complainant as the twin brother of the key impeachment witness.

In his complaint, the Complainant stated that his purpose for attending the televised impeachment inquiry was to publicly support his brother, who was providing testimony consistent with his and the Complainant's earlier protected communications to Mr. Ellis and Mr. Eisenberg that President Trump might have violated laws.

The Complainant's complaint alleged that during LTC Alexander Vindman's testimony in the impeachment inquiry, the Complainant attended "for public support that all the world could see, including the White House," and said that this was a protected activity. Section 1034 is silent regarding claims of associational retaliation. Although not directly on point, we recognize that the courts and the U.S. Merit Systems Protection Board have interpreted similar whistleblower protection statutes to prohibit retaliation against an employee who is a close friend or relative of a

whistleblower.¹² In this case, as discussed below, we do not need to extend, as a matter of law, the protections of Section 1034 to associational retaliation because the strength of evidence regarding reprisal for direct retaliation is so strong.

Third Protected Communication: Meeting With Mr. Ellis and Mr. Eisenberg on January 30, 2020

The Complainant met with an NSC Special Assistant, at the Special Assistant's request, on January 17, 2020. During their conversation, the Special Assistant raised allegations that Mr. O'Brien and Mr. Gray had engaged in sexism, Antideficiency Act violations, and ethical conduct violations. The Complainant told us that he could tell the Special Assistant's concerns were a pressing issue after calling him a few times to schedule their January 17 meeting, and that he noted uneasiness when they met.

The Complainant made a third protected communication on January 30, 2020, to Mr. Ellis and Mr. Eisenberg, both authorized recipients, when he conveyed to them the allegations that an NSC Special Assistant discussed with him on January 17, 2020. In his conversation with Mr. Ellis and Mr. Eisenberg, the Complainant reported that an NSC staff member told him that Mr. O'Brien and Mr. Gray had engaged in sexist conduct by making inappropriate comments about women's looks, although the Complainant did not relay specifically what the alleged inappropriate comments were; that Mr. O'Brien and Mr. Gray would "talk down" to female employees; and that six female staff members were not invited to meetings to which their male counterparts were invited.

During the same meeting with Mr. Ellis and Mr. Eisenberg, the Complainant reported that an NSC staff member was asked to carry out personal errands in violation of 5 CFR sec. 2635.705, "Standards of Ethical Conduct for Employees of the Executive Branch, Use of official time." This included having an NSC staff member make dinner arrangements that required coordination with Mr. O'Brien's wife and scheduling haircut appointments for Mr. O'Brien and Mr. Gray. The Complainant also reported that Mr. O'Brien and Mr. Gray had an NSC staff member retrieve their personal baggage after a trip and obtain their lunch. The Complainant also told Mr. Ellis and Mr. Eisenberg that this staff member informed Mr. Gray that having staff members perform these tasks was inappropriate, but Mr. Gray nonetheless asked the Special Assistant to do it before assigning the task to another staff member. Finally, the Complainant also conveyed that this staff member reported that NSC "Challenge" coins were purchased with appropriated funds, and that

¹² See, e.g., *Thompson v. North American Stainless LP*, 562 U.S. 170 (2011) (recognizing an associational retaliation claim under Title VII of the Civil Rights Act of 1964 for an employee who was terminated in retaliation for his fiancée's protected activity); *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187, 1188-89 (1st Cir. 1994) (holding no reversible error in the lower court's finding that the complainant's employment was terminated in violation of Section 11(c) of the Occupational Safety and Health Act because of his connection with another employee who had made protected complaints); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987) (holding that an order of reinstatement of a supervisory employee under the National Labor Relations Act was valid because there was substantial evidence that the supervisory employee was fired in retaliation for her son's union activity); *Moghadam v. Department of Veteran's Affairs*, 2020 MSPB LEXIS 2221 (2020) (holding that the Whistleblower Protection Act of 1989 "prohibits an agency from taking a personnel action against one person because of his relationship with another employee who has made a protected disclosure") (citation omitted).

Mr. O'Brien awarded these coins to foreigners.¹³ Giving coins purchased with appropriated funds to foreigners may violate the Purpose Statute and the Antideficiency Act.¹⁴

The Complainant made this communication to two authorized recipients, and wrote a contemporaneous memorandum describing the meeting, which was consistent with the testimonial account he provided us. Moreover, on January 28, 2020, the Special Assistant sent the Complainant an e-mail titled, "Overview," that describes many of the scenarios the Complainant stated that he conveyed to Mr. Ellis and Mr. Eisenberg. Finally, witness testimony corroborated that the Complainant discussed these allegations with both Mr. Ellis and Mr. Eisenberg. Therefore, the evidence indicates that Mr. Ellis and Mr. Eisenberg had knowledge of the Complainant's protected communication.

We have no evidence upon which to conclude that Mr. O'Brien or Mr. Gray had knowledge of the Complainant's protected communication.

Based on the totality of the evidence, we conclude the Complainant complained of violations of law or regulation, gross mismanagement, a gross waste of funds, or an abuse of authority, and that the Complainant reported these alleged violations of law to two authorized recipients. Therefore, his communication was protected under 10 U.S.C. § 1034.

Memorandum to Director, Standards of Conduct Office, on March 6, 2020

The Complainant sent a memorandum to Mr. Scott Thompson, Senior Executive Service (SES), DoD, Director, Standards of Conduct Office (SOCO), on March 6, 2020, memorializing his awareness of essentially the same allegations that the NSC Special Assistant told him in mid-January 2020. As stated previously, the evidence indicates that Mr. Ellis and Mr. Eisenberg had knowledge of the allegations the Special Assistant told the Complainant, as the Complainant had brought the matter to their attention in late January 2020, though to the Complainant's knowledge, no action had yet been taken. The Complainant's memorandum alleged that Mr. O'Brien and Mr. Gray engaged in demeaning and demoralizing sexist conduct toward female NSC employees, misused their positions, misused NSC staff's official time for their own personal errands, engaged in sexist conduct, violated standards of ethical conduct for employees, and violated the Antideficiency Act.

Section 1034(b)(1)(B)(vi) allows a communication to any other person or organization designated pursuant to regulations or other established administrative procedures for such communications. SOCO is a part of the U.S. Office of Government Ethics, and its website specifically notes the following under "Where to Report Misconduct."

¹³ The NSC "Challenge" coins are similar to the coin program in the military, which Army Regulation 600-8-22, "Military Awards," March 5, 2019, describes as coins or medallions presented to Service members or civilian employees for one-time awards or recognition devices for acts of exceptional or unique service, achievement, or unique contribution toward an accomplishment.

¹⁴ The Purpose Statute, 31 U.S.C. § 1301, requires that appropriations be applied only to the objects for which the appropriations were made except as otherwise provided by law. A Purpose Statute violation can be a violation of the Antideficiency Act, 31 U.S.C. §§ 1341, 1342, and 1517, if proper funds were not available at the time the funds were obligated, at the time of correction, and continuously between those two times. We limited our review of the potential violation to whether appropriated funds could be used to purchase gifts given to foreigners. We did not conduct additional analysis into the specifics of the funding or the gift; therefore, we are not making a recommendation for NSC or other officials to determine whether an Antideficiency Act violation occurred.

OGE's [Office of Government Ethics] mission is one of prevention. The [OGE] does not handle complaints of misconduct, nor does OGE have investigative or prosecutorial authority. However, there are several agencies and entities across federal, state, and local governments that are responsible for investigating and prosecuting misconduct.

Therefore, neither the SOCO nor the Office of Government Ethics is an "organization designated pursuant to regulations or other administrative procedures for such communications." Accordingly, the Complainant's report of ethics violations made to the SOCO is not protected under 10 U.S.C. § 1034, as defined by DoD Directive 7050.06.

Significant Changes in Duties and Responsibilities

As the Deputy Legal Advisor, the Complainant directly supported the African Affairs Directorate, including providing support on matters such as the Democratic Republic of the Congo's Ebola response. Additionally, the Complainant was responsible for advising on any instances of personnel-related misconduct, including any resulting investigations and dismissals. The Complainant would attend engagements of any NSC staff, up to the National Security Advisor, with non-U.S. Government entities, including private companies and nongovernmental organizations, if the potential for divulging Government internal information existed.

In April 2019, approximately halfway through the Complainant's detail at the NSC, Ms. Joan O'Hara, NSC, Deputy Assistant to the President and NSC Executive Secretary, appointed him to be the NSC Alternate Designated Agency Ethics Official (ADAEO). As described in 5 CFR sec. 2638.603, the ADAEO serves as the primary deputy to the Designated Agency Ethics Official (DAEO) in coordinating and managing the agency's ethics program. The DAEO has primary responsibility for directing the daily activities of the agency's ethics program and coordinating with the Office of Government Ethics. As the ADAEO, the Complainant had secondary responsibility, as alternate for the DAEO, for directly liaising with the Office of Government Ethics, giving the NSC's initial and annual ethics briefings, reviewing and clearing outside engagements and widely attended gatherings of NSC officials, reviewing all gifts received by NSC staff, and reviewing financial disclosures for NSC staff.

In his capacities as Deputy Legal Advisor and ADAEO, the Complainant was primary deputy to the NSC DAEO, legal advisor to four NSC directorates, and the lead White House attorney on the President's Africa and Foreign Assistance Realignment strategies. The Complainant helped manage congressional oversight matters and NSC legal compliance, and managed the conduct of sensitive internal investigations. He advised the National Security Advisor and Deputy National Security Advisor on legal matters relating to national security and foreign relations, including foreign assistance, the nature and scope of presidential authorities, intelligence matters, and treaty interpretation.

Responsibilities in a Prior Lieutenant Colonel Position

The Complainant's date of rank to lieutenant colonel (O-5) was April 2, 2016, and from May 2016 through May 2018, the Complainant served as an Attorney and Legal Advisor in the Labor and

Employment Law Division in the Office of the Judge Advocate General. Some of the Complainant's duties as a lieutenant colonel in this position included:

- providing legal advice to the Army Staff and Secretariat on Department of the Army policies, plans, and programs affecting appropriated and non-appropriated fund personnel;
- providing legal opinions on management-employee relations, labor management relations, and the interpretation and application of rules and regulations pertaining to civilian personnel management; and
- serving as the Army's primary interface for matters arising from the Freedom of Information Act, Headquarters Department of the Army (HQDA) Personnel Review Boards, and civilian transgender policy.

During this time as a new lieutenant colonel, the Complainant's evaluations described his character as epitomizing Army values, noting that he provided the Army a feverish work ethic and an uncompromising moral compass, and that he had matchless moral courage to "always" do the right thing. His work performance was described as reliable, steadfast, timely, and accurate, noting that he was handpicked for his legal acumen, becoming the HQDA legal expert in his field and demonstrating "treasured" expertise.

Reduction of Duties and Responsibilities

The Complainant told us that he began to experience significant changes to his duties and responsibilities beginning in the fall of 2019. He alleged that these changes commenced after his July 2019 protected communication; indeed, the Complainant also told us that he retained virtually none of the job functions he performed before July 2019. According to the Complainant, 5 CFR sec. 2638.104 authorized his access to agency heads when necessary, and the regulation provides that agency ethics officials require access to the agency head to discuss important matters related to the agency's ethics program.¹⁵

The Complainant alleged that from September through November 2019, Mr. Ellis repeatedly denied his access to Mr. O'Brien and the NSC Chief of Staff, Mr. Gray, even though the Complainant's official duties included reviewing the National Security Advisor's interactions with private entities. Around this time, the Complainant became aware of Mr. O'Brien and his spouse's planned Government-funded travel to Utah and California for interactions with non-Federal entities, including planned meetings at Brigham Young University and with the leadership of The Church of Jesus Christ of Latter-day Saints. Upon learning of this planned trip, the Complainant raised concerns primarily to Mr. Ellis, and to a lesser extent Mr. Eisenberg, that the Government-funded travel was not sufficiently official in nature. According to the Complainant, after he raised these concerns, Mr. Ellis directed him to stop reviewing the National Security Advisor's interactions with private entities because any actions involving the National Security Advisor's engagements with private entities would now be verified through the White House Counsel's Office (WHCO). However, according to the Complainant, he became aware that, in early January 2020, another NSC Deputy Legal Advisor, rather than a member of the WHCO, reviewed and cleared an engagement between the National Security Advisor and Lufthansa Airlines representatives.

The Complainant also alleged that in November 2019, Mr. Ellis did not permit the Complainant to attend an NSC Deputies Committee meeting on Libya, a meeting squarely within his portfolio as the

¹⁵ 5 CFR sec. 2638.104, "Government ethics responsibilities of agency ethics officials," paragraph (b)(1), states that "the DAEO must be an employee at an appropriate level ..., such that the DAEO is able to ... gain access to the agency head when necessary to discuss important matters related to the agency's ethics program."

Deputy Legal Advisor to the African Affairs Directorate, and particularly notable as he was the lead White House attorney for the President's Africa and Foreign Assistance Realignment strategies.

According to the Complainant, Mr. Ellis told him there was still plenty of ethics work to do. Concerned about a possible unfavorable personnel action, the Complainant asked Mr. Ellis whether his termination was imminent. The Complainant told us that Mr. Ellis told him his termination was not imminent but said the termination decision was up to others. The Complainant told us that from this point on Mr. Ellis did not allow him to attend any senior-level meetings about the NSC Middle East and North African Affairs Directorate, as he had previously done, but instead directed two other NSC Deputy Legal Advisors to start attending.

The Complainant told us that by January 2020, Mr. Ellis had removed his responsibilities for reviewing personnel-related matters, including conducting sensitive internal investigations, though he had been meeting "nearly" weekly with Mr. Charles Kupperman, Deputy National Security Advisor, on such topics. Then, on January 6, 2020, Mr. Ellis and Mr. Eisenberg directed him to stop attending any meetings for either Mr. O'Brien or the Deputy National Security Advisor, and told him to stop working on any financial disclosure management matter for any commissioned officer, as he had done so previously. Additionally, on January 10, 2020, Mr. Ellis directed the Complainant to stop attending any meetings involving the North Atlantic Treaty Organization (NATO) despite it being part of his portfolio.

As previously noted, we were unable to question any administration officials on this subject, although witness testimony confirmed that after July 2019, Mr. Ellis treated the Complainant coolly or in a curt manner. A witness also corroborated that Mr. Ellis excluded the Complainant from routine meetings that he had previously attended.

The reduction of the Complainant's duties at the NSC to such a degree that no focus area was left untouched was swift and appears stark. The reduction was not a scenario where a supervisory rating chain removed certain duties so that an officer could better focus or pivot to tasks with higher priorities. Here, the Complainant's duties were reduced to the extent he no longer had ethics work to perform, no longer met weekly with the Deputy National Security Advisor, was excluded from senior-level meetings about the NSC Middle East and North African Affairs Directorate, was removed from NATO-related meetings, and was prohibited from reviewing the National Security Advisor's interactions with private entities. Such a complete removal of the Complainant's responsibilities reflects a reduction in duties that resulted in his marginalization and isolation.

The Complainant's reduced duties and responsibilities were not only inconsistent with the Complainant's prior tasks as a lieutenant colonel in the Office of the Judge Advocate General where he provided legal advice, opinions, and interpretations and was the Army's primary interface for a number of policy issues, but were also inconsistent with the duties he performed at the NSC before making his protected communications. Based on the evidence available to us, we conclude that it is more likely than not that Mr. Ellis significantly changed the Complainant's duties and responsibilities to a degree inconsistent with his grade.

President Trump's Comments About LTC Alexander Vindman and the Complainant

During the same period in which Mr. Ellis significantly changed the Complainant's duties and responsibilities, President Trump made several public comments about LTC Alexander Vindman

and the Complainant. During a November 3, 2019 interview, President Trump was asked what evidence he had showing LTC Alexander Vindman was a so-called “Never Trumper.” President Trump replied, “We’ll be showing that to you real soon, OK?”

After the Senate voted to acquit him, President Trump told a news analyst on February 13, 2020:

Remember he said the statement, which is a mob statement: “Don’t call me. I’ll call you.” I didn’t say that. Fortunately, for all of us here today and for our country, we had transcripts. We had transcribers—professional transcribers. Then they said, “Oh, well, maybe the transcription is not correct.” But Lieutenant Colonel [Alexander] Vindman and [the Complainant]—right?—we had some people that—really amazing. But we did everything. We said, “What’s wrong with it?” “Well, they didn’t add this word or that one.” It didn’t matter. I said, “Add it. They’re probably wrong but add it.” So now everyone agrees that [the transcripts] were perfectly accurate.

President Trump also delivered remarks on the impeachment at the White House on February 6, 2020. When questioned about recent departures from the White House, including “the Vindman twins,” President Trump stated:

Yeah, I obviously wasn’t happy with the job he did. First of all, he reported a false call. That wasn’t what was said on the call. What was said on the call was totally appropriate. And I call it a “perfect call.” ... There was no setup. There was no anything. And he reported it totally differently. And then they all went wild when I said that we have transcripts of the calls. And they turned out to be totally accurate transcripts. And if anybody felt there was any changes, we let them make it because it didn’t matter. So we had accurate—totally accurate transcripts. And it turned out that what he reported was very different. And also, when you look at Vindman’s—the person he reports to—said horrible things: avoided the chain of command, leaked, did a lot of bad things. And so we sent him on his way to a much different location and the military can handle him any way they want. General Milley has him now. I congratulate General Milley. He can have him, but—and [the Complainant] also.

As he was boarding Marine One the next day, President Trump again addressed LTC Alexander Vindman’s NSC departure. “I’m not happy with him; you think I’m supposed to be happy with him? I’m not.” Finally, President Trump tweeted on February 8, 2020:

I don’t know [LTC Alexander Vindman], never spoke to him or met him (I don’t believe!) but, he was very insubordinate, reported contents of my “perfect” calls incorrectly ... and was given a horrendous report by his superior, the man he reported to, who publicly stated that Vindman had problems with judgement, adhering to the chain of command and leaking information. In other words, “OUT.”

Army Officer Evaluation Reports With Assessments

The Officer Evaluation Report (OER) is the document that rating officials use to assess the performance and potential of rated officers, and U.S. Army officers use the OER in HQDA selection board processes. Army Regulation (AR) 623-3, “Evaluation Reporting System,” June 14, 2019, and

Department of the Army Pamphlet (DA Pam) 623-3, "Evaluation Reporting System," September 27, 2019, outline the policy and procedures for evaluating officers and using the OER.

AR 623-3 states that performance evaluations are assessments of how well the rated officer met duty requirements and adhered to the professional standards of the Officer Corps. Furthermore, the AR states that performance is evaluated by considering the results achieved, how they were achieved, and how well the officer complied with professional standards. DA Pam 623-3 requires rating officials to make a conscientious assessment of a rated officer's performance in their assigned position and their potential for increased responsibility and service in positions of higher ranks.

2019 Favorable Officer Evaluation Report (May 30, 2018, Through May 31, 2019)

Mr. Ellis as rater and Mr. Eisenberg as senior rater gave the Complainant his annual OER for the period May 30, 2018, through May 31, 2019 (2019 OER).¹⁶ [REDACTED] served as the supplementary reviewer.¹⁷ The rating officials and rated officer (the Complainant) signed the 2019 OER on July 1, 2019. This OER is shown in Appendix A.

Mr. Ellis assessed the Complainant's overall performance during his first year at the NSC, rating the Complainant in Part IV, block e, "Performance Evaluation-Professionalism, Competencies, and Attributes" as "EXCELS," the highest possible rating.¹⁸ In Part IV, block d2, Mr. Ellis further described the Complainant as an excellent attorney who excelled in a fast-paced and challenging environment and who quickly became an expert on ethics and administrative law leading to his designation as the ADAEO.

Similarly, Mr. Eisenberg assessed the Complainant in Part VI, block a, as "MOST QUALIFIED," the highest rating possible, and his comments included, "[The Complainant] is a top 1% military attorney and officer and the best LTC with whom I have ever worked."

Complainant's Removal From the National Security Council

President Trump's impeachment trial concluded on February 5, 2020. Two days later, the Complainant was removed from his position on the NSC. The Complainant described this to us as "abruptly and unceremoniously walked out of the White House by NSC Security." That same day, the Complainant's brother, LTC Alexander Vindman, was also removed from his position on the

¹⁶ The OER covered the full 12-month period, including the 2 months before the Complainant's arrival at the NSC and exceeds one year reflecting a start date overlapping with the Complainant's previous 2017-2018 OER

¹⁷ AR 623-3 notes supplementary review requirements. In instances when no uniformed Army designated rating officials exist for the rated officer, an Army officer within the organization will be designated as a uniformed Army advisor and perform a supplementary review. The uniformed Army advisor will monitor evaluation practices and provide assistance and advice to rating officials (as required) on matters pertaining to Army evaluations.

¹⁸ In the OER, Part IV, block e, the rater assesses the rated officer's overall performance compared with all other officers of the same rank the rater has previously rated or currently has in his or her population. The ratings in descending order are "EXCELS," "SATISFACTORY," "CAPABLE," and "UNSATISFACTORY." The HQDA electronically generated label overlays the rater's marked performance box in Part IV, block e, on the OER, which contains the rated officer's and rater's names and the date HQDA received the report; total ratings by the rater for those rated in the same grade; and the number of times the rated officer has been rated by this rater, which helps identify raters with small rating populations.

NSC. Mr. O'Brien publicly asserted, while speaking at the Atlantic Council think tank, that the decision to remove the Vindman brothers was his: "Those were my decisions, and I stand by them."

Unfavorable Officer Evaluation Report (June 1, 2019, Through February 7, 2020)

On April 6, 2020, Mr. Ellis and Mr. Eisenberg signed an unfavorable OER for the Complainant for the rating period June 1, 2019, through February 7, 2020 (2020 OER). Neither Mr. Ellis nor Mr. Eisenberg identified a supplementary reviewer on the 2020 OER. They also did not furnish the 2020 OER to the Complainant for acknowledgement or comment, as required by AR 623-3 and as occurred with his 2019 OER. The unfavorable OER is shown in Appendix B.

Mr. Ellis was again the Complainant's rater and assessed his overall performance during the second year at the NSC. However, for the 2020 OER, Mr. Ellis rated the Complainant in Part IV, block e, "Performance Evaluation-Professionalism, Competencies, and Attributes" as "UNSATISFACTORY," the lowest possible rating. Mr. Ellis marked the "UNSATISFACTORY" box and noted, "[the Complainant] is a hardworking officer, but he frequently lacks judgment and has difficulty understanding the appropriate role of a lawyer in an organization." Mr. Ellis told an Army Inquiry Officer (IO) in a Commander's Inquiry (CI) that the Complainant was not a good fit for the NSC but was "capable otherwise." Mr. Eisenberg was the senior rater again, marked the "NOT QUALIFIED" box, and entered unfavorable comments in Part VI. Mr. Eisenberg wrote that the Complainant did not grow professionally; that with additional counseling and experience, his performance might improve; and that the Complainant would benefit from additional experience in a slower-paced work environment subject to less pressure and scrutiny.

The OER Part II-Authentication shows the rating officials signed the OER attesting to the comments in their respective portions. According to DA Pam 623-3, in Part IV, block e, the rater assesses the rated officer's overall performance when compared with all other officers of the same rank the rater has previously rated or currently has in his or her population. If the performance assessment is consistent with the majority of officers in that grade, the rater will mark the "PROFICIENT" box. If the rated officer's performance exceeds that of the majority of officers in the rater's population, the rater will mark the "EXCELS" box. According to DA Pam 623-3, the intent is for the rater to use the "EXCELS" box to identify the upper third of officers for each rank. If the rated officer's performance is below the majority of officers in the rater's population for that grade and the rater believes the rated officer should be further developed, the rater will mark the "CAPABLE" box. If the rated officer's performance is below the majority of officers in the rater's population for that grade and the rater does not believe the rated officer's performance has met the standards required of an Army officer, the rater will mark the "UNSATISFACTORY" box.

An "UNSATISFACTORY" box marking rendered the 2020 OER an adverse or referred report.

The U.S. Army Identified Deficiencies in the 2020 Officer Evaluation Report

In the spring of 2020, an NSC Senior Director contacted [REDACTED] for guidance on the rating schemes for LTC Alexander Vindman and the Complainant. On April 6, 2020, the NSC Senior Director provided [REDACTED] the Complainant's 2020 OER so that [REDACTED] could review the

narrative comments. [REDACTED] then advised the NSC Senior Director that a supplementary review was needed, that the 2020 OER needed to be formally given to the Complainant, and that the comments were derogatory and contained negative box marks. [REDACTED] also advised the NSC to be prepared for the Complainant to submit a request for a CI about the 2020 OER.

The OER should have been categorized as a "Referred" OER as required by AR 623-3, Paragraph 3-27a, because it contained derogatory comments in specific sections (Part IV, V, or VI), and any derogatory comments in those sections deem the report "Referred." Additionally, the OER should have been "Referred" because of the negative box marks including the rater assessment of "UNSATISFACTORY" for "Performance Evaluation-Professionalism, Competencies, and Attributes" (Part IV), and the senior rater assessment of "NOT QUALIFIED" (Part VI). The rating officials did not furnish the referred OER to the Complainant for acknowledgement or comment despite AR 623-3, Paragraph 1-4, requiring this action before transmission to HQDA.

The OER was sent to HQDA on or about April 8, 2020, and Brigadier General (BG) R. Patrick Huston, U.S. Army, Assistant Judge Advocate General for Military Law and Operations, was appointed the supplementary reviewer. On May 4, 2020, while acting in this capacity, BG Huston notified the NSC rating officials of the 2020 OER errors, and, because Mr. Eisenberg as the senior rater had not begun the OER referral process as required by AR 623-3, paragraph 3-29, BG Huston referred the 2020 OER to the Complainant for acknowledgement and comment on June 10, 2020.

The U.S. Army assigned the Complainant as an Administrative Law Attorney at the U.S. Legal Services Agency at Fort Belvoir, Virginia, following his departure from the NSC. On June 24, 2020, the Complainant received a Complete the Record OER that rated him for his work with the U.S. Legal Services Agency, which covered the rating period of February 10, 2020 through June 14, 2020. The Complete the Record OER evaluated the Complainant's performance as "EXCELS," the highest rating possible, and noted he was a brilliant attorney and model officer of extraordinary versatility, who displayed impeccable judgment and superior legal acumen.

MILPER Message 20-158, "Amendment to the to Fiscal Year 2020 (FY20) Army Judge Advocate General's Corps Senior Service College (SSC) Selection Board Zone," published on June 5, 2020, noted that the board would convene on July 13, 2020, and included several amended personnel files submission suspense dates. The unfavorable NSC 2020 OER was not included at the time the promotion and SSC boards convened, but the Complainant's Complete the Record OER was included in his personnel files for consideration.¹⁹

The Complainant responded to BG Huston with comments on July 10, 2020, noting that the NSC 2020 OER violated the procedural requirements of the Army regulation governing evaluations. The Complainant's comments, paragraph 8, noted:

As both the rater and senior rater know full well, another obvious and completely inappropriate factor behind this OER is the whistleblower testimony my twin brother (LTC Alexander S. Vindman) gave during the impeachment proceedings in November 2019, during which time I was present. My brother was also serving in the White House during the rating period for this OER and it was known he solicited my advice and that I accompanied him to meetings with my senior rater. The OER illegally retaliates against me for his testimony.

¹⁹ A "Complete the Record" OER is an optional evaluation completed for members who have served a minimum of 90 days before meeting an HQDA-level selection board.

BG Huston sent the Complainant's responses to Mr. Ellis and Mr. Eisenberg, and at the end of July 2020, the NSC notified BG Huston that the rating officials elected to make no changes to the 2020 OER.

Army Commander's Inquiry Into the 2020 Officer Evaluation Report

In a memorandum dated July 17, 2020, and addressed to "Commander with Authority to Order a Commander's Inquiry per AR 623-3," the Complainant requested a CI into his 2020 OER for the rating period ending on February 7, 2020. The primary purpose of a CI as defined by AR 623-3, Paragraph 4-4, is to provide a greater degree of command involvement in preventing obvious injustices to the rated Soldier and correcting errors before they become a matter of permanent record. The Complainant's memorandum noted that the 2020 OER contained serious irregularities and errors, including inaccurate and untrue statements, and presented a lack of objectivity and fairness by the rating officials, and that it did not evaluate his duty performance and potential; rather, the 2020 OER punished him for calling attention to matters including presidential misconduct. The CI report was issued on September 15, 2020.

On August 3, 2020, Lieutenant General (LTG) Walter Piatt, U.S. Army, Director of the Army Staff, appointed Major General (MG) Michel Russell, U.S. Army, Assistant Deputy Chief of Staff, G-4, as the Army IO charged with conducting an inquiry into the alleged errors, injustices, or irregularities pertaining to the Complainant's 2020 OER. LTG Piatt also appointed [REDACTED]

[REDACTED].²⁰ The CI commenced on August 3, 2020, and the Army IO conducted interviews with the Complainant, Mr. Ellis and Mr. Eisenberg, and several witnesses including the NSC Senior Director. BG Huston told the Complainant on August 6, 2020, that the rating officials elected to make no changes to his OER. The Complainant signed his 2020 OER in Part II, block e1, on August 6, 2020, and BG Huston signed the supplementary reviewer portion of the OER in Part II, block f6, the next day.

On August 14, 2020, the Army IO interviewed Mr. Ellis and Mr. Eisenberg separately about the alleged errors and injustices in the Complainant's 2020 OER. Mr. Ellis told the Army IO that he had very little experience with Army evaluations and gave details about specific statements in the 2020 OER, Part IV, block d2, which are included later in this report. Mr. Ellis said that both he and Mr. Eisenberg orally counseled the Complainant about the deficiencies noted in the 2020 OER but that no written records of counseling existed. Mr. Eisenberg said that he counseled the Complainant about the deficiencies listed in Parts III and IV of the OER, that he believed he was objective and fair in assessing the Complainant's work performance, and that he stood by everything written in the evaluation.²¹

²⁰ On August 3, 2020, the U.S. Army Deputy Chief of Staff, G1, LTG Gary Brito, U.S. Army, approved an exception to policy allowing a person who is not the next higher official in the Complainant's rating chain to perform the Commander's Inquiry (Exhibit B, CI).

²¹ OER Part III is Duty Description and Part IV is the rater portion, Performance Evaluation-Professionalism, Competencies, and Attributes.

Commander's Inquiry Findings and Recommendations

On September 15, 2020, the Army IO submitted his findings and recommendations to the Director of the Army Staff. The Army IO's findings reflected that according to AR 623-3, paragraph 3-7a(3)(c)3, an "UNSATISFACTORY" rating was only appropriate if the rated officer's performance was below the majority of officers in the rater's population for that rank, and if the rater believed the rated officer's performance did not meet standards required of an Army officer. Specifically, the Army IO wrote that Mr. Ellis's statements on the 2020 OER that the Complainant was of "average ability" and that the Complainant was "capable" during his CI interview suggested the Complainant met the standards required of an Army officer.

The Army IO noted that according to AR 623-3, a "NOT QUALIFIED" rating was only appropriate if the rated officer's potential was below the majority of officer's in the senior rater's population for that rank, and if the senior rater believed the officer should not be retained on active duty. When the Army IO questioned Mr. Eisenberg about whether the Complainant should be retained on active duty, Mr. Eisenberg told him that he was not qualified to make that determination and would "leave it up to the Army." The Army IO noted:

This statement and the comments made in part VI, block c do not justify a "Not Qualified" rating in part VI, block a. Moreover, statements that an officer "would benefit from additional experience in a slower-paced work environment" and that the officer's performance may improve "[w]ith additional counseling and experience" does not indicate the senior rater believes that [the Complainant] should be separated from active duty. As such, the "Not Qualified" rating in part VI, block a, of the subject OER regarding [the Complainant's] potential is inaccurate.

The Army IO also determined that both Mr. Ellis and Mr. Eisenberg lacked objectivity when evaluating both the Complainant's work performance and potential, referencing the "stark" difference in performance ratings on the Complainant's 2019 and 2020 OERs. The Army also explained:

While past performance does not guarantee future success, the greater weight of the evidence suggests that it would be difficult to justify the negative evaluation over the eight-month rating period given the following:

(a) The rating officials did not provide any documentation supporting the derogatory information in the subject OER. Both rating officials stated they verbally [orally] counseled [the Complainant] about his deficient work performance, but never captured it in writing. AR 623-3 does not require rating officials to reduce corrective counseling to writing. However, when there is a precipitous decline in work performance and it warrants an extreme rating—"Unsatisfactory" box check in part IV, block e, and/or a "Not Qualified" box check in part VI, block a, of an OER—documentation substantiating the deficiency (e.g., written counseling statements, emails) is reasonable and expected. The lack of such documentation regarding [the Complainant's] work performance leaves the OER lacking any verifiable objective bases for significantly poor ratings.

The Complainant's former NSC colleagues who provided the Army IO their assessments about the Complainant's exemplary work performance during the rated period included Mr. Kupperman,

former Assistant to the President and Deputy National Security Advisor; Mr. Joshua Champagne, Deputy Legal Advisor, NSC; and [REDACTED].

Mr. Kupperman served from January to September 2019, while Mr. Champagne and [REDACTED] served from about August 2019 to September 2020. All three individuals worked with the Complainant between 3 and 5 months during the period in which his performance was rated unfavorably. Collectively, these individuals reported that the Complainant had strong technical proficiency and sound judgment while serving on the NSC. Additionally, Mr. John Bolton, former National Security Advisor from April 2018 to September 2019, said that in his experience, the Complainant was an “outstanding staffer” who “performed exceptionally.” The Army IO concluded that although these assessments were not supervisory in nature, they directly conflicted with the rated officials’ evaluation of the Complainant’s work performance.

Travel Issue

During the Commander’s Inquiry into the Complainant’s 2020 adverse OER, Mr. Ellis told the Army IO that his line that the Complainant lacked judgment was based on the Complainant’s involvement in his brother’s travel issue. In contrast, an NSC witness, described later in the section, told us that there were no issues when asked about the witness’s encounters with the Complainant on any travel-related matter. We found the NSC witness’s statements about the Complainant with regard to the travel issue undermined the basis on which Mr. Ellis claimed the adverse 2020 OER was appropriate.

According to the Complainant, in April or May 2019, during his 2019 OER rating period, he provided counsel to the NSC Resource Management Directorate after an issue arose involving travel voucher reimbursement for two Army officers, one of whom was his brother. The Complainant said that he asked, and Mr. Eisenberg agreed, he could engage on the matter, as it fell within his portfolio but also involved his brother. The Complainant told us that his involvement was limited to a “fiscal concern” and did not constitute advocacy for his brother. He said that he then engaged with members of the office about the unreimbursed travel voucher LTC Alexander Vindman filed at the conclusion of his trip to Ukraine. The Complainant told us that he conveyed to office staff that he saw a fiscal and potential unlawful augmentation issue with the unreimbursed vouchers, and that there was a potential Antideficiency Act problem if the U.S. Government made Soldiers pay for their own travel. LTC Alexander Vindman described to us the problem as having occurred in May 2019 after he traveled to Ukraine as part of a presidential delegation in which he was a White House representative. LTC Alexander Vindman said that an NSC Resource Management official denied his travel claim for per diem reimbursement, and that despite working on the matter for months, he “gave up” and was never reimbursed.

LTC Alexander Vindman corroborated the Complainant’s testimony that the denied travel claim was the reason his brother became involved, and that the Complainant managed a similar issue for another Army Service member.²² The Complainant did not speak to Mr. Ellis about the matter because it involved ethics, and, as the former ADAEO, Mr. Eisenberg was the appropriate point of contact.

The Complainant prepared a detailed memorandum on September 24, 2021, regarding the travel issue of the two Service members. In it he opined that at the time of LTC Alexander Vindman’s

²² LTC Alexander Vindman chose not to provide the name of the other military officer because his attorney cited concerns with disclosing the name in an unclassified setting.

travel, the Department of State agreed to fund travel for LTC Vindman's trip but not to fund the per diem, and the "default rule was that [the] NSC paid for travel." After briefing Mr. Eisenberg about the travel reimbursement issue, the Complainant noted that Mr. Eisenberg told him to handle the issue as the legal advisor for the NSC Resource Management Directorate. The Complainant told us that he then spoke to two NSC Resource Management finance officials. According to the Complainant, one of these officials, who was a Navy O-6 detailee, informed the Complainant that LTC Alexander Vindman would be paid while another unnamed GS-15 official balked at paying LTC Alexander Vindman.

The Complainant described an "amicable" encounter with an NSC Resource Management official about LTC Alexander Vindman's unreimbursed travel voucher and said that both he and the official displayed mutual courtesy without raised voices. He said that he conveyed legal guidance on the matter, and the official agreed to "look into it." The Complainant said that an NSC Resource Management official told him his involvement in his brother's travel issue was inappropriate, and that it felt like there was "perhaps a perception issue," but that after he informed the official that he received clearance from Mr. Eisenberg to discuss the matter with Resource Management staff, he proceeded as he normally would. The Complainant also told us that the person who raised the "appearance" issue was subsequently terminated.

According to the Complainant, no one, including Mr. Eisenberg or Mr. Ellis, gave him any negative feedback or counseled him about any of his interactions with the Resource Management staff regarding the travel matter. As part of the Commander's Inquiry, an Army IO conducted an unsworn telephonic interview with Mr. Ellis and Mr. Eisenberg. Mr. Ellis told the Army IO that the line in the Complainant's 2020 OER that read, "[The Complainant] frequently lacks judgment" referred to more than one occasion and dealt with a conflict of interest; specifically, it referred to the Complainant's involvement in the reimbursement of his brother's travel voucher when both Mr. Ellis and Mr. Eisenberg advised the Complainant to not get involved. Although Mr. Eisenberg told the Army IO that he counseled the Complainant about the deficiencies noted in his 2020 OER, he provided no examples or specific reasons why he rated the Complainant the way he did, other than to say the Complainant "added himself" to meetings without approval.

As an additional part of the CI, the Army IO conducted an unsworn, telephonic interview with an NSC witness. Also present during the telephonic interview were Mr. Ellis and several other NSC officials. The Army IO summarized the telephonic interview of the NSC witness in a Memorandum for Record. According to this memorandum, the NSC witness told the Army IO that sometime in July or August 2019, the witness had a negative interaction with the Complainant regarding the Complainant's advocacy for the reimbursement of his brother's travel voucher. Specifically, the witness described how some staff felt "uncomfortable" or "intimidated" by the Complainant because he appeared upset, based on the tone of his voice, his body language, and flushed face, and because he pursued the travel reimbursement issue even after being notified by some staff that he made them uncomfortable. The witness said that the Complainant calmed down after being told how his behavior was being interpreted.

During the telephonic interview, the Army IO asked the NSC witness whether there had been other incidents involving the Complainant. The NSC witness indicated two issues involved the Complainant, namely that he gave incorrect or inaccurate guidance and that the Complainant had questionable judgment. However, when the Army IO asked for details about these incidents, the NSC witness could produce no description of any incident in which the Complainant gave incorrect or inaccurate guidance, nor could the NSC witness provide any descriptions of scenarios involving questionable judgment. Finally, when asked whether any other NSC staff had these experiences

with the Complainant, the NSC witness said another NSC manager had issues but did not name the manager.

We also spoke on the telephone with this NSC witness to seek an interview with the witness to gain any additional information about the Complainant's involvement in his brother's attempts to receive reimbursement for a travel voucher, particularly because Mr. Ellis wrote in the Complainant's 2020 OER that the Complainant lacked judgment and said that comment was specifically about the Complainant's intervention in this travel matter. When we first contacted the witness, we were not aware that the individual was still an NSC employee. We explained that we were seeking an interview as part of our review of allegations that the Complainant was retaliated against for making protected communications. The witness asked what, specifically, we wanted to discuss, and in response to being told we wanted to discuss any travel-related issues or encounters with the Complainant, the witness immediately volunteered that there were no issues. Furthermore, the NSC witness stated that the witness was instructed to draft a document that identified any issues or challenges posed by the Complainant. The witness repeatedly emphasized to us that the witness had no problem with the Complainant.

Revised Unfavorable 2020 Officer Evaluation Report: December 2020 Through January 2021

Mr. Ellis signed the revised 2020 OER on December 31, 2020, and Mr. Eisenberg signed it on January 7, 2021. The revised 2020 OER included supplementary reviewer data in part II, blocks f1 through f4, and a marked box in part II, block d, signifying the OER was a "Referred" report. The 2020 OER is shown in Appendix C. AR 623-3 states that entries that designate the evaluation as referred or adverse are:

- a "fail" for the Army Physical Fitness Test, or a "No" entry for noncompliance with the height and weight standards of AR 600-9, "The Army Body Composition Program," July 16, 2019;
- a rater performance evaluation of "UNSATISFACTORY" in Part IV;
- a rater performance evaluation of "CAPABLE" in Part IV where the required explanation has derogatory information;
- a rater potential evaluation in Part IV where the required explanation has derogatory information;
- a senior rater potential evaluation of "NOT QUALIFIED" or "UNSATISFACTORY" in Part VI, block a; or
- any negative or derogatory comments contained in parts IV, V, or VI of the OER.

The revised 2020 OER added the Army Physical Fitness Test information in Part IV, block a, which was blank on the April 2020 signed version. The rater entries contained in the revised 2020 OER, Part IV, blocks b through d1, for broadening assignments, operational assignments, and "Character" did not change.

Mr. Ellis's entries in the comments portion of the revised OER within Part IV, block d2 (page 2), of the 2020 OER signed in April 2020 contained references to the previous reporting period. AR 623-3, Paragraph 3-21d, "Prohibited comments," directs that no remarks about nonrated periods of time or performance or incidents that occurred before or after the rating period can be made on an evaluation report. Mr. Ellis's entry that read "During the prior reporting period and early portion of this rating period" was edited to remove the reference to the prior reporting period.

Also, within Part IV, block e, the number “1” was added to the number of current Army officers in this grade that Mr. Ellis rated; the box for “No” was marked denoting that a completed DA Form 67-10A was received with this report and considered in the evaluation; and the marked box was changed from “UNSATISFACTORY” to “CAPABLE.”

The first sentence in the comments section beneath Part IV, block e, did not change. The second sentence changed from “Owing to the early termination of [the Complainant’s] detail to the NSC, it was not possible to prepare a DA Form 67-10-1A,” to “A DA Form 67-10-1A was not prepared or provided.”²³ Mr. Eisenberg upgraded Part VI potential comments from “NOT QUALIFIED” to “QUALIFIED” on the revised OER. In the revised OER’s Comments on Potential, he deleted the words, “In the prior reporting period,” but kept the description essentially intact. The 2020 revised OER remained adverse because despite the rating official’s changes, the report still contained negative or derogatory comments in Parts IV and VI.

On April 6, 2020, and again on December 31, 2020, and January 7, 2021, despite revisions, Mr. Ellis and Mr. Eisenberg issued the Complainant a referred OER for the performance period June 1, 2019, through February 7, 2020.

A referred OER is an unfavorable performance evaluation that has the potential to affect the military member’s career; therefore, it constitutes an unfavorable personnel action under 10 U.S.C. § 1034.

January 12, 2021 Commander’s Inquiry Conclusions

The Army IO presented his findings in a January 12, 2021 memorandum to the Army Human Resources Command that identified the CI findings. The memorandum noted, “[T]he rater incorrectly marked the ‘Unsatisfactory’ box in part IV, block e based on the comments in block e, and the senior rater incorrectly marked the ‘Not Qualified’ [box] in part VI, block a based on the comments in block c.”

According to the Army IO, upon completion of the CI and after he worked with the rating officials for several months, Mr. Ellis and Mr. Eisenberg made corrections to the 2020 OER. However, the final revised 2020 OER remained adverse and referred because of the derogatory information in the narrative sections of Parts IV and VI.²⁴

AR 623-3, Paragraph 4-5h, requires the OER be provided to the Complainant for acknowledgement and a response period before being forwarded to the Army HRC. However, the Army IO found that Mr. Ellis’s and Mr. Eisenberg’s lack of objectivity in evaluating both the Complainant’s work performance and potential still remained in the edited 2020 OER, and because of this,

²³ According to DA Pam 623-3, DA Form 67-10-1A, “Officer Evaluation Report Support Form,” “promotes a top-down emphasis on leadership communication, integrating rated officer participation in objective setting, performance counseling, and the evaluation process. At the beginning of the rating period, it enhances planning and relates performance to mission through rater and rated officer joint discussion of the duty description and major performance objectives. During the rating period, the rating official encourages performance counseling and the best use of individual talent through continuous communication to update and revise the performance objectives. At the end of the rating period, the rating official enables the rated officer to provide input to the appropriate version of the series DA Form 67-10 series OERs.” Use of DA Form 67-10-1A is mandatory for use by all Army officers in grades warrant officer one (WO1) through colonel (COL).

²⁴ DA Form 67-10 series numbers are the Department of the Army form numbers for the OERs.

recommended the revised 2020 OER not be filed in the Complainant's Army Military Human Resource Record (AMHRR).

Additionally, AR 623-3, Paragraph 1-4, "Responsibilities," Subparagraph b.7-9, states, "Rating officials give timely counseling to subordinates on professionalism and job performance, encouraging self-improvement, when needed. Each rating official personally knows how the subordinates whom they evaluate performed during the rating period. Rating officials provide candid assessments of rated Soldiers." The Complainant stated that Mr. Ellis never counseled him for the actions that served as the basis for the "UNSATISFACTORY" rating on the 2020 OER.

Mr. Ellis served for over 12 years as a Navy Reserve intelligence officer, with more than a decade of familiarity and understanding of the military evaluation system. During the course of his career, Mr. Ellis received 16 Navy Fitness Report & Counseling Records (FITREP), which are the equivalent of an Army OER for a Navy commissioned officer. Mr. Ellis was a Navy Reserve officer, serving in the rank of lieutenant commander (O-4) and transitioned to the Standby Reserve in 2017 upon his appointment to the White House.

Similar to the Army's regulatory requirement for providing counseling as part of performance evaluation, the Navy also requires such counseling. Specifically, the Navy Bureau of Naval Personnel (BUPERS) Instruction 1610.10E, "Navy Performance Evaluation System," December 6, 2019, describes counseling as a major focus of performance evaluation and states that counseling enhances professional growth and encourages development. The Navy instruction also states that the counseling process should include feedback from the person being counseled. Therefore, based on Mr. Ellis's previous experience as a Naval officer, he should have known that counseling was a required part of the Complainant's evaluation process, even though the Complainant was in a different Military Service.

Exception to Policy for Army Military Human Resource Record Filing

The Army Deputy Chief of Staff, G1, LTG Gary Brito, U.S. Army, reviewed the CI report. LTG Brito noted, as part of his review, that while the rating officials made corrections to the Complainant's 2020 OER, "the error that the rating officials lacked objectivity in their evaluation of the Complainant's work performance still remains in the [OER]." Based on this error, on January 14, 2021, the Army Deputy Chief of Staff, G1, concurred with the Army IO's recommendation that the revised 2020 OER not be filed in the Complainant's AMHRR and granted an exception to several provisions of AR 623-3. The Army Deputy Chief of Staff, G1, granted an exception to the provisions of AR 623-3 within:

- paragraph 4-5h, which requires the rating chain to provide the final evaluation, if it is still a referred report, to the rated officer for acknowledgment and the opportunity to submit comments before sending it to the HRC;
- paragraph 2-8, which after an evaluation has been edited as a result of a Commander's Inquiry, requires a supplementary review of an evaluation when there are no uniformed Army designated rating officials for the rated officer; and
- table 4-1, step 5, which requires the IO to submit an evaluation and the results of the CI to the HRC for filing in the officer's AMHRR upon completion of the inquiry.

The exception to policy also outlined that the revised 2020 OER would not be referred to the Complainant for comment, would not receive a supplementary review, and would not be forwarded to the HRC. Additionally, the exception to policy noted that appropriate action would be taken to account for these exceptions in the Complainant's AMHRR, and the 2020 OER was not filed in the Complainant's AMHRR.

The U.S. Army took specific steps via an exception to policy to ensure the Complainant's 2020 OER did not become the official record of his overall performance for his second year on staff at the NSC. As the U.S. Army agreed via its CI that both Mr. Ellis and Mr. Eisenberg lacked objectivity in their evaluation of the Complainant's work performance, we relied upon the 2019 OER Mr. Ellis and Mr. Eisenberg gave the Complainant prior to his protected communications when evaluating the level of his work performance at the NSC. Notably, this 2019 OER evaluated the Complainant by assigning the highest possible ratings ("EXCELS"), noting he was an excellent attorney who excelled in a fast-paced and challenging environment, and that he was "MOST QUALIFIED," the top 1% military attorney and officer, and the best LTC with whom Mr. Eisenberg ever worked.

We found the 2019 OER and its excellent ratings to be the only official record of the Complainant's work performance while at the NSC. However, we also relied upon the Army CI findings that discussed the Complainant's exemplary work performance during the 2020 rated period as assessed by his colleagues, including Mr. Kupperman, former Assistant to the President and Deputy National Security Advisor; Mr. Joshua Champagne, Deputy Legal Advisor, NSC; and [REDACTED]. Additionally, the Army CI findings noted that the former National Security Advisor, Mr. Bolton, stated that the Complainant was an "outstanding staffer" who "performed exceptionally."

Failure to Submit a Recommendation for End of Tour Award

The complaint alleged that the Complainant was not given a decoration after his NSC tour ended, nor was he recommended for one. The Complainant contended he was withheld a Defense Superior Service Medal (DSSM), and that this award was customary after the successful completion of an NSC tour.

According to AR 600-8-22, "Military Awards," March 5, 2019, a DSSM is awarded for superior meritorious service in positions of significant responsibility. DoD Manual 1348.33, Volume 4, "Manual of Military Decorations and Awards: DoD-Wide Personal Performance and Valor Decorations," December 21, 2016 (Change 3, Effective May 7, 2021), characterizes the DSSM as the equivalent of the Legion of Merit and states it is intended to recognize superior meritorious service and to honor an individual's accomplishments over a sustained period. The DoD Manual notes that such an award is normally awarded for a period of time greater than 12 months, encompassing the nominee's entire joint assignment, including any extensions.

Furthermore, AR 600-8-22, Chapter 3-5, requires that the recommending official have first-hand personal knowledge of the event that serves as the recommendation basis, or that they must have observed the actions or been provided information by an individual who observed the actions of the individual. At the time of the Complainant's departure in February 2020, he had served over 18 months on the NSC. During his first year on staff, the Complainant received two tour extensions to his initial 6-month assignment, and was also appointed the ADAEO.

The Complainant's prior assignments show he was a Labor and Employment Law Attorney at the Office of the Judge Advocate General, Pentagon, Washington, D.C., and the Senior Trial Counsel and

Acting Chief of Military Justice at III Corps and Fort Hood, Texas, before he was selected for the assignment at the NSC. The Complainant received the Presidential Service Badge and Certificate on August 1, 2019.

A review of the available evidence found that 21 out of 60 (35 percent) field grade officers across all Military Services who served on the NSC staff were recommended for an end of tour of award for their NSC service.

Failure to submit a recommendation for an award is a personnel action under 10 U.S.C. § 1034. The Army Regulation governing awards identifies that the recommending official must have either:

- first-hand personal knowledge of the event that served as the recommendation basis,
- been provided information by the individual who observed the actions, or
- by virtue of their position, been “associated” with either the incident or the individual being recommended for the award.

Given that Mr. Ellis, Mr. Eisenberg, Mr. O’Brien, and Mr. Gray, by virtue of their positions, were “associated” with the Complainant, they could have recommended he receive an end of tour award.

Complainant is Selected for Promotion to Colonel

For FY 2020, the Army Active Component Colonel Judge Advocate General Corps Promotion Selection Board Results and Senior Service College (SSC) Selection Board Results were released on March 16, 2021, and the Complainant was selected for promotion to colonel, Sequence Number 0020, and for SSC on the Alternate list.

Analysis

The elements of reprisal are protected communication; knowledge of the protected communication; a personnel action taken, threatened, or withheld; and a causal connection between the protected communication and the personnel action. If the evidence does not establish that the personnel action would have been taken, threatened, or withheld absent the protected communication, then the complaint is substantiated. Conversely, if the evidence establishes that it would have been taken, threatened, or withheld absent the protected communication, then the complaint is not substantiated. In the following sections, we analyze each element.

Unfavorable Personnel Actions Taken or Favorable Personnel Actions Withheld

The Complainant was the subject of unfavorable and withheld favorable personnel actions under 10 U.S.C. § 1034. DoD Directive 7050.06 defines a personnel action as “[a]ny action taken on a Service member that affects, or has the potential to affect, that member’s current position or career.” Such actions include:

- promotion;
- disciplinary or other corrective action;
- transfer or reassignment;
- a performance evaluation;

- decisions concerning pay, benefits, awards, or training;
- relief and removal;
- separation;
- discharge;
- referral for mental health evaluations in accordance with DoD Instruction 6490.04, "Mental Health Evaluations of Members of the Military Services," March 4, 2013 (Incorporating Change 1, Effective April 22, 2020); and
- any other significant change in duties or responsibilities inconsistent with the Service member's grade.

The Complainant experienced unfavorable and withheld favorable personnel actions under DoD Directive 7050.06 when he received an unfavorable 2020 OER, had his duties and responsibilities significantly changed to a degree inconsistent with his grade, was removed from the NSC, and when a recommendation for an end of tour award was not submitted. While the Complainant's career may not appear to have been adversely affected as he has since been promoted to the rank of Colonel, his career is not over. The retaliatory actions taken by Mr. Ellis and Mr. Eisenberg could prove to be detrimental to the Complainant for the remainder of his career.

Knowledge and Timing

We attempted to interview Mr. Ellis and Mr. Eisenberg, but they declined to cooperate with this investigation. Based on the available evidence, we conclude that it is more likely than not that Mr. Ellis knew of two of the Complainant's protected communications, and Mr. Eisenberg knew of three of the Complainant's protected communications. The Complainant made his protected communications starting July 25, 2019, and his last protected communication in January 2020. The Complainant experienced his first unfavorable personnel action in the fall of 2019 when his duties and responsibilities started to be reduced, and his second unfavorable personnel action when he received a referred OER for the performance period June 1, 2019, through February 7, 2020. The close proximity in time between the Complainant's protected communications and the personnel actions raises an inference of reprisal.

Motive to Retaliate

Evidence for motive generally exists when protected communications allege wrongdoing that, if proven, would adversely affect the subject. From February 2017 through February 2020, Mr. Ellis held a White House presidential appointment as the Deputy NSC Legal Advisor and Senior Associate Counsel to the President. Mr. Eisenberg held a White House presidential appointment as the Assistant to the President. Mr. O'Brien was the National Security Advisor and reported directly to the President. Mr. Gray was Deputy Assistant to the President and NSC Chief of Staff.

In a series of tweets and remarks, President Trump made clear his thoughts about LTC Alexander Vindman when he characterized LTC Alexander Vindman's report of the presidential phone call as "a false report" and associated the Complainant with his brother when describing the phone call. Additionally, President Trump publicly said that LTC Alexander Vindman avoided the chain of command, leaked [information], and "did a lot of bad things. And so we sent him on his way to a much different location and the military can handle him any way they want." President Trump specifically identified the Complainant with ire as he defended his telephone call to President Zelensky, and considering the Complainant's close association with his twin brother and that both

reported President Trump's alleged misconduct, the Complainant's communications could well have motivated any administration official to take action against him.

Referred 2020 Officer Evaluation Report

During the Complainant's NSC assignment, Mr. Ellis served as the Complainant's direct supervisor and rater and Mr. Eisenberg served as the Complainant's second-line supervisor and senior rater. Because neither Mr. Ellis nor Mr. Eisenberg cooperated with our investigation, we were unable to ask them why they issued the Complainant a referred 2020 OER. The only evidence we have regarding their justification for the referred 2020 OER was in their unsworn interviews with the Army IO, who questioned them about the Complainant's performance and 2020 OER.

Mr. Ellis signed the Complainant's 2020 OER in April 2020 and the final revised 2020 OER in December 2020, which noted the Complainant displayed increasingly poor judgment and failed to learn from his mistakes. Mr. Ellis annotated on the 2020 OER that the Complainant "frequently lacks judgment and has difficulty understanding the appropriate role of a lawyer in an organization." The Army IO asked Mr. Ellis to explain these statements.

According to the Army IO's Memorandum for Record summarizing his interview, Mr. Ellis said that conflicts of interest arose on a number of occasions, including when the Complainant worked on legal cases that involved LTC Alexander Vindman. Mr. Ellis then said that he and Mr. Eisenberg advised the Complainant not to get involved in a travel reimbursement issue involving LTC Alexander Vindman. The Army IO's memorandum reflected that Mr. Ellis noted that the Complainant's poor judgment and failure to learn were demonstrated by his involvement in his brother's travel reimbursement issue.

Mr. Ellis explained to the Army IO that, on another occasion, the Complainant legally objected to a particular matter but was unable to produce the law or authority underpinning his objection. Mr. Ellis went on to say that this incident showed that the Complainant did not understand the appropriate role of a lawyer in an organization and also did not understand the difference between law and policy.

The Army IO noted that Mr. Ellis also sought to justify the 2020 OER statement that read that on "multiple occasions, [the Complainant's] unprofessional demeanor made NSC staff feel uncomfortable," claiming that this referred to several occasions when the Complainant displayed aggressive behavior, generally about issues involving his brother. Mr. Ellis explained to the IO that during one conversation with the Complainant about his attendance at a meeting, the Complainant used a hostile tone, and that the Complainant was "aggressive" with an NSC Senior Director.

Mr. Ellis explained to the Army IO that his 2020 OER statement, "[d]espite express guidance from his supervisor, [the Complainant] continued to add himself to meetings with senior NSC staff where he did not add value," concerned one occasion in which the Complainant added himself to a meeting list that Mr. Eisenberg told him not to attend. Mr. Ellis noted that his statement in the 2020 OER that the Complainant "lacked judgement on critical issues" referred generally to examples he previously raised. Mr. Ellis said that he and Mr. Eisenberg orally counseled the Complainant about the deficiencies identified in the 2020 OER, but that no written records of counseling existed. Finally, when asked about the Complainant's capability as an attorney, Mr. Ellis said that the Complainant was capable, but not a good fit for the NSC.

Mr. Eisenberg told the Army IO he was unfamiliar with Army OERs and that he did not know what a rating scheme was, although he said he had a fair amount of interaction with the Complainant. With respect to Mr. Eisenberg's statement in the 2020 OER that the Complainant added himself to meetings with NSC staff in which he added no value, Mr. Eisenberg told the Army IO that although he had instructed the Complainant to not attend meetings without his or Mr. Ellis's permission, the Complainant attended meetings without permission.

The Army IO wrote that Mr. Eisenberg "claimed" he counseled the Complainant on several occasions but the counseling sessions were oral and that no documentation existed to corroborate those statements. Finally, when asked whether the Complainant should be retained on active duty, Mr. Eisenberg said that he was not qualified to make that determination and that he would leave it up to the Army.

Mr. Ellis's narrative and characterization in the 2020 OER of the Complainant's performance showed a drastic decline from the 2019 OER, without any documented counseling. The Complainant's 2019 OER contained the highest possible ratings while the 2020 OER contained the lowest possible ratings, all while serving in the same duty position with the same rating officials over the course of an 8-month rating period. The differences between the 2019 OER and 2020 OER were vast. Mr. Ellis issued the 2019 OER before the Complainant's first protected communication. Mr. Ellis issued the 2020 OER after the Complainant's protected communications.

The four possible selections for a rater to assess overall performance on the Army OER in decreasing order are "EXCELS," "PROFICIENT," "CAPABLE," and "UNSATISFACTORY." The following table shows which boxes the rater marked on the Complainant's five previous evaluations in the same rank (lieutenant colonel). Mr. Ellis's rater assessments are highlighted and show Mr. Ellis's first-year assessment and the two second-year assessments. Mr. Ellis issued the Complainant the highest "EXCELS" rating with the assessment "the epitome of an Army officer and lawyer" the first year (2019). In 2020, shortly after the Complainant's reports of, in part, presidential misconduct, Mr. Ellis rated the Complainant as "UNSATISFACTORY," the poorest possible rating, ultimately upgrading it to "CAPABLE."

Table: Complainant's Five Previous Evaluations

Rating Period (Month and Year)	Unit (Date Signed)	Rater Assessment	Months Rated
May 2016 – May 2017	Office of The Judge Advocate General	EXCELS	12
May 2017 – May 2018	U.S. Army Legal Services Agency	EXCELS	12
May 2018 – May 2019*	National Security Council (July 2019)	EXCELS	12
June 2019 – February 2020	National Security Council (April 2020) National Security Council (Revised December 2020)	UNSATISFACTORY CAPABLE	8
February 2020 – June 2020	U.S. Army Legal Services Agency	EXCELS	4

Source: DoD OIG Complainant's OERs.

*The OER start date reflects the THRU date of the previous OER starting on May 30, 2018 instead of May 31, 2018.

The ratings for the two 2020 OERs show that Mr. Ellis's ratings were inconsistent compared to the Complainant's "EXCELS" assessment in previous OERs and the OER the Complainant received from February through June 2020.

Mr. Eisenberg's narrative and characterization in the 2020 OER of the Complainant's potential deviated significantly from his comments in the 2019 OER. Specifically, Mr. Eisenberg in 2019

noted the Complainant was a “top 1%” military attorney and officer and the “best LTC” with whom he had ever worked. He also noted that the Complainant was sought out by White House staff regularly and that he could “do any job in the legal field under unusual and constant pressure and scrutiny.” Mr. Eisenberg in 2019 evaluated the Complainant’s potential when compared to other officers in the same grade as “MOST QUALIFIED.” In 2020, however, he commented that the Complainant not only did not grow professionally, but that his performance could improve from additional experience in a slower-paced work environment with less pressure and scrutiny, and that “in time” he “may” become a better attorney. The OER comments Mr. Eisenberg made just 10 months after he said the Complainant was in the top 1 percent of military attorneys and officers and the best lieutenant colonel with whom he had ever worked were vastly different from how he evaluated him only months earlier.

The Director of the Army Staff designated an Army major general and an Army colonel to serve as the IO and Assistant IO for the to determine if serious irregularity or error undermined the integrity of the rating process and constituted an injustice to the officer concerned or otherwise required the subject evaluation report to be clarified, amended, or removed.

The CI determined that the rating officials’ decision to forego correction of the significant OER errors suggested Mr. Ellis and Mr. Eisenberg failed to maintain sufficient objectivity in rendering an administratively accurate evaluation report. Specifically, the significant OER errors were brought to the NSC’s attention over a period of 16 weeks, first when the HRC notified NSC Resource Management of the OER errors on April 6, 2020, and then again on July 10, 2020, when BG Huston notified the rating officials. The CI also noted that many of the identified errors, if corrected, would have administratively brought the OER within the guidelines of AR 623-3. Additionally, the HRC Chief of Evaluation, Selection and Promotion informed the Army Assistant IO that the NSC did not normally contact the HRC regarding the OERs, and that the HRC did not advise the NSC on how to complete the OERs and did not complete the administrative portion of the OERs for the NSC.

Mr. Ellis said that the reason he issued the Complainant the unfavorable 2020 OER was due to his involvement with his brother’s travel reimbursement issue after he and Mr. Eisenberg advised him to not get involved, a point disputed by the Complainant, who said he specifically sought and received permission from Mr. Eisenberg to intercede. While Mr. Eisenberg said he told the Complainant not to attend meetings without his permission, he said nothing about the travel reimbursement issue when given the opportunity to discuss the Complainant’s performance or the basis for his derogatory comments on the Complainant’s potential. Mr. Ellis also claimed to have based the “UNSATISFACTORY” rating on the Complainant’s unprofessional demeanor with NSC staff, the Complainant’s struggle to understand the difference between law and policy, and the Complainant including himself in meetings in which he added no value.

The CI found that Mr. Ellis’s and Mr. Eisenberg’s ratings failed to accurately support the accompanying comments, and that there was a failure to follow the regulatory guidelines for the “UNSATISFACTORY” and “NOT QUALIFIED” ratings. The CI also found that Mr. Ellis and Mr. Eisenberg failed to objectively assess the Complainant’s work performance when they issued the Complainant an exceedingly favorable evaluation shortly followed by a very unfavorable evaluation his second year without any traditional documentation supporting such a dramatic performance decline. The CI noted that the unfavorable 2020 OER was difficult to justify given the lack of supporting documentation.

The Complainant said that he never received performance counseling despite his attempts to seek feedback from Mr. Ellis and Mr. Eisenberg. Although Mr. Ellis and Mr. Eisenberg told the IO that

they orally counseled the Complainant about the deficient work performance, both failed to document any of the counseling in writing, and the CI noted that documentation about such counseling would have been both reasonable and expected. Based on the evidence we reviewed, we agree with the IO that the 2020 OER lacks documentation to support or verify the significantly poor ratings.

The CI also found the rating officials' decision not to correct administrative errors after receiving guidance from both an HRC representative and a supplementary reviewer might suggest the rating officials did not prioritize objectivity or administrative accuracy in their assessment of the Complainant's work performance. AR 623-3 establishes OER administrative requirements, and despite notification of this guidance as well as advice from the HRC and the supplementary reviewer, Mr. Ellis took no action to make 2020 OER corrections until months after the conclusion of the CI.

Although Mr. Ellis told the Army IO that he was unfamiliar with Army evaluations and had very little experience with Army evaluation reports, we found this to be an insufficient explanation for why he ignored the governing regulation on ensuring the evaluation's accuracy. As a lieutenant commander in the Navy Reserve with more than 12 years of military service, having received 16 Navy performance evaluations during his career, and as an experienced attorney, Mr. Ellis had the requisite knowledge and experience to ensure the Complainant's OER was correct from a regulatory standpoint. Mr. Ellis supervised four enlisted Sailors during his time as the Deputy Department Head, Command Services and Manpower, in 2015 and 2016, and given this supervisory experience in his military career, we find that he would have been familiar with the evaluation process and understood the criticality of timely performance feedback and its resulting impact upon evaluations.

Based on the evidence we reviewed, including the Army CI report, the preponderance of the evidence demonstrates that the Complainant received an unfavorable 2020 OER in reprisal for his protected communications.

Significant Changes in Duties and Responsibilities

Mr. Ellis and Mr. Eisenberg significantly changed the Complainant's duties and responsibilities beginning in the fall of 2019, resulting in his marginalization and isolation. These changes commenced after the Complainant's July 2019 protected communication, and started with an instruction to not attend meetings he was previously responsible for, progressed to the removal of the Complainant's responsibilities providing clearance on ethics-related matters for the National Security Advisor, and culminated in his removal from any senior-level meetings about the NSC Middle East and North African Affairs Directorate that he previously attended. This was a marked departure from the Complainant's routine duty requirements. These changes in duties and responsibilities occurred despite the Complainant serving as the lead White House attorney for the President's Africa and Foreign Assistance Realignment strategies.

By January 2020, Mr. Ellis had removed the Complainant's responsibilities reviewing personnel-related matters, including conducting sensitive internal investigations, although he had been meeting weekly with the Deputy National Security Advisor on such matters. Then, on January 6, 2020, both Mr. Ellis and Mr. Eisenberg directed the Complainant to stop attending any meetings for either Mr. O'Brien or the Deputy National Security Advisor and to stop working on any financial disclosure management matters for any commissioned officer, even though the Complainant had done so previously. Additionally, on January 10, 2020, Mr. Ellis directed the Complainant to stop

attending any meetings involving NATO despite these meetings representing part of his portfolio. Finally, although the Complainant told us that Mr. Ellis told him that the White House Counsel's Office would review the National Security Advisor's engagements with private entities, in early January 2020, another NSC Deputy Legal Advisor reviewed and cleared an engagement between the National Security Advisor and Lufthansa Airlines representatives. This contradicted Mr. Ellis' earlier statement to the Complainant that only the White House Counsel's Office would review the National Security Advisor's engagements.

A member of the NSC staff provided witness testimony confirming that after July 2019, Mr. Ellis treated the Complainant coolly or in a curt manner. The witness also corroborated that Mr. Ellis excluded the Complainant from routine meetings he previously attended, and confirmed that although the Complainant retained the ADAEO title, duties associated with the position were restricted and eventually assumed in part by Mr. Ellis. As a result of the Complainant's change in duties and responsibilities, the Complainant was effectively marginalized and isolated from the rest of the office. For example, the Complainant was excluded from weekly meetings with the Deputy National Security Advisor, any senior-level meetings about the NSC Middle East and North African Affairs Directorate, and any NATO-related meetings; prohibited from reviewing the National Security Advisor's interactions with private entities. Mr. Ellis also relieved the Complainant of his responsibilities for reviewing personnel related matters.

Removal From the NSC

The Complainant was removed from his position on the NSC on February 7, 2020. In a public statement at the Atlantic Council, Mr. O'Brien publicly asserted that the decision to remove the Vindman brothers was his: "Those were my decisions, and I stand by them." We did not find sufficient evidence to contradict Mr. O'Brien's statement of responsibility.

Failure to Be Recommended for an End of Tour Award

Neither Mr. Ellis nor Mr. Eisenberg recommended the Complainant for an end of tour award for his NSC service. The Complainant served 18 months out of a 24-month detail in the NSC Legal Affairs Directorate and received no recommendation for an award upon his departure. Mr. Ellis assessed the Complainant's first 12 months' performance on the 2019 OER as EXCELS, the highest rating possible. Mr. Ellis's 2019 OER comments described the Complainant as an excellent attorney, trusted to work on complex and sensitive issues. Mr. Ellis also noted on the Complainant's 2019 OER that he expertly advised senior White House officials, including the National Security Advisor and NSC staff, on a myriad of actions and flawlessly performed numerous legal reviews. Mr. Eisenberg assessed the Complainant's potential during his first 12 months on his 2019 OER as most qualified, the highest rating possible. Mr. Eisenberg also described the Complainant on the 2019 OER as a top 1 percent military attorney and officer.

According to AR 600-8-22, Military Awards, no individual is automatically entitled to an award upon departure from an assignment, and no award is automatic. DoD Manual 1348.33 notes that the Defense Superior Service Medal (DSSM) recognizes superior meritorious service and is awarded to honor an individual's accomplishments over a sustained period—normally a period of time greater than 12 months—and encompasses the nominee's entire joint assignment, including any extensions. The Complainant received two tour extensions.

The Complainant contended that a DSSM was withheld from him and that this award was customary after the successful completion of an NSC tour. A review of the available evidence found that 21 out of 60 (35 percent) field grade officers across all Military Services who served on the NSC staff were recommended for an end of tour of award for their NSC service.

Insufficient evidence existed to conclude that the Complainant would have been recommended for an end of tour award absent his protected communications. Specifically, we were not able to review the e-mails of Mr. Ellis, Mr. Eisenberg, or other relevant White House officials, and neither Mr. Ellis nor Mr. Eisenberg cooperated with our investigation. Therefore, we are unable to conclude that it is more likely than not that they would have been recommended the Complainant for an end of tour award absent his protected communications.

Conclusion

We carefully considered the evidence surrounding the Complainant's protected communications, including the administration officials' knowledge of those communications; the administration officials' motive to reprise against the Complainant because of those protected communications; and the timing of unfavorable personnel actions in relation to those protected communications. Based on a preponderance of the evidence, we conclude that it is more likely than not that the Complainant was the subject of unfavorable personnel actions and that these were in reprisal for his protected communications in violation of 10 U.S.C. § 1034.

Recommendation

We make no recommendation with respect to the Complainant, who has been promoted to the rank of Colonel and has achieved correction of his performance record. We make no recommendation with respect to the White House officials, who did not work in the DoD, named in this report. These officials have all departed their positions in the White House.

Appendix A: OER May 30, 2018, Through May 31, 2019

HQDA#: 2917300		UNCLASSIFIED				
FIELD GRADE PLATE (O4 - O5; CW3 - CW5) OFFICER EVALUATION REPORT					<i>See Privacy Act Statement in AR 623-3.</i>	
For use of this form, see AR 623-3; the proponent agency is DCS, G-1.						
PART I - ADMINISTRATIVE (Rated Officer)						
a. NAME (Last, First, Middle Initial) VINDMAN, YEVGENY, S		b. SSN (or DOD ID No.) [REDACTED]	c. RANK LTC	d. DATE OF RANK (YYYYMMDD) [REDACTED]	e. BRANCH JA	f. COMPONENT (Status Code)
g. UNIT, ORG., STATION, ZIP CODE OR APO, MAJOR COMMAND NATIONAL SECURITY COUNCIL, THE WHITE HOUSE, WASH., D.C.				h. UIC [REDACTED]	i. REASON FOR SUBMISSION 02 Annual	
j. PERIOD COVERED FROM (YYYYMMDD) 20180530 THRU (YYYYMMDD) 20190531		k. RATED MONTHS 12	l. NON RATED CODES	m. NO. OF ENCLOSURES 0	n. RATED OFFICER'S EMAIL ADDRESS (.gov or .mil) [REDACTED]	
PART II - AUTHENTICATION (Rated officer's signature verifies officer has seen completed OER Parts I-VI and the administrative data is correct)						
a1. NAME OF RATER (Last, First, Middle Initial) ELLIS, MICHAEL, J		a2. SSN (or DOD ID No.) [REDACTED]	a3. RANK EX-IV	a4. POSITION Sr. Assoc. Counsel to the Pres.		
a5. EMAIL ADDRESS (.gov or .mil) [REDACTED]		a6. RATER SIGNATURE MICHAEL ELLIS [REDACTED]		a7. DATE (YYYYMMDD) 20190701		
b1. NAME OF INTERMEDIATE RATER (Last, First, Middle Initial)		b2. SSN (or DOD ID No.)	b3. RANK	b4. POSITION		
b5. EMAIL ADDRESS (.gov or .mil)		b6. INTERMEDIATE RATER SIGNATURE		b7. DATE (YYYYMMDD)		
c1. NAME OF SENIOR RATER (Last, First, Middle Initial) EISENBERG, JOHN, A		c2. SSN (or DOD ID No.) [REDACTED]	c3. RANK EX-II	c4. POSITION Deputy Counsel to the President		
c5. SENIOR RATER'S ORGANIZATION National Security Council The White House Washington, DC 20504		c6. BRANCH	c7. COMPONENT	c9. EMAIL ADDRESS (.gov or .mil) [REDACTED]		
c8. SENIOR RATER PHONE NUMBER [REDACTED]		c10. SENIOR RATER SIGNATURE JOHN EISENBERG [REDACTED]		c11. DATE (YYYYMMDD) 20190701		
d. This is a referred report, do you wish to make comments? <input type="checkbox"/> Referred <input type="checkbox"/> Yes, comments are attached <input type="checkbox"/> No		e1. RATED OFFICER SIGNATURE VINDMAN YEVGENY SIMK [REDACTED]		e2. DATE (YYYYMMDD) 20190701		
f1. Supplementary Review Required? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		f2. NAME OF REVIEWER (Last, First, Middle Initial) [REDACTED]				
f3. RANK COL		f4. POSITION SJA		f5. Comments Enclosed <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
f6. SUPPLEMENTARY REVIEWER SIGNATURE [REDACTED]		f7. DATE (YYYYMMDD) 20190701				
PART III - DUTY DESCRIPTION						
a. PRINCIPAL DUTY TITLE Deputy Legal Advisor, NSC and ADAEO, NSC			b. POSITION AOC/BRANCH 27A/JA			
c. SIGNIFICANT DUTIES AND RESPONSIBILITIES Advises the National Security Council (NSC), the Assistant to the President for National Security Affairs (APNSA), the Assistant to the President and Deputy Counsel to the President, NSC committees and NSC staff on ethics, administrative law, national security and foreign relations, including Presidential authorities, Constitutional law, treaty and statutory interpretation, fiscal law and personnel matters. Drafts and reviews Presidential and APNSA correspondence, speeches, and policies. Facilitates legal review of Presidential documents. Coordinates legal advice for NSC Principals, Deputies and Policy Coordination Committees and prepares papers on legal matters arising in senior interagency meetings. Primary legal advisor to the African Affairs, Records and Access Management, International Organizations, Emerging Technologies, Situation Room, and Resource Management directorates of the NSC. Advises the NSC Executive Secretariat regarding the operations of the NSC and staff. Serves as the NSC Alternate Designated Agency Ethics Official (ADAEO).						
PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM, COMPETENCIES, AND ATTRIBUTES (Rater)						
a. APFT Pass/Fail/Profile: <u>PASS</u> Date: <u>20190530</u> Height: <u>70</u> Weight: <u>191</u> Within Standard? <u>YES</u> Comments required for "Failed" APFT, or "Profile" when it precludes performance of duty, and "No" for Army Weight Standards?						
b. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING BROADENING ASSIGNMENTS OCLL, Executive Officer, PPTO						
c. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING OPERATIONAL ASSIGNMENTS Staff Judge Advocate; Division Chief, OTJAG; Chairman's Deputy Legal Advisor						
d1. Character: <i>(Adherence to Army Values, Empathy, and Warrior Ethos/Service Ethos and Discipline. Fully supports SHARP, EO, and EEO.)</i>		Yevgeny (Yev) is the epitome of an Army officer and lawyer. He is a hard-working, disciplined, tough-minded team player who manifests the Army Values. He is unrelentingly honest in delivering legal advice, without concern of repercussions Yev does the right thing and is approachable and personable. Fully supports SHARP, EO and EEO.				

HQDA#: 2917300		UNCLASSIFIED																	
NAME VINDMAN, YEVGENY, S	SSN (or DOD ID No.) [REDACTED]	PERIOD COVERED: FROM (YYYYMMDD) 20180530	THRU (YYYYMMDD) 20190531																
<p>d2. Provide narrative comments which demonstrate performance regarding field grade competencies and attributes in the Rated Officers current duty position. (i.e. demonstrates excellent presence, confidence and resilience in expected duties and unexpected situation, adjusts to external influence on the mission or tasks and organization, prioritizes limited resources to accomplish mission, proactive in developing others through individual coaching counseling and mentoring, active learner to master organizational level knowledge, critical thinking and visioning skills, anticipates and provides for subordinates on the job needs for training and development, effective communicator across echelons and outside the Army chain of command, effective at engaging others, presenting information and recommendations and persuasion, highly proficient at critical thinking, judgment and innovation, proficient in utilizing Army design method and other to solve complex problems, uses all influence techniques to empower others; proactive in gaining trust in negotiations, remains respectful, firm and fair. Fully supports SHARP and creates a positive command/workplace environment.)</p> <p>COMMENTS: Yev is an excellent attorney who is trusted to work on complex and sensitive issues. Yev stepped into a fast-paced and challenging environment and excelled. He quickly became an expert on ethics and administrative law, leading to his designation as NSC ADAEO. Yev expertly led several sensitive internal inquiries into allegations regarding certain senior officials and advised NSC leadership on appropriate dispositions. His acumen, perception, and judgment were critical in preventing pitfalls, negotiating MOUs with the interagency, crafting US strategy and advising senior White House staff. Yev is an expert at coordinating with interagency lawyers.</p> <p>e. This Officer's overall Performance is Rated as: (Select one box representing Rated Officer's overall performance compared to others of the same grade whom you have rated in your career. Managed at less than 50% in EXCELS.)</p> <p>A completed DA Form 67-10-1A was received with this report and considered in my evaluation and review: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (explain in comments below)</p> <table border="1" style="width: 100%; text-align: center;"> <tr> <td colspan="4">HQDA COMPARISON OF THE RATER'S PROFILE AND BOX CHECK AT THE TIME THIS REPORT PROCESSED</td> </tr> <tr> <td colspan="4">EXCELS</td> </tr> <tr> <td>RO: VINDMAN, YEVGENY, S</td> <td>SSN: [REDACTED]</td> <td>R: ELLIS, MICHAEL, J</td> <td>SSN: [REDACTED]</td> </tr> <tr> <td>DATE: 2019-07-03</td> <td>TOTAL RATINGS: 4</td> <td>RATINGS THIS OFFICER: 1</td> <td>I currently rate 1 Army Officers in this grade.</td> </tr> </table> <p>Comments: Peerless performance. Smart, motivated and versatile, Yev proved himself capable of executive-level performance. He expertly advised senior White House officials, including the APNSA and NSC staff, on myriad actions, performing numerous legal reviews flawlessly. A consummate teammate and advisor, senior USG officials sought him out for guidance and counsel. Lead attorney for the Africa Strategy, two NSPMs, a sanctions EO, a White House economic initiative, and ethics training for the NSC, Yev is the first pick lawyer for any team.</p>				HQDA COMPARISON OF THE RATER'S PROFILE AND BOX CHECK AT THE TIME THIS REPORT PROCESSED				EXCELS				RO: VINDMAN, YEVGENY, S	SSN: [REDACTED]	R: ELLIS, MICHAEL, J	SSN: [REDACTED]	DATE: 2019-07-03	TOTAL RATINGS: 4	RATINGS THIS OFFICER: 1	I currently rate 1 Army Officers in this grade.
HQDA COMPARISON OF THE RATER'S PROFILE AND BOX CHECK AT THE TIME THIS REPORT PROCESSED																			
EXCELS																			
RO: VINDMAN, YEVGENY, S	SSN: [REDACTED]	R: ELLIS, MICHAEL, J	SSN: [REDACTED]																
DATE: 2019-07-03	TOTAL RATINGS: 4	RATINGS THIS OFFICER: 1	I currently rate 1 Army Officers in this grade.																
PART V - INTERMEDIATE RATER																			
PART VI - SENIOR RATER																			
<p>a. POTENTIAL COMPARED WITH OFFICERS SENIOR RATED IN SAME GRADE (OVERPRINTED BY DA)</p> <p>HQDA COMPARISON OF THE SENIOR RATER'S PROFILE AND BOX CHECK AT THE TIME THIS REPORT PROCESSED</p> <table border="1" style="width: 100%; text-align: center;"> <tr> <td>MOST QUALIFIED</td> </tr> </table> <p>RO: VINDMAN, YEVGENY, S</p> <p>SR: EISENBERG, JOHN, A</p> <p>DATE: 2019-07-03</p> <p>TOTAL RATINGS: 1</p> <p>RATINGS THIS OFFICER: 1</p>		MOST QUALIFIED	<p>b. I currently senior rate 1 Army Officers in this grade.</p> <p>c. COMMENTS ON POTENTIAL: Yev is a top 1% military attorney and officer and the best LTC with whom I have ever worked. Functioning at the executive level, he advises White House senior staff with skill, tact, and judgment on matters of geostrategic importance. Sought by White House staff regularly, he can do any job in the legal field under unusual and constant pressure and scrutiny. Select now for SSC and promote immediately to COL. Absolutely unlimited potential!</p> <p>d. List 3 future SUCCESSIVE assignments for which this Officer is bestsuited: Staff Judge Advocate; Division Chief, OTJAG; OCJCS-LC</p>																
MOST QUALIFIED																			

Appendix B: OER June 1, 2019, Through February 7, 2020

HQDA#: _____					
FIELD GRADE PLATE (O4 - O5; CW3 - CW5) OFFICER EVALUATION REPORT					<i>See Privacy Act Statement in AR 623-3</i>
For use of this form, see AR 623-3; the proponent agency is DCS, G-1.					
PART I - ADMINISTRATIVE (Rated Officer)					
a. NAME (Last, First, Middle Initial) VINDMAN, YEVGENY S.		b. SSN (or DOD ID No.)	c. RANK LTC	d. DATE OF RANK (YYYYMMDD)	e. BRANCH JA
g. UNIT, ORG., STATION, ZIP CODE OR APO, MAJOR COMMAND NATIONAL SECURITY COUNCIL, THE WHITE HOUSE, WASH., DC			h. UIC	i. REASON FOR SUBMISSION 04 Change of Duty	
j. PERIOD COVERED FROM (YYYYMMDD) 20190601 THRU (YYYYMMDD) 20200207		k. RATED MONTHS 8	l. NON RATED CODES	m. NO. OF ENCLOSURES	
n. RATED OFFICER'S EMAIL ADDRESS (.gov or .mil)					
PART II - AUTHENTICATION (Rated officer's signature verifies officer has seen completed OER Parts I-VI and the administrative data is correct)					
a1. NAME OF RATER (Last, First, Middle Initial) ELLIS, MICHAEL J.		a2. SSN (or DOD ID No.)	a3. RANK EX - IV	a4. POSITION Sr. Assoc. Counsel to the Pres.	
a5. EMAIL ADDRESS (.gov or .mil)		a6. RATER SIGNATURE MICHAEL ELLIS		a7. DATE (YYYYMMDD) 20200406	
b1. NAME OF INTERMEDIATE RATER (Last, First, Middle Initial)		b2. SSN (or DOD ID No.)	b3. RANK	b4. POSITION	
b5. EMAIL ADDRESS (.gov or .mil)		b6. INTERMEDIATE RATER SIGNATURE		b7. DATE (YYYYMMDD)	
c1. NAME OF SENIOR RATER (Last, First, Middle Initial) EISENBERG, JOHN A.		c2. SSN (or DOD ID No.)	c3. RANK EX - I	c4. POSITION Deputy Counsel to the Pres.	
c5. SENIOR RATER'S ORGANIZATION National Security Council The White House Washington, DC 20504		c6. BRANCH CIV	c7. COMPONENT NONE	c9. EMAIL ADDRESS (.gov or .mil)	
c8. SENIOR RATER PHONE NUMBER		c10. SENIOR RATER SIGNATURE		c11. DATE (YYYYMMDD) 2020/04/04	
d. This is a referred report, do you wish to make comments? <input type="checkbox"/> Referred <input type="checkbox"/> Yes, comments are attached <input type="checkbox"/> No			e1. RATED OFFICER SIGNATURE		e2. DATE (YYYYMMDD)
f1. Supplementary Review Required? <input type="checkbox"/> Yes <input type="checkbox"/> No			f2. NAME OF REVIEWER (Last, First, Middle Initial)		
f3. RANK		f4. POSITION		f5. Comments Enclosed	
f6. SUPPLEMENTARY REVIEWER SIGNATURE			f7. DATE (YYYYMMDD)		
PART III - DUTY DESCRIPTION					
a. PRINCIPAL DUTY TITLE Deputy Legal Advisor and ADAEO, NSC			b. POSITION AOC/BRANCH 27A/JA		
c. SIGNIFICANT DUTIES AND RESPONSIBILITIES Advises the National Security Council (NSC); the Assistant to the President for National Security Affairs (APNSA); the Assistant to the President, Deputy Counsel to the President for National Security Affairs, and NSC Legal Advisor; NSC committees; and NSC staff on ethics, administrative law, national security, and foreign relations, including Presidential authorities, constitutional law, treaty and statutory interpretation, fiscal law, and personnel matters. Drafts and reviews Presidential and APNSA correspondence, speeches, and policies. Facilitates legal review of Presidential documents. Coordinates legal advice for NSC Principals, Deputies, and Policy Coordination Committees and prepares papers on legal matters arising in senior interagency meetings. Primary legal advisor to the African Affairs, Records and Access Mg't, International Organizations, Situation Room, and Resource Mg't directorates of the NSC. Advises the NSC Executive Secretary regarding the operations of the NSC staff. Serves as the NSC Alternate Designated Agency Ethics Official (ADAEO).					
PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM, COMPETENCIES, AND ATTRIBUTES (Rater)					
a. APFT Pass/Fail/Profile: _____ Date: _____ Height: _____ Weight: _____ Within Standard? _____ Comments required for "Failed" APFT, or "Profile" when it precludes performance of duty, and "No" for Army Weight Standards?					
b. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING BROADENING ASSIGNMENTS The Army Staff					
c. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING OPERATIONAL ASSIGNMENTS The Army Staff					
d1. Character: (Adherence to Army Values, Empathy, and Warrior Ethos/Service Ethos and Discipline. Fully supports SHARP, EO, and EEO.)		LTC Vindman is a hardworking officer, but he frequently lacks judgment and has difficulty understanding the appropriate role of a lawyer in an organization. He fully supports SHARP, EO, and EEO.			

HQDA#:		NAME VINDMAN, YEVGENY S.		SSN (or DOD ID No.)	PERIOD COVERED: FROM (YYYYMMDD) 20190601	THRU (YYYYMMDD) 20200207
<p>d2. Provide narrative comments which demonstrate performance regarding field grade competencies and attributes in the Rated Officer's current duty position. (i.e. demonstrates excellent presence, confidence and resilience in expected duties and unexpected situation, adjusts to external influence on the mission or taskings and organization, prioritizes limited resources to accomplish mission, proactive in developing others through individual coaching counseling and mentoring, active learner to master organizational level knowledge, critical thinking and visioning skills, anticipates and provides for subordinates on-the-job needs for training and development, effective communicator across echelons and outside the Army chain of command, effective at engaging others, presenting information and recommendations and persuasion, highly proficient at critical thinking, judgment and innovation, proficient in utilizing Army design method and other to solve complex problems, uses all influence techniques to empower others; proactive in gaining trust in negotiations, remains respectful, firm and fair. Fully supports SHARP and creates a positive command/workplace environment.)</p> <p>COMMENTS: During the prior reporting period and early portions of the reporting period, LTC Vindman performed his duties satisfactorily. Over time, LTC Vindman displayed increasingly poor judgment and failed to learn from his mistakes. On multiple occasions, his unprofessional demeanor made NSC staff feel uncomfortable. Despite express guidance from his supervisor, he continued to add himself to meetings with senior NSC staff where he did not add value. LTC Vindman's substandard performance--his lack of judgment, failure to communicate well with his superiors, and inability to differentiate between legal and policy decisions--caused him to lose the trust of NSC senior leadership.</p> <p>e. This Officer's overall Performance is Rated as: (Select one box representing Rated Officer's overall performance compared to others of the same grade whom you have rated in your career. Managed at less than 50% in EXCELS.)</p> <p>I currently rate _____ Army Officers in this grade.</p> <p>A completed DA Form 67-10-1A was received with this report and considered in my evaluation and review: <input type="checkbox"/> Yes <input type="checkbox"/> No (explain in comments below)</p> <p>EXCELS (49%) <input type="checkbox"/> PROFICIENT <input type="checkbox"/> CAPABLE <input type="checkbox"/> UNSATISFACTORY <input checked="" type="checkbox"/></p> <p>Comments: LTC Vindman is an attorney of average ability, but he lacks judgment on critical issues. In a stressful and high-pressure work environment, his performance did not live up to the extremely high standards of the NSC Legal Affairs Directorate. Owing to the early termination of LTC Vindman's detail to the NSC, it was not possible to prepare a DA Form 67-10-1A.</p>						
PART V - INTERMEDIATE RATER						
PART VI - SENIOR RATER						
<p>a. POTENTIAL COMPARED WITH OFFICERS SENIOR RATED IN SAME GRADE (OVERPRINTED BY DA)</p> <p><input type="checkbox"/> MOST QUALIFIED (limited to 49%)</p> <p><input type="checkbox"/> HIGHLY QUALIFIED</p> <p><input type="checkbox"/> QUALIFIED</p> <p><input checked="" type="checkbox"/> NOT QUALIFIED</p>		<p>b. I currently senior rate _____ Army Officers in this grade.</p> <p>c. COMMENTS ON POTENTIAL: In the prior reporting period, LTC Vindman demonstrated potential, but he did not grow professionally after the extension of his detail assignment to the NSC. With additional counseling and experience, LTC Vindman's performance may improve. He would benefit from additional experience in a slower-paced work environment subject to less pressure and scrutiny. In time, he may become a better attorney.</p> <p>d. List 3 future SUCCESSIVE assignments for which this Officer is best suited: The Army Staff</p>				

Appendix C: Revised OER June 1, 2019, Through February 7, 2020

HQDA#:		FIELD GRADE PLATE (O4 - O5; CW3 - CW5) OFFICER EVALUATION REPORT				<i>See Privacy Act Statement in AR 623-3.</i>	
For use of this form, see AR 623-3; the proponent agency is DCS, G-1.							
PART I - ADMINISTRATIVE (Rated Officer)							
a. NAME (Last, First, Middle Initial) VINDMAN, YEVGENY S.		b. SSN (or DOD ID No.) [REDACTED]	c. RANK LTC	d. DATE OF RANK (YYYYMMDD) [REDACTED]	e. BRANCH JA	f. COMPONENT (Status Code)	
g. UNIT, ORG., STATION, ZIP CODE OR APO, MAJOR COMMAND NATIONAL SECURITY COUNCIL, THE WHITE HOUSE, WASH., DC				h. UIC [REDACTED]	i. REASON FOR SUBMISSION 03 Change of Rater		
j. PERIOD COVERED FROM (YYYYMMDD) 20190601 THRU (YYYYMMDD) 20200207		k. RATED MONTHS 8	l. NON RATED CODES	m. NO. OF ENCLOSURES	n. RATED OFFICER'S EMAIL ADDRESS (.gov or .mil) [REDACTED]		
PART II - AUTHENTICATION (Rated officer's signature verifies officer has seen completed OER Parts I-VI and the administrative data is correct)							
a1. NAME OF RATER (Last, First, Middle Initial) ELLIS, MICHAEL J.		a2. SSN (or DOD ID No.) [REDACTED]	a3. RANK EX - IV	a4. POSITION Sr. Assoc. Counsel to the Pres.			
a5. EMAIL ADDRESS (.gov or .mil) [REDACTED]		a6. RATER SIGNATURE [REDACTED]			a7. DATE (YYYYMMDD) 20201231		
b1. NAME OF INTERMEDIATE RATER (Last, First, Middle Initial)		b2. SSN (or DOD ID No.)	b3. RANK	b4. POSITION			
b5. EMAIL ADDRESS (.gov or .mil)		b6. INTERMEDIATE RATER SIGNATURE			b7. DATE (YYYYMMDD)		
c1. NAME OF SENIOR RATER (Last, First, Middle Initial) EISENBERG, JOHN A.		c2. SSN (or DOD ID No.)	c3. RANK EX - I	c4. POSITION Deputy Counsel to the Pres.			
c5. SENIOR RATER'S ORGANIZATION National Security Council The White House Washington, DC 20504		c6. BRANCH CIV	c7. COMPONENT NONE	c9. EMAIL ADDRESS (.gov or .mil) [REDACTED]			c11. DATE (YYYYMMDD) 20210107
c8. SENIOR RATER PHONE NUMBER [REDACTED]		c10. SENIOR RATER SIGNATURE [REDACTED]			e2. DATE (YYYYMMDD)		
d. This is a referred report, do you wish to make comments? <input checked="" type="checkbox"/> Referred <input type="checkbox"/> Yes, comments are attached <input type="checkbox"/> No		e1. RATED OFFICER SIGNATURE [REDACTED]					
f1. Supplementary Review Required? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No		f2. NAME OF REVIEWER (Last, First, Middle Initial) HUSTON, ROBERT P.					
f3. RANK BG	f4. POSITION AJAG, MLO	f5. Comments Enclosed <input type="checkbox"/> Yes <input type="checkbox"/> No					
f6. SUPPLEMENTARY REVIEWER SIGNATURE		f7. DATE (YYYYMMDD)					
PART III - DUTY DESCRIPTION							
a. PRINCIPAL DUTY TITLE Deputy Legal Advisor and ADAEO, NSC				b. POSITION AOC/BRANCH 27A/JA			
c. SIGNIFICANT DUTIES AND RESPONSIBILITIES Advises the National Security Council (NSC); the Assistant to the President for National Security Affairs (APNSA); the Assistant to the President, Deputy Counsel to the President for National Security Affairs, and NSC Legal Advisor; NSC committees; and NSC staff on ethics, administrative law, national security, and foreign relations, including Presidential authorities, constitutional law, treaty and statutory interpretation, fiscal law, and personnel matters. Drafts and reviews Presidential and APNSA correspondence, speeches, and policies. Facilitates legal review of Presidential documents. Coordinates legal advice for NSC Principals, Deputies, and Policy Coordination Committees and prepares papers on legal matters arising in senior interagency meetings. Primary legal advisor to the African Affairs, Records and Access Mg't International Organizations, Situation Room, and Resource Mg't directorates of the NSC. Advises the NSC Executive Secretary regarding the operations of the NSC staff. Serves as the NSC Alternate Designated Agency Ethics Official (ADAEO).							
PART IV - PERFORMANCE EVALUATION - PROFESSIONALISM, COMPETENCIES, AND ATTRIBUTES (Rater)							
a. APFT Pass/Fail/Profile: <u>PASS</u> Date: <u>20190530</u> Height: <u>70</u> Weight: <u>191</u> Within Standard? <u>YES</u> Comments required for "Failed" APFT, or "Profile" when it precludes performance of duty, and "No" for Army Weight Standards?							
b. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING BROADENING ASSIGNMENTS The Army Staff							
c. THIS OFFICER POSSESSES SKILLS AND QUALITIES FOR THE FOLLOWING OPERATIONAL ASSIGNMENTS The Army Staff							
d1. Character: (Adherence to Army Values, Empathy, and Warrior Ethos/Service Ethos and Discipline. Fully supports SHARP, EO, and EEO.)		LTC Vindman is a hardworking officer, but he frequently lacks judgment and has difficulty understanding the appropriate role of a lawyer in an organization. He fully supports SHARP, EO, and EEO.					

HQDA#:	
NAME VINDMAN, YEVGENY S.	SSN (or DOD ID No.) [REDACTED]
PERIOD COVERED: FROM (YYYYMMDD) 20190601 THRU (YYYYMMDD) 20200207	
<p>d2. Provide narrative comments which demonstrate performance regarding field grade competencies and attributes in the Rated Officer's current duty position. (i.e., demonstrates excellent presence, confidence and resilience in expected duties and unexpected situation, adjusts to external influence on the mission or taskings and organization, prioritizes limited resources to accomplish mission, proactive in developing others through individual coaching counseling and mentoring, active learner to master organizational level knowledge, critical thinking and visioning skills, anticipates and provides for subordinates on-the-job needs for training and development, effective communicator across echelons and outside the Army chain of command, effective at engaging others, presenting information and recommendations and persuasion, highly proficient at critical thinking, judgment and innovation, proficient in utilizing Army design method and other to solve complex problems, uses all influence techniques to empower others; proactive in gaining trust in negotiations, remains respectful, firm and fair. Fully supports SHARP and creates a positive command/workplace environment.)</p>	
<p>COMMENTS: During the early portions of this rating period, LTC Vindman performed his duties satisfactorily. Over time during this rating period, LTC Vindman displayed increasingly poor judgment and failed to learn from his mistakes. On multiple occasions, he made NSC staff feel uncomfortable with his unprofessional demeanor. Despite express guidance from his supervisor, he continued to add himself to meetings with senior NSC staff where he did not add value. LTC Vindman's substandard performance - lack of judgment, failure to communicate well with his superiors, and inability to differentiate between legal and policy decisions - caused him to lose the trust of NSC senior leadership.</p>	
<p>e. This Officer's overall Performance is Rated as: (Select one box representing Rated Officer's overall performance compared to others of the same grade whom you have rated in your career. <i>More than 50% in EXCELS.</i>)</p> <p>I currently rate <u>1</u> Army Officers in this grade [REDACTED]</p> <p>A completed DA Form 67-10-1A was received with this report and considered in my evaluation and review: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No (explain in comments below)</p> <p>EXCELS (49%) <input type="checkbox"/> PROFICIENT <input type="checkbox"/> CAPABLE <input checked="" type="checkbox"/> UNSATISFACTORY <input type="checkbox"/></p>	
<p>Comments: LTC Vindman is an attorney of average ability, but he lacks judgment on critical issues. In a stressful and high-pressure work environment, his performance did not live up to the extremely high standards of the NSC Legal Affairs Directorate. A DA Form 67-10-1A was not prepared or provided.</p>	
PART V - INTERMEDIATE RATER	
PART VI - SENIOR RATER	
<p>a. POTENTIAL COMPARED WITH OFFICERS SENIOR RATED IN SAME GRADE (OVERPRINTED BY DA)</p> <p><input type="checkbox"/> MOST QUALIFIED (limited to 49%)</p> <p><input type="checkbox"/> HIGHLY QUALIFIED</p> <p><input checked="" type="checkbox"/> QUALIFIED</p> <p><input type="checkbox"/> NOT QUALIFIED</p>	<p>b. I currently senior rate <u>1</u> Army Officers in this grade.</p> <p>c. COMMENTS ON POTENTIAL: LTC Vindman did not grow professionally during this rating period after the extension of his detail assignment to the NSC. With additional counseling and experience, LTC Vindman's performance may improve. He would benefit from additional experience in a slower-paced work environment subject to less pressure and scrutiny. In time, he may become a better attorney.</p> <p>d. List 3 future SUCCESSIVE assignments for which this Officer is best suited: The Army Staff</p>

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