DCN: 12159

Sarkar, Rumu, CIV, WSO-BRAC

From: Wilder Harlan G Civ AF/JAA
Sent: Tuesday, August 23, 2005 10:46 AM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: FW: GC memo on ARC training

Attachments: Memo - Limitations on Technician and AGR Training.PDF

Attached is the memo of the AF GC to AF/XP regarding concerns expressed for some time to the XP during future total force discussions. SAF/GC and AF/JA interpret the restrictions in the same manner.

HG Wilder
Chief, Administrative Law

Memo - Limitations on Technici...

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Sarkar, Rumu, CIV, WSO-BRAC

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Tuesday, August 23, 2005 10:20 AM
To: Hague, David, CIV, WSO-BRAC
Subject: FW: AF legal Op. on Using AGR Units to train Active Duty Personnel
Attachments: JAA 28 July 05.pdf

Sir: I am forwarding a legal opinion I sourced from an AF attorney, Harlan Wilder, an expert on the subject, regarding the AF's position on using Active Guard and Reserve (AGR) units to train active duty military personnel, including for fighter jet training purposes. This has been the subject of much prior discussion, and the conclusion reached in the matter is that using the ANG in a Title 32 status to perform a "federal operational mission" such as training fighter pilots, etc., would raise serious constitutional, statutory and appropriations law questions.

Although Section 502 of Title 32 allows ANG units to perform training as one of the authorized federally-funded duties of the National Guard, the section is not apparently worded broadly enough to contemplate the type of training arrangement under consideration by the Commission. Also, the AF memo points out that using ANG units to perform federal training missions while such units are still in Title 32 status raises significant command and control issues since the Governor of the State in where such ANG units are located would actually be in command, thus, compromising the President's command and control authority. Not only is this seen an an imprudent course of action to follow, but there are also appropriations issues that come into play that may result in an Anti-Deficiency Act violation if the guardsmen are actually augmenting active component forces rather than engaging in legitimate Title 32 training exercises. These activities may prompt changes in end strength numbers that could violate limitations imposed on end strengths imposed by Congress under 10 U.S.C. Section 115.

In conclusion, the memo (which will be supplemented by further DoD OGC guidance) proposes the following alternatives in using ANG forces in T. 32 status for federally-mandated training missions: (1) using active duty components exclusively; (2) using ANG guardsmen on a very limited scale to augment the mission without compromising the legal requirements of T. 32; and (3) converting the ANG units into T. 10 status.

I will keep you continuously advised as I receive more information. I will also brief Commissioner Newton, as you direct. Thanks, Rumu

Rumu Sarkar
Associate General Counsel
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street, Suite 600, Room 600-18
Arlington, VA 22202-3920
Tel: (703) 699-2973
Cell: (703) 901-7843
Fax: (703) 699-2735

From: Wilder Harlan G Civ AF/JAA (703) 614-4075
Sent: Tuesday, August 23, 2005 9:49 AM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: FW: For your review and placement in your Continuity books----FTF-related Legal Opinion

Attached is an opinion that describes some of the problems observed with the ANG taking over federal missions. It contains citations to laws limiting the use of ANG personnel. We have written opinions describing the Constitutional, fiscal and statutory constraints on the use of the ANG for a number of years. I will also forward

the Air Force General Counsel's guidance by separate email.

HG Wilder
Chief, Administrative Law Directorate
Office of The Judge Advocate General
614-4075

DCN: 12159

DCN: 12159

DEPARTMENT OF THE AIR FORCE
WASHINGTON, DC 20330-1740

OFFICE OF THE GENERAL COUNSEL

JUN 0 2 2005

MEMORANDUM FOR AF/XP

FROM: SAF/GC

SUBJECT: Limitations on Technician and AGR Training

The Secretary of the Air Force has asked that we provide the following information pertaining to limitations on the use of Active Guard and Reserves (AGRs) and Technicians in the training of Active Duty personnel. The information below is general in nature and should be used only to determine whether further analysis of a particular circumstance may be required. In all cases, we highly recommend that commanders consult with their legal counsel, and that those counselors communicate with Headquarters Air Force regarding any situation that is not readily resolved.

The General Rule

[redacted]

Exceptions:

[redacted] either the same mission shared by their unit and an affiliated unit (e.g., associate units with a common mission sharing airframes, or as members of a mixed component organization (e.g., all members of a joint task force) [redacted] (b). However, the primary role of the Reserve AGR must be to support the Reserve component.

[redacted] the primary purpose of the training (e.g., an ANG organization existing to train ANG aircrews, staffed by ANG Technicians and AGRs, may make available excess capacity to Active Duty (AD) or Reserve personnel so long as the primary purpose and nature of the training remains focused on, and predominantly for ANG personnel). Reimbursement of costs to the training unit from the other components would still be required.

A Guard or Reserve unit whose Title 10 mission is to train (e.g., a unit that has as its mission essential task upon activation running a "schoolhouse" for individuals in Title 10 status) may [redacted] (i.e., their mission is to be trainers on active duty and in order to maintain training proficiency they train other component personnel because there are not sufficient individuals of their own component to

train). In this situation, the individuals being trained receive an incidental benefit, the primary purpose of the training being to allow the Technicians and AGRs to *practice* training.

Other Considerations

[redacted] Unique personnel end strength allocations and unique appropriations (e.g. "Reserve Personnel," "National Guard Personnel," "Military Personnel,") exist to fund Technicians, AGRs, and active duty personnel for their specific components. To use these personnel allocations and funds for the benefit of other components would violate the statutes cited above as well as the purpose for which separate appropriations are made [redacted] circumstances, could also violate the Antideficiency Act, 31 U.S.C. §§1341, 1342, 1517. The Department of Defense has previously proposed to consolidate these appropriations to provide greater flexibility in managing uniformed personnel, but Congress rejected this idea. [redacted]

[redacted] does apply that would allow the use of Technicians or AGRs to train members of other components, it would still be necessary to consider what, if any, [redacted] funds would be required to avoid violations of the Antideficiency Act. Usually, this can be [redacted] by means of the Economy Act, 31 U.S.C. §1535, or other applicable statutory authority, with funds being transferred from the sending organization to the training organization. Usually, the details of reconciling the fiscal issues should be reduced to writing, often by means of a Memorandum of Agreement, Support Agreement, or funding document that sets for the requirement for the training or support and the authority under which [redacted]

Potential Solutions

Where a situation exists, or would exist according to a plan not yet executed, that would violate the limitations on the use of Technicians or AGRs for training of other components, there are some [redacted] that include:

- [redacted] the [redacted]

- Converting [redacted] (allowing use of the broader exceptions of 10 U.S.C. §12310(b) [redacted] with other components);

- [redacted] (In this case, the primary purpose of the training must be to prepare the Traditional Guardsmen or Reservists to perform their Title 10 mission and the individuals being trained receive an incidental benefit);

- Modifying the balance of trainers and students to the point that the primary purpose (e.g., clearly preponderant purpose) of the training is clearly to the benefit of the component providing the training.

In all cases, even when respecting the limitations on Technicians and AGRs discussed above, it is essential to ensure that fiscal requirements are met, and that the aggregate effect of the arrangements does not violate the intent of end strength limitations applicable to the respective personnel categories.

Conclusion

The matters discussed above represent significant limitations established by law, and are not to be ignored. If your review of this discussion leaves any questions about the propriety of training situations under your authority, you should seek the advice of legal and fiscal experts to resolve the questions. Since this is not an area of general practice, organizational legal advisers are encouraged to elevate questions through their functional chains as required to address the particular situation. HAF experts are available as needed.

MARY L. WALKER
General Counsel

DCN: 12159

Sarkar, Rumu, CIV, WSO-BRAC

From: Wilder Harlan G Civ AF/JAA
Sent: Tuesday, August 23, 2005 9:49 AM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: FW: For your review and placement in your Continuity books----FTF-related Legal Opinion
Attachments: JAA 28 July 05.pdf

Attached is an opinion that describes some of the problems observed with the ANG taking over federal missions. It contains citations to laws limiting the use of ANG personnel. We have written opinions describing the Constitutional, fiscal and statutory constraints on the use of the ANG for a number of years. I will also forward the Air Force General Counsel's guidance by separate email.

HG Wilder
Chief, Administrative Law Directorate
Office of The Judge Advocate General
614-4075

DCN: 12159

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, UNITED STATES AIR FORCE
WASHINGTON, DC

28 July 2005

MEMORANDUM FOR HQ AFSPC/JA

FROM: HQ USAF/JAA
1420 Air Force Pentagon, Rm 5E279
Washington DC 20330-1420

SUBJECT: Legal Restraints on the Use of the Air National Guard to Perform Federal Operational Missions

This responds to your request for our opinion as to whether the Air National Guard (ANG) may perform federal operational missions while in Title 32 training status, and if so, under what circumstances. You have indicated that this issue has arisen on a number of occasions with respect to Air Force Space Command (AFSPC) missions, and most recently, with respect to the possible transfer of the 13th Space Warning Squadron (13 SWS) mission to the Alaska ANG and the use of the North Dakota ANG to guard the 91st Space Wing (91 SW) missile fields. As a general rule, we believe the Air National Guard is precluded from performing federal operational missions unless placed in active duty status under Title 10, United States Code. However, there are specific, limited exceptions to this rule. Identifying the cases to which these exceptions apply is not always straight forward and each case will need to be evaluated on its own merits. The intent of this opinion is to provide some general guidance on evaluating these cases, as well as to address your specific concerns regarding the Alaska and North Dakota proposals.

Background

The issue of whether, and to what extent, the ANG may perform federal missions was prompted by two proposals that would transfer missions currently performed by active component (AC) units, in whole or in part, to ANG units. The first is a proposal to stand up a new Alaska ANG unit (213 SWS) consisting almost entirely of ANG members on Active Guard and Reserve (AGR) duty for the sole purpose of taking over the 13 SWS mission in its entirety. The plan calls for the security forces members of the 213 SWS to guard the perimeter of Clear AFS, Alaska while in Title 32 training status. With regard to the system operators at Clear AFS, the plan calls for ANG members to be placed into Title 10 status using self-executing orders whenever they are seated at the system consoles. When the system operators are finished at the consoles, they will revert back into Title 32 status.

The second proposal is for the members of the North Dakota ANG to augment an active duty unit, the 91st Security Forces Squadron (SFS), guarding the 91 SW missile fields. The ANG unit would consist of an almost even mix of AGR personnel and traditional or drill status guardsmen. The AGR personnel would provide full-time augmentation to the 91 SWS with manpower

requirements based on 24/7 operations. Like the Clear AFS proposal, the AGR personnel and traditional guardsman would remain in Title 32 training status.

Constitutional Foundations

In examining the proper functions and duties of the Air National Guard, we are reminded that the Army and Air National Guard (hereinafter "the National Guard") are specifically provided for in the United States Constitution and thus must function within that framework. Article I, Section 8 of the Constitution states that Congress shall have the power "[t]o provide for the calling forth of the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions"[1] and "[t]o provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[2] The Constitution further states that the President "shall be the Commander in Chief ... of the Militia of the several States, when called into actual Service of the United States."[3] The National Guard comprises that portion of the Militia that may be called into federal service.[4]

[redacted] Second, in order to perform a federal mission, the Constitution contemplates, if not requires, that the National Guard will be called into federal service. [redacted] of their States when in state status and the other to the President when in federal [redacted]

The Constitutional framework for the National Guard is clearly reflected in the United States Code. Consistent with that framework and with the conclusions articulated above, [redacted] states:

> In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line defenses of the United States be maintained and assured at all times. ***Whenever Congress determines that more units and organizations are needed for the national security*** than are in the regular components of the ground and air forces, the Army National Guard of the United States and the Air National Guard of the United States, or such parts of them as are needed, together with such units of other reserve components as are

[1] Constitution, Art I, § 8, cl 15.
[2] Constitution, Art I, § 8, cl 16.
[3] Constitution, Art II, § 2, cl 1.
[4] See 10 U.S.C. § 101; 32 U.S.C. § 101.

necessary for a balanced force, ***shall be ordered to active Federal duty and retained as long as so needed.***

In other words, the purpose of the National Guard is to train and prepare air and land forces to augment the regular Armed Forces of the United States as needed for national security. Notably, Section 102, like the Constitution, contemplates that the National Guard will be called into federal service when performing federal missions.

Authorized Title 32 Activities

[redacted] Among other things, it enumerates the authorized functions and duties of the National Guard, at least with respect to federally-funded activities. They include:

a. drug interdiction and counter-drug activities[6];
b. performance of funeral honors[7];
c. rifle instruction[8];
d. training[9]; and
e. homeland defense activities[10].

In addition, Title 10 permits National Guard members who are on full-time National Guard duty (FTNGD) to perform duties in support of emergency preparedness programs to prepare for or respond to incidents involving the use of weapons of mass destruction.[11]

There are also specific functions and duties associated with the different categories of guardsmen. [redacted] The traditional or drill status Guardsmen (DSG) are true "part-timers." Their primary role is to train for their federal mission in accordance with [redacted] which specifies the required number of annual drill and training periods. AGRs are National Guard members on FTNGD for a period of 180 days or more for the purpose of organizing, administering, recruiting, instructing, or training the reserve components.[12] Technicians are federal civilian employees who are also members of the National Guard. [redacted] the [redacted] supplies.

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[5] 32 U.S.C. §§ 106, 702.
[6] 32 U.S.C. § 112.
[7] 32 U.S.C. § 114.
[8] 32 U.S.C. § 316.
[9] 32 U.S.C. Ch. 5.
[10] 32 U.S.C. Ch. 9.
[11] 10 U.S.C. § 12310.
[12] Also, the "other duty" provision of 32 U.S.C. § 502(f) provides the authority for placing guardsmen on AGR duty. *See* 10 U.S.C. § 101(d)(6) for the definition of AGR; See also, DoDD 1205.18, *Full-time Support (FTS) to the Reserve Components*, May 25, 2000; ANGI 36-101, *The Active Guard/Reserve Program*, May 3, 2002.

Authority to Perform Federal Operational Missions

In analyzing whether the National Guard may perform a federal operational mission while in Title 32 status, we must first look to Title 32 to see if Congress has authorized the National Guard to undertake such an activity. As noted above, Congress has identified several specific, albeit limited, circumstances under which the National Guard may perform what are arguably federal missions. They include drug interdiction and counter-drug activities, homeland defense activities, and weapons of mass destruction duties. We will not discuss these authorities here because they are more or less self-explanatory. We instead turn our attention to the training rationale posited in the Alaska and North Dakota ANG situations described above.

[redacted] According to this line of reasoning, National Guard members receive a training benefit from actually performing or participating in the missions, and thus, as part of their Title 32 training mission, they may perform federal operational missions. While there is some merit to this argument, we believe its utility is very limited.

The basic training requirements for traditional Guardsmen are set forth in Section 502(a), which provides for 48 unit training assemblies per year and at least 15 days of annual training. National Guard members may, of course, perform more than the basic training requirements in order to prepare themselves for their federal mission. However, when training is used as the rationale to permit National Guard members to perform federal operational missions, common sense and experience tell us that at some point the training benefit associated with actually performing the operational mission ceases, or at least, becomes ancillary to the mission itself. In other words, at some point, th[redacted] Title 32 forces in [redacted]

[redacted]:

a. Whether performance of the federal operational mission is consistent with the unit's formalized training program. Both active and reserve component units typically have formalized training programs to ensure that the units are capable of performing their mission essential tasks and that unit personnel are capable of meeting their individual training requirements, such as upgrade, qualification, proficiency, and currency training. When performance of a federal operational mission is not consistent with this program or detracts from it by interfering with a unit's ability to perform all of its mission essential tasks or with an individual's ability to meet his or her training requirements then the legitimacy of the training rationale comes into question.

b. **Whether the federal mission can be performed without the National Guard unit.** [redacted]

[redacted]

c. Whether the use of full-time Guard personnel is disproportionate. The disproportionate use of full-time personnel, both AGR and technicians, should trigger concerns. As noted above, the [redacted] This means the duties assigned to these full-time personnel should be consistent with this purpose. This also means that there should be a reasonable ratio of full-time to part-time personnel. In our opinion, it [redacted] training the reserve [redacted] inappropriate to man a National Guard unit with a disproportionate number of AGR personnel knowing they will not be performing AGR duties. In other words, if it reasonably takes twenty full-time personnel to support a unit of one hundred full- and part-time National Guard members, than manning the unit with forty full-time personnel so that it can perform a federal mission would be inappropriate.

Air Force Space Command Proposals

[redacted]

The Alaska proposal calls for the 213 SWS security forces members to provide full-time security for Clear AFS by calling it training. Because we do not have any information on the unit training program, we are unable to evaluate the first factor noted above, i.e., whether the installation security mission detracts from or contributes to unit training. We are, however, able to evaluate the other two factors. First, it is obvious that the installation security mission would not be accomplished if the 213 SWS did not perform it because the plan calls for the 213 SWS to completely take over the mission from the 13 SWS. This, by itself, is strong evidence that the primary purpose of installation security mission is performance of the national defense mission itself and not training. Moreover, it appears that the 213 SWS will consist primarily of AGR personnel. The need for a disproportionate number of AGR personnel strongly suggests that the primary purpose of the unit is to perform a federal mission and not training. Based on the foregoing, we do not believe it would be appropriate for the 213 SWS security forces to perform the installation security mission.

You have also raised questions regarding the role of the 213 SWS with respect to system operations at Clear AFS, indicating that AGR personnel would be placed on active duty status using self-executing orders when they are seated in front of the consoles and returned to AGR status when no longer at the consoles. The DoD General Counsel considered a similar proposal regarding the manning of the Army's Ground-based Midcourse Defense (GMD) commands.[13] That office identified three legal risks associated with the use of AGR personnel: (1) the failure

[13] DoD OGC Memorandum, February 16, 2005.

to identify duties for AGR personnel when not in active duty status; (2) the questionable nature of voluntary written agreements that would provide the basis for placing AGR personnel on active duty under 10 U.S.C. § 12301(d); and (3) potential confusion regarding the chain of command. The same "legal risks" are more or less present in this case. We find the failure to articulate duties for AGR personnel to be of greatest concern. In our opinion, it is inappropriate to place guardsmen into AGR status if they will not be performing AGR duties.

The North Dakota proposal differs somewhat from the Alaska proposal because it calls for the North Dakota ANG to augment rather than replace the 91 SFS. Here again, we do not have any information on the unit training program and thus cannot evaluate this factor. With respect to the second factor, i.e., whether the operational mission can be performed without the National Guard unit, we are somewhat concerned by the fact that the North Dakota ANG will be providing full-time support to the 91 SFS. This is not to say that the 91 SFS could not perform the missile field security mission by itself; however, this factor merits further evaluation to ensure the North Dakota ANG unit is not effectively supplanting the active component forces. Finally, the third factor, i.e., whether the use of full-time National Guard personnel is disproportionate, cuts strongly against the training rationale. The North Dakota proposal contemplates the use of 75 AGR personnel and 92 traditional guardsmen. It is unclear why 75 AGR personnel are required to organize, administer, recruit, instruct, or train a unit with only 167 personnel. Based on the foregoing, the North Dakota ANG appears to be legally unsupportable.

Additional Considerations

[redacted]

Moreover, there are significan[redacted]th the Alaska and North Dakota proposals. B[redacted]he Purpose Statute states that "[a]ppropriations shall be applied only to the objects for which the appropriations were made."[14] A violation of the Purpose Statute could result in a violation of the Antideficiency Act (ADA), which prohibits obligation or expenditure of funds in excess of an appropriation or formal subdivision thereof.[15] [redacted]ed [redacted]ns. Because of this, the use of National Guard personnel to perform a federal mission could result in a violation of the Purpose Statute [redacted] Air Force ends up expending more funds on the [redacted]

[14] 31 U.S.C. § 1301.

[15] 31 U.S.C. §§ 1341, 1517.

[16] In addition, this would constitute an impermissible augmentation of the funds.

The proposals may also violate the personnel end strengths established by Congress under 10 U.S.C. § 115. [redacted] violations.

The Way Forward

[redacted]

Conclusions

As you have described them, the two proposals calling for the use of ANG units to perform security forces missions at Clear AFS and Minot AFB while in Title 32 status appear to be legally unsupportable. While there are no hard and fast rules for determining when the training benefit associated with performing a federal mission becomes an ancillary part of the mission, our analysis of the two proposals suggests that th[redacted] the Alaska proposal, we also find th[redacted] simply to make them available for Title 10 duties is [redacted] under the enabling statutes. Following either of the proposed courses of action could have significant fiscal and command and control implications.

If you have any question, please do not hesitate to contact Lt Col Keric Chin at (703) 614-4075.

HARLAN G. WILDER
Chief, Administrative Law Division
Office of The Judge Advocate General

Peterson Richard Civ AF/JAA

From: Wilder Harlan G Civ AF/JAA
Sent: Monday, June 20, 2005 1:22 PM
To: Peterson Richard Civ AF/JAA
Cc: Chin Keric LtCol AF/JAA
Subject: FW: Request for Opinion - Title 32/10 issues

Please have Keric prepare an appropriate legal review. This one raises the precise issues that have been troubling us in other areas. HGW
-----Original Message-----
From: Harding Richard C Col AFSPC/JA
Sent: Monday, June 20, 2005 11:27 AM
To: Wilder Harlan G Civ AF/JAA
Cc: Tilford Michelle P Maj AFSPC/JA; Chin Keric LtCol AF/JAA; Waldrop Elizabeth S Maj AFSPC/JA
Subject: Request for Opinion - Title 32/10 issues

Sir,

Attached is a copy of a request for a legal opinion I signed this morning.

Maj Michelle Tilford in my office has discussed this issue before with Lt Col Keric Chin in your office.

As explained in the request, time is of the essence, as the Guard is scheduled to take over the federal missions, which are discussed in the request, this fiscal year. Apparently, the issue was raised earlier (for the first time almost 2 years ago!) before Maj Tilford or I arrived at AFSPC, but a request for a JAA opinion was never sent to you.

Your quick turn would be greatly appreciated.

V/R,

Rich

<<Use of Guard and Reserve - request for opinion.doc>>

DCN: 12159

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE SPACE COMMAND

20 June 2005

MEMORANDUM FOR HQ AF/JAA

FROM: HQ AFSPC/JA

SUBJECT: Request for Legal Opinion - Legal Restraints on the Use of the Air National Guard to Perform Federal Operational Missions

1. In the past few years, the question of the use of members of the Air National Guard to support or take over AFSPC missions has come up numerous times. We are aware that similar issues have been raised in ACC. Most recently, within AFSPC, there have been project task forces (PROTAFs) identified to look at the transfer of the mission of the 13th Space Warning Squadron (SWS) to the Alaska ANG and another to explore the use of North Dakota ANG members to guard 91st Space Wing missile fields.

2. With regard to the mission at Clear AFS, AK, the desire has been for members of the Alaska ANG to take over the space surveillance mission of the 13 SWS in its entirety. A new Alaska ANG unit (213 SWS) consisting almost primarily of active guard and reserve (AGR) status guardsmen would be activated for the sole purpose of completely taking over the mission of the 13 SWS. The proposal has been for the security forces members, who would be guarding the perimeter of Clear AFS, to remain in Title 32 state status while performing their duties. This would be paid for with Title 32 training dollars With regard to the system operators at Clear AFS, the proposal is that rather than putting the members in Title 10 status for the duration of assignment to the 213 SWS, each member would use self-executing Title 10 orders to go into Title 10 status upon being seated at the console, their primary duty location, and revert back to Title 32 status when no longer at the console. A state training mission for these members while in Title 32 status has never been identified (other than advocating that the actual performance of a Title 10 mission is one of the best ways to train for performing the mission); however, we believe that there will be at least some training for the federal mission done when members are in Title 32 status (e.g.: ancillary training such as buddy care, LOAC, etc.).

3. The proposal for members of the North Dakota ANG to augment members of the 91 SFS in guarding the missile fields is similar to that at Clear AFS. As with Clear AFS, an ANG squadron (an ANG SFS) would be activated for the purpose of augmenting the 91 SFS. The squadron augmenting the 91 SFS would consist of an almost even mix of AGRs and traditional guardsmen (75 and 92 respectively). The AGRs would provide full-time augmentation to the 91 SFS, with manpower requirements based on 24/7 operations, while the traditional guardsmen would take over shifts from the active duty SFS members on their training days. The desire is that all ANG members would perform this mission in Title 32 status, again, under the classification of "training" and again paid with Title 32 training dollars.

4. We are concerned that there may be fiscal law prohibitions (e.g.: using training dollars to augment mission performance dollars and circumvent Congressionally-mandated end strengths). We are also concerned that the proposals may give rise to possibly unsolvable command and control challenges at Clear AFS and at Minot AFB. For example, when performing the Title 10 missions outlined above, do the AGRs and traditional guardsmen work for the Governor or the President? Do self-executing Title 10 orders resolve this concern? Time is of the essence, because both proposals are scheduled for execution this fiscal year. Therefore, your quick response would be greatly appreciated.

5. If you have further questions, please contact Maj Michelle Tilford, Maj Elizabeth Waldrop, or me at DSN 692-3916.

Very Respectfully,

RICHARD C. HARDING, Colonel, USAF
Staff Judge Advocate

DCN: 12159

LookSmart ARTICLES

The integrated Active and Reserve Division: background, legal foundation, and the role of judge advocates

Christopher W. Behan

Introduction

On 4 and 5 June 1999, the Army activated its first integrated Active and Reserve Component combat divisions: the 7th Infantry Division (Light), with headquarters at Fort Carson, Colorado; (2) and the 24th Infantry Division (Mechanized), with headquarters at Fort Riley, Kansas. (3) Although these units bear the designations of some of the most storied divisions in Army history, (4) they are unique organizations that break new ground in integrating the Army's active and Reserve combat units. Each division is commanded by an active duty major general and has an active duty headquarters staff; however, the combat power of each division consists entirely of Army National Guard enhanced-readiness combat brigades. (5)

This article discusses the history and legal basis for the integrated divisions, outlines their organization and structure, and analyzes the role of judge advocates in these new units.

History of the Integrated Divisions

[redacted] hough the Army's leadership has made several efforts to integrate the three components into a cohesive whole, the efforts have not always been successful. The components have often competed for resources, roles, and training, (8) notwithstanding official Army rhetoric to the contrary. (9)

Army leaders have made a number of efforts to integrate the Active Component and the National Guard more seamlessly over the past quarter century. In 1973, following the Vietnam War, the Army adopted the "Total Force" policy, a force restructuring that attempted to "integrate the active duty, National Guard, and the other Reserve forces into a homogenous whole" and ensure that war plans included all components fighting alongside each other. (10) The Department of Defense shifted resources and built up National Guard and Reserve units to the point where over fifty percent of the Army strength resided in Reserve formations. (11) During the years between the Vietnam War and the 1991 Persian Gulf War (Gulf War), the Army experimented with new concepts, such as "roundout" and "roundup" brigades, in which National Guard maneuver brigades were to train with associated Active Component divisions and augment them during wartime. These brigades received higher priority for resources than other National Guard brigades. (12)

The Gulf War represented the first real test of the Total Force policy. A number of National Guard and Reserve units, primarily combat service and combat service support units, participated in the conflict. (13) Most performed well, and some actually outperformed their active duty counterparts. (14) Major

National Guard combat maneuver formations, however, did not always perform as well. Although the President authorized the mobilization of three roundout and roundup brigades, none of those brigades ever made it to the war. The Army refused to certify them for combat, and they remained in a training status until the war ended. (15)

After the Gulf War, the Army and Congress reacted to perceived readiness problems within some National Guard units. In 1991, the Army adopted the "Bold Shift" strategy in which Army officials provided additional focus for peacetime training goals and Congress mandated the assignment of Active Component advisors to the brigades. (16) One year later, Congress passed the Army National Guard Combat Readiness Reform Act (ANGCRRA) of 1992. (17) This new plan also focused on improving integration between Active and Reserve units. In ANGCRRA, Congress directed the Secretary of the Army to assign Active Component advisors to the brigades, (18) minimize post-mobilization training time for National Guard units, (19) maximize the percentage of National Guard officers with prior Active Component service, (20) and make Active Component advisors and counterpart units responsible for supervising training in National Guard units. (21) In 1993, the Army eliminated roundout and roundup brigades in favor of "enhanced readiness brigades" that are expected to be ready for combat within sixty to ninety days after mobilization and have the highest priority for training, resources, and equipment. (22)

The formation of Active-Reserve integrated divisions is the latest step in the evolutionary process of integrating Active Component and National Guard units. The 1995 Army National Guard Division Redesign Study (23) recommended the formation of two integrated divisions with Active Component headquarters and National Guard maneuver brigades. The proposal was approved in 1996, and in 1997, U.S. Army Forces Command (FORSCOM) formed an Implementation Process Action Team (IPAT) to solve any problems that emerged during the creation of the divisions. (24) In 1998, the FORSCOM commander, the Director of the Army National Guard, and the adjutants general from each of the six contributing states signed a memorandum of agreement (MOA) officially creating the divisions. (25) The 7th Infantry Division and the 24th Infantry Division were formally reactivated on 4 and 5 June 1999. (26)

Legal Basis for the Integrated Divisions

Overview

Unlike their Active Component counterparts [redacted] g, [redacted] mobilized but are engaged [redacted] (28) [redacted] mobilized in the service of the United States, Title 10 of the United States Code [redacted] conduct, training, and command relationships. (30) [redacted]

[redacted] By design and of necessity, the National Guard operates differently from the Active Component [redacted] Title 32 recognizes the authority of those officers and [redacted] (32)

Just as the control of National Guard units may come from federal or state authorities, so may their funding. National Guard units use a different funding stream than Active Component units. (33) The funding source depends on a unit's mission and legal status (Title 32 or Title 10) at any particular time. (34) This can create fiscal challenges for those who must provide these resources for the National Guard brigades in integrated divisions.

A collection of statutes and the previously mentioned MOA govern the command relationship between the Active and National Guard components of the integrated divisions. Title 32 allows Active Component officers to command National Guard troops when they are properly designated to do so. (35) [redacted] (36) [redacted] It begins with a discussion of the constitutional underpinnings of the dual federal-state status of National Guard troops, and uses that discussion as a foundation for integrating the Active Component and National Guard units' command structures. (37) The MOA recognizes that the federal and state governments have distinct roles in relation to the National Guard. (38) Significantly, the MOA also contains a provision granting Active Component commanders the necessary authority to carry out the purposes of the MOA, even when federal statutory authority does not grant them sufficient control over the National Guard units. (39)

The following subsections discuss various aspects of the MOA and summarize some of the arrangements made to bridge the gap between the Active Component headquarters and the National Guard maneuver brigades.

Division Headquarters Mission

At present, the mission of the division headquarters is limited to overseeing its brigades' training and readiness to mobilize promptly in case of war, national emergency, or other contingencies; this is known as Training and Readiness Oversight (TRO). (40) The brigades remain available to their TAGs and governors to conduct state missions. (41) The brigades also retain their missions as separately deployable entities within currently existing war plans; in the TRO phase of the integrated division process, the divisions themselves will not deploy as integrated units. (42) The division headquarters performs most of the administrative functions required to keep the National Guard brigades ready for mobilization. A partial list of the division commander's responsibilities includes issuing annual training guidance, determining training priorities, approving the mission essential task list (METL) for the brigades, approving each brigade's yearly training program, validating the brigades' compatibility with Active Component forces and validation for deployment, conducting inspections of the brigades, reviewing brigade unit status reports (USR), issuing a consolidated division USR, and participating in the rating schemes of the separate brigade commanders and subordinate battalion commanders. (43) Because many of these functions also affect the brigades' readiness to participate in state missions, division commanders must coordinate closely with each brigade's respective state TAG.

Command Arrangements

Command arrangements for the integrated divisions are complex; the National Guard brigades fall under their division commanders for combat training purposes and their state TAG for state missions. (44) The dual nature of the brigades' existence requires close cooperation, open communication, and full coordination between the Active Component division headquarters and the TAG. (45)

The divisions, in turn, are each under the command of a Continental Army of the United States (CONUSA) during the TRO phase. The 24th Infantry Division (M) is pan of 1st Army, and the 7th Infantry Division (L) is pan of 5th Army. (46) Because the brigades in the divisions are all separately deployable during the TRO phase, the divisions also have a responsibility to coordinate with gaining commands in the event National Guard brigades are mobilized separately. (47) A relatively new concept called "corps packaging" aligns the integrated divisions with Active Component corps headquaners. (48) Finally, FORSCOM exercises command and control of the integrated divisions through the CONUSAs. (49) The staffs at both the brigade and division levels, therefore, must be flexible and adept at working under different command arrangements.

Military Justice

There are vast differences between the disciplinary tools available to commanders when troops are operating under state codes, in federal training status under Title 32, or mobilized under Title 10. When the Army first created the integrated divisions, Army regulations were silent about disciplinary responsibility in multi-component units. (50) It was necessary, therefore, for the MOA to create a disciplinary scheme that recognized the different legal statuses of the Active Component and National Guard troops in the integrated division.

When the integrated National Guard units are entirely under state status, such as during disaster relief operations, their state TAGs are responsible for maintaining their good order and discipline. The units also remain in Title 32 status when they train for their wartime missions under their integrated division commanders; state-specific disciplinary rules still apply, just as they did before the activation of the divisions, (51) but TAGs must coordinate with division commanders before taking disciplinary actions that require approval above the brigade level. The division commanders are general court-martial (GCM) convening authorities for their Active Component division headquarters unit. (52) They also have GCM authority over National Guard troops that have been mobilized, are in Title 10 status, and are still under control of the division commander. (53)

In the most recent version of Army Regulation (AR) 27-10, the Army adopted a regulatory scheme similar to that found in the integrated division MOA. The regulation now clarifies that each state has the authority and responsibility for military discipline of its soldiers when they are in not in federal status. (54) Federal commanders of multi-component units must send their recommendations to discipline National Guard soldiers to the soldiers' state chain of command. Likewise, National Guard commanders whose multi-component units include soldiers from other states must send their disciplinary recommendations to the soldiers' respective state chains of command. (55)

Fiscal Issues

There is no such thing as integrated money in integrated divisions; [redacted] Operations and Maintenance Army (OMA), Operations [redacted] (OMNG), Other Procurement Army (OPA), and National Guard Pay [redacted]s, commanders of integrated divisions, who are responsible for budgeting, manpower, training, and resources for their Active Component and National Guard units, (58) must understand a more complicated set of fiscal law rules. State TAGs also play a critical role in the budgeting process; the integrated National Guard brigades may form a substantial portion of the

forces at their disposal. State TAGs must assure that the integrated National Guard units remain ready to perform missions for the states, as well as for the federal government.

The National Guard Bureau (NGB) also provides separate unit training and readiness funds to support the integrated National Guard brigades. (59) The NGB distributes those funds to the brigades using existing procedures, with one exception--each year, in coordination with FORSCOM and the NGB, the division commander withholds a portion of these NGB funds for uses consistent with the purposes of the funds' appropriation. Division commanders must coordinate with state TAGs before making any decisions, such as the reallocation of funds, that affect the overall funding levels of the brigades. (60)

Structure and Organization of the Integrated Divisions

In their current form, the integrated divisions differ substantially from the Army's other combat divisions, whether Active Component or National Guard. As previously mentioned, the integrated division consists of an Active Component Headquarters and Headquarters Company (HHC), and National Guard combat maneuver brigades. In the TRO phase of the integrated divisions, there are no traditional divisional assets such as division artillery, a division support command, or division aviation. (61) The 24th Infantry Division also has a small Forward Headquarters at Fort Jackson, South Carolina, (62) under the direction of the Assistant Division Commander for Maneuver-Forward (ADC-F). (63)

The brigades of the 7th Infantry Division are organized as separate infantry brigades, (64) and the brigades of the 24th Infantry Division are organized as separate mechanized infantry brigades. (65) In addition to their National Guard staffs, the National Guard brigades each have a cadre of Active Guard and Reserve (AGR) officers and noncommissioned officers to help run day-to-day operations at brigade armories. (66)

Judge Advocate Operations in the Integrated Divisions

Each integrated division has an Active Component O-5 staff judge advocate (SJA). The SJA is responsible for TRO of the division's judge advocates and for ensuring that the division complies with the MOA, federal law, and state law. The SJA has a skeletal staff of two or three attorneys and several paralegal specialists. (67) The SJA's staff usually provides legal support for the installation as well as the division. (68)

The Reserve brigades are each authorized five National Guard attorneys: an O-5 SJA, an O-4 deputy SJA, and three company-grade judge advocates. They are also authorized a warrant officer legal administrator, a chief paralegal noncommissioned officer (NCO), and several paralegal specialists. The brigade legal sections provide administrative law services, military justice, legal assistance, and operational law support to their brigades. (69)

The brigade legal sections must be competent in the full spectrum of legal issues that impact Army operations, as well as state law issues that affect their brigades. Because the brigades are independently deployable, the brigade judge advocates serve as the primary sources of legal advice and support to their commanders. Brigades from the integrated divisions have participated in rotations at the Army's combat training centers (70) and deployments to places as diverse as Egypt (71) and Bosnia. (72) The brigade legal sections have participated in all of these operations, providing legal assistance to deploying soldiers and sending deployed brigade operational law teams (BOLTs) (73) to the combat

training centers. (74)

Legal Issues and Challenges in the Integrated Divisions

The unique nature of the integrated division's structure regularly presents its judge advocates with unique legal issues. The following examples are based primarily on experiences at the 24th Infantry Division, but they represent issues that commonly arise in the integrated divisions.

Criminal Jurisdiction Over Soldiers in National Guard Brigades

The greatest challenge commanders and their judge advocates face in maintaining discipline within integrated units is untangling the complexities of criminal jurisdiction in those units. Jurisdiction over a soldier in an integrated division depends on the soldier's duty status. The division commander has no disciplinary authority over soldiers in Title 32 status, but may exercise discipline over those in a Title 10 status. The MOA recognizes this distinction, but it does not always draw clear lines of separation between the different commanders' jurisdictional provinces. (75) Determining whether the division commander or TAG will have jurisdiction, however, may still not resolve the ultimate question of which commander has authority.

Most jurisdictional questions concerning Title 32 forces training within the integrated divisions are fairly straightforward. When a soldier in a Title 32 status is suspected of misconduct, the state chain of command will have jurisdiction, unless the accused has since been placed on Title 10 status. (76) Both components, of course, should coordinate their investigations with each other to avoid duplicating their efforts. (77) When the 30th Heavy Separate Brigade (HSB) held its 2001 annual training, for example, an active-duty 24th Infantry Division headquarters soldier and a National Guard soldier from 30th HSB were suspected of misconduct. The division G3, an Active Component primary staff officer, appointed an investigating officer to examine the allegations. (78) Judge advocates from the division and brigade ensured that the brigade commander was fully informed of the progress of the investigation, that the investigation complied with the requirements of Army regulations and the MOA, and that both soldiers and all of the respective chains of command had access to legal advice. The brigade commander made the final decision of what, if any, punishment was appropriate. (79)

Active Component officers who command National Guard units face another potential complication--statutory restrictions on their authority. As of this writing, one battalion of the 30th HSB (M), a North Carolina National Guard unit, is commanded by an Active Component lieutenant colonel with commissions from both the Regular Army and the North Carolina National Guard. (80) North Carolina's Code of Military Justice prohibits officers with federal commissions from imposing non-judicial punishment on its National Guard soldiers, even when those officers also have state commissions. (81) Moreover, the Posse Comitatus Act prohibits any commander with a federal commission from commanding soldiers during state missions that would involve law enforcement functions. (82) Ironically, a National Guard commander called to active duty to command an Active Component unit would be in a Title 10 status; therefore, these restrictions would not apply to such a commander. (83)

When a brigade task force is assembled from multiple states, commanders must untangle intersecting lines of criminal jurisdiction before taking disciplinary action. In July 2000, for example, the 218th HSB from the South Carolina National Guard deployed to the NTC for a rotation. (84) The task force of

nearly 5000 soldiers included soldiers from twenty-six states, all under the command of a South Carolina National Guard brigadier general. Because the soldiers were training for their federal mission while in Title 32 (state) status, the brigade commander had disciplinary authority over the soldiers from South Carolina only. When allegations of misconduct arose involving soldiers from other states, the South Carolina judge advocates soon learned that the MOA does not sort out which commander has disciplinary authority. The task force judge advocates ultimately had to coordinate their investigative and disciplinary actions with judge advocates and commanders from the other states. (85) Fortunately, the most recent change to AR 27-10 at least addresses multi-component disciplinary issues of this kind; National Guard commanders must forward their recommendations for disciplinary action against soldiers from other states to the soldiers' home state chains of command. (86)

Active duty judge advocates should work closely with their AGR counterparts when questions of status and jurisdiction arise. It is the AGR attorneys who are the mostly likely to have confronted and researched similar issues in the past, and to have a firm grasp of how to determine a soldier's status.

Funding the Mission

Commanders of integrated divisions must also cope with unique and often inflexible funding streams. It has proven easier to integrate soldiers than money. Examples of funding questions include purchase authority for physical training uniforms for a deploying National Guard unit, (87) travel funding for training purposes, and the funding of a barracks upgrade to house a unit preparing to deploy overseas. (88) Some of the statutory fiscal limits can be frustrating; for example, there is no authority for the Active Component division headquarters to purchase and issue Rucksack-Deployable Law Office and Law Library (RDL) systems to their National Guard brigade judge advocate sections. (89)

The barracks upgrade issue illustrates how complicated fiscal issues can become. As part of a recent rotation to Bosnia under the command of the 3d Infantry Division, the 48th HSB was scheduled to conduct lengthy post-mobilization training at Fort Stewart, Georgia. The brigade's soldiers occupied barracks that were leased by the Georgia National Guard from Fort Stewart. The barracks, traditionally used for summer training, were in many ways inadequate for the mid-winter post-mobilization training the brigade was required to conduct. Several months before the mobilization, the brigade and the 24th Infantry Division recognized that the barracks would need some upgrades. Fiscal difficulties existed at many levels: the Georgia National Guard had difficulties expending state funds for improvements related to a federal mission; Fort Stewart was reluctant to spend its money to upgrade barracks under lease to the Georgia National Guard; and the 24th Infantry Division did not have funds to upgrade barracks at another installation for a unit that would not be under its command after mobilization. Ultimately, comptrollers were able to use some contingency operations funds to provide minimal barracks upgrades. (90) If the integrated divisions are to become independently deployable entities, they will need more flexibility to carry out their missions. New legislation may be the only way to provide this flexibility.

Legal Assistance

National Guard soldiers need help with many of the same legal assistance issues as their Active Component counterparts, including debtor-creditor issues, divorces and separations, reports of survey, and Soldiers' and Sailors' Civil Relief Act issues. Unlike their active-duty counterparts, however, National Guard soldiers also worry about job security when they deploy for major exercises or mobilize

for federal missions. Active Component judge advocates must familiarize themselves with The Uniformed Services Employment and Re-Employment Rights Act, (91) which helps National Guard and Reserve soldiers protect their jobs while they are gone. (92) Active duty judge advocates should not overlook their AGR counterparts, who often have extensive experience advising National Guard soldiers and their commanders.

Conclusion

The integrated divisions represent the latest step in the Army's effort to evolve into a truly integrated force. Statutory and constitutional differences between the Active Component and the National Guard still greatly complicate even basic military operations. Although an MOA between the National Guard Bureau, FORSCOM, and the contributing states' TAGs has done much to sort out the conflicting responsibilities of multiple commands, underlying constitutional tensions between the state and federal roles of the National Guard, as well as statutory funding differences, continue to present commanders with administrative difficulties. Although the brigades are independently deployable, the divisions' headquarters have TRO responsibilities to prepare them for war. At the same time, state TAGs have a responsibility to keep the brigades ready to perform their state missions. Judge advocates at the brigade, state, and division levels must be involved at every step of the process to help commanders overcome the unique legal challenges of integrated divisions.

(1.) The author served as Chief, Administrative and Operational Law, 24th Infantry Division (Mechanized), from June 2001 to June 2002.

(2.) Fort Carson Integrates Active Duty and National Guard, ASSOCIATED PRESS STATE & LOCAL WIRE, June 5, 1999, LEXIS, News Group File.

(3.) Daniel Hobson, 24th Infantry Division Reactivated, ARMY NEWS SERVICE (June 11, 1999); at http://www.dtic.mil/armylink/news/Jun1999/a19990624 24thid.html.

(4.) The 7th Infantry Division first fought in World War I. The "Bayonet Division" also fought with distinction in World War II and Korea. In the 1980s, the 7th Infantry Division became the Army's first true light infantry division. Before being deactivated in 1994, the division participated in actions in Honduras, Panama, and the Los Angeles riots. Seventh Infantry Division, Bayonets, at http://www.carson.army.mil/7ID/7ID.htm (last modified Nov. 15, 2001). The 24th Infantry Division, "The Victory Division," was the first Army unit to fire hostile shots in the Pacific during World War II--at Pearl Harbor. Elements of the 24th Infantry Division, including the well-known Task Force Smith, were the first to fight in Korea. In the Gulf War, the 24th Infantry Division penetrated deep into the heart of Iraq as part of General Schwarzkopf's famous "left hook" maneuver, carrying out what has been called "the longest cavalry charge in history." U.S. 24th Infantry Division Association, Victory Division, at http://home.att.net/~victory24/history.htm (last visited Jan. 6, 2003).

(5.) The 24th Infantry Division has three mechanized infantry brigades: the 30th Heavy Separate Brigade (HSB) in North Carolina, the 218th HSB in South Carolina, and the 48th HSB in Georgia. The 7th Infantry Division has three light infantry brigades: the 45th Separate Infantry Brigade (SIB) in Oklahoma, the 39th SIB in Arkansas, and the 41st SIB in Oregon. U.S. Dep't of Army, News Release No. 99-028, Unit Designation of Two New U.S. Army Active Component/Army National Guard Integrated Divisions (7 Apr. 1999) [hereinafter News Release No. 99-028], available at

http://www.dtic.mil/armylink/news/Apr1999/r19990406greentop.html. The Army created the enhanced readiness brigades in 1993 to serve as a trained and ready force of National Guard units that could augment and reinforce active duty in the event of two major and nearly simultaneous regional conflicts. GEN. ACCOUNTING OFFICE, ARMY NATIONAL GUARD: COMBAT BRIGADES' ABILITY TO BE READY FOR WAR IN 90 DAYS IS UNCERTAIN, REPORT NO. GAO/NSIAD 95-91, at 2 (1995) [hereinafter GAO 95-91].

(6.) 10 U.S.C. [section] 311 (2000); 32 U.S.C. [subsections] 101,104 (2000); see also Jeff Bovarnick, Perpich v. United States Department of Defense: Who's in Charge of the National Guard?, 26 NEW ENG. L. REV. 453 (1991).

(7.) See U.S. CONST. art. 1, [section] 8, cl. 16 (investing the authority to organize, arm, and discipline the militia in the federal government, but giving states the authority to train it and appoint its officers); Patrick Todd Mullins, The Militia Clauses, the National Guard, and Federalism: A Constitutional Tug of War, 57 GEO. WASH. L. REV. 328, 328-30 (1988); see, e.g., 10 U.S.C. [section] 12301 (limiting the federal government's authority to mobilize the National Guard without the consent of state governors and adjutants general).

(8.) See, e.g., U.S. Dep't of Army, News Release No. 98-24, Army Releases White Paper (18 June 1999) [hereinafter News Release 98-24], available at http://www.dtic.mil/armylink/news/Jun1998/a19980615integrat.html (discussing the Army Chief of Staff's admission in a recent white paper that relations between the components have been "strained" at times).

(9.) For example, in 1918, the War Department published the following guidance:

> This country has but one array--the United States Army. It includes all the land forces in the service of the United States. Those forces, however raised, lose their identity in that of the United States Army. Distinctive appellations, such as the Regular Army, Reserve Corps, National Guard, and National Army, heretofore employed in administration and command, will be discontinued, and the single term, the United States Army, will be used.

Headquarters, Dep't of War, Gen. Orders No. 73 (7 Aug. 1918), quoted in Bovarnick, supra note 6, at 464 n.87; see also Frederick Bernays Wiener, The Militia Clause of the Constitution, 54 HARV. L. REV. 181, 207 n. 149 (1940). Compare this to a more recent pronouncement from General Eric Shinseki, the current Army Chief of Staff:

> Today, I declare that we are The Army--totally integrated, with a unity of purpose--no longer The Total Army, no longer The One Army. We are The Army, and we will march into the 21st century as The Army. We acknowledge our components and their unique strengths. But we are The Army, and we will work to structure ourselves accordingly.

General Eric Shinseki, Remarks at Army Chief of Staff Arrival Ceremony (June 22, 1999), at

http://www.army.mil/leaders/CSA/speeches/990622.htm.

(10.) Kevin D. Hartzell, Voluntary Warriors: Reserve Force Mobilization in the United States and Canada, 29 CORNELL INT'L L.J. 537,539-41 (1996).

(11.) News Release 98-24, supra note 8 (stating that in 1998, fifty-four percent of the Army's strength was in the Reserve Components).

(12.) GAO 95-91, supra note 5, ch. 1. There were seven roundout and roundup brigades out of forty-four National Guard combat brigades. Id.

(13.) CAPTAIN LES MELNYK, NATIONAL GUARD BUREAU OFFICE OF PUBLIC AFFAIRS HISTORICAL SERVICES DIVISION, MOBILIZING FOR THE STORM: THE ARMY NATIONAL GUARD IN OPERATIONS DESERT SHIELD AND DESERT STORM (2001), available at http://www.ngb.dtic.mil/downloads/pdf/desertstorm.pdf.

(14.) See id. at 23 (noting that a National Guard Multiple Launch Rocket System unit achieved the highest rate of fire of any Third Army artillery unit); Hartzell, supra note 10, at 541 n.25.

(15.) GAO 95-91, supra note 5, at 2. There was a tremendous disconnect between how the brigades perceived their own readiness and how the Army perceived it. At the time of mobilization, the brigades estimated that they would need twenty-eight to forty-two days of post-mobilization training. The two brigades that completed training, however, required 91 and 106 days of training, and the Army estimated that the units would each require an additional twenty-four days of post-training activities before deployment. Id. The decision not to deploy the brigades to the Gulf was extremely controversial; some National Guard soldiers believed that the Army had subjected Guard units to a double standard, but many Active Component officers believed that Guard units did not understand Army training doctrine and needed to be more objective in assessing their own proficiency. Id. at 34-35. The situation came to a head when the Georgia National Guard's 48th Brigade, slated to augment the 24th Infantry Division (then an active unit based at Fort Stewart, Georgia), went to the National Training Center (NTC) and participated in the longest rotation to that point in the NTC's history. The NTC officials found the brigade so unprepared that its commander was relieved on the spot, and the 24th Infantry Division deployed to the Gulf with an Active Component brigade to round out its strength. JAMES KITFIELD, PRODIGAL SOLDIERS 351-52 (Simon & Schuster 1995). But see MELNYK, supra note 13, at 18-21 (providing the National Guard perspective for this story, suggesting that Guard maneuver units were left out of the fight because-unlike the Guard's aviation, artillery, combat service and combat service support units--the Army did not need them and many active Army officers believed Guard maneuver units could not be combat ready).

(16.) GAO 95-91, supra note 5, at 2.

(17.) Pub. L. No. 102-484, [subsections] 1101-1137, 106 Stat. 2315, 2536-42 (codified at 10 U.S.C. [section] 10105).

(18.) Id. [section[1132. It has been difficult to measure the effectiveness of these advisory arrangements. In a 1995 study, the General Accounting Office (GAO) found that the Army had not clearly established the duties or delineated the authority of the Active Component advisors. GAO 95-91,

supra note 5, ch. 3.

(19.) 10 U.S.C. [section] 1119, 106 Stat. at 2539.

(20.) Id. [section] 1111.

(21.) Id. [subsections] 1131-1132.

(22.) See id. [section] 1135 (directing the Army to develop a mobilization priority system for National Guard units, and to give the highest-priority units first priority in the allocation of equipment, training, support, and personnel). In 1995, the GAO reported that the elimination of the roundup and roundout brigades and the implementation of the new rules had caused some confusion within National Guard units. GAO 95-91, supra note 5, at 2.

(23.) GAO 95-91, supra note 5.

(24.) John Pike, Army National Guard Divisions, Global Security (Nov. 3, 2002), at http://www.globalsecurity.org/military/agency/army/division-arng.htm.

(25.) Memorandum of Agreement between U.S. Army Forces Command, National Guard Bureau, and the Adjutants General of Arkansas, Georgia, North Carolina, Oklahoma, Oregon, and South Carolina, subject: Active Army/Army National Guard Integrated Division (12 Oct. 1998) [hereinafter MOA].

(26.) News Release No. 99-028, supra note 5.

(27.) U.S. CONST. art. I, [section] 8, cl. 16.

(28.) 32 U.S.C. [section] 501 (2000).

(29.) Id. [section] 109.

(30.) 10 U.S.C. [subsections] 10105-10106 (2000).

(31.) U.S. CONST. art. I, [section] 8, cl. 16.

(32.) 32 U.S.C. [subsections] 101(4)(D), 310.

(33.) MOA, supra note 25, [section] X, para. A.1.

(34.) See, e.g., 32 U.S.C. [section] 107; MOA, supra note 25, [section] X, para. A.1.

(35.) 10 U.S.C. [section] 104(d). This section states:

> To maintain appropriate organization and to assist in training and instruction, the President may assign the National Guard to divisions, wings, and other tactical units, and may detail commissioned officers of the National Guard or of the Regular Army

or the Regular Air Force, as the case may be, to command those units.

Id.

(36.) MOA, supra note 25, para. 1(A).

(37.) Id. [section] X, paras. 1.A-1.B.

(38.) Id. [section] X, para. 1.B.

(39.) Id. [section] X, para. 1.C. "In those instances when Federal law may not be considered sufficient to accomplish the purposes of this agreement, the specified Federal officers will be deemed to be acting on behalf of and with the permission of the respective Governors." Id.

(40.) Id. [section] VI, para. A.1.

(41.) Id. [section] VI.

(42.) Id. [section] VI, para. A, [section] VII, para. A. 1.

(43.) Id. [section] VIII.

(44.) Id. [section] VI, para. A.1.

(45.) See, e.g., id. [section] X, paras. B.2-B.4 (discussing the unique roles played by the division commander and the TAG, and recognizing the necessity for coordination and communication for the brigades to be prepared for both federal and state missions).

(46.) Id. [section] VII.

(47.) See, e.g., SFOR to Cut, Restructure Bosnia Force, ARMY News SERVICE, Nov. 2, 1999, available at http://www.dtic.mil/armylink/news/Nov1999/ a19991102bosnianew.html (reporting that both the 24th Infantry Division and the 7th Infantry Division sent National Guard units to Bosnia, under the command of the 3d Infantry Division).

(48.) Kristin Patterson, Shinseki Expands Active Component/RC Division Teaming, ARMY NEWS SERVICE, Sept. 19, 2000, available at http://www.dtic.mil/armylink/ news/Sep2000/a20000919ngteaming.html. Under this concept, the 24th Infantry Division is aligned with the XVIII Airborne Corps, and the 7th Infantry Division is aligned with the III Corps. Id.

(49.) MOA, supra note 25, [section] V, para. A.4.

(50.) See generally U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (24 June 1996).

(51.) MOA, supra note 25, [section] IX, subsec. A.

(52.) See Headquarters, Dep't of Army, Gen. Orders No. 10 (9 Apr. 1981) (designating the commanders of Fort Carson, Fort Riley, and eight other installations or commands as General Court-Martial Convening Authorities); see also MOA, supra note 25, [section] IX, para. A.2.

(53.) MOA, supra note 25, [section] IX, para. A.2.

(54.) Id. para. 21-13b.

(55.) U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE (6 Sept. 2002) [hereinafter AR 27-10].

(56.) See, e.g., 10 U.S.C. [section] 115(d), (g) (2000) (providing for separate appropriations to pay Active and Reserve Component personnel); 32 U.S.C. [section] 107 (2000) (limiting the use of National Guard appropriations to those expenses necessary to conduct National Guard operations); see also 31 U.S.C. 1301(a) (2000) (providing that appropriations shall only be applied to the objects for which Congress made the appropriations, unless the law provides otherwise).

(57.) MOA, supra note 25, [section] X.

(58.) Id. [section] X, para. A.

(59.) Id. [section] X, para. B.2.

(60.) Id. [section] X, para. B.3.

(61.) Telephone Interview with Captain Ryan Arne, 24th Infantry Division Training Officer (Jan. 3, 2003) [hereinafter Captain Arne Interview].

(62.) See Fort Riley, Kansas, 24th Infantry Division (Mech), at http://www.riley.army.mil/Units/HQ24ID (last visited Jan. 6, 2003).

(63.) Captain Arne Interview, supra note 61.

(64.) U.S. DEP'T OF ARMY, FIELD MANUAL 7-30, THE INFANTRY BRIGADE para. 1-4 (3 Oct. 1995).

(65.) U.S. DEP'T OF ARMY, FIELD MANUAL 71-3, THE ARMORED AND MECHANIZED INFANTRY BRIGADE [section] II, fig. 1-3 (8 Jan. 1996).

(66.) This cadre consists of officers and enlisted soldiers in the AGR who serve on active duty under either Tire 10 or Title 32. 10 U.S.C. [section] 12310 (2000); 32 U.S.C. [section] 502(f) (2000). Their primary role is to help organize, administer, recruit, instruct, or train the Reserve Component. Information Paper, Office of The Judge Advocate General, Administrative Law Division, subject: Use of Active Guard and Reserve (AGR) Soldiers (29 Aug. 2000) (on file with author). In the integrated divisions, the AGR personnel are National Guardsmen on active duty in a Title 32 status and fall under the state chain of command. See 32 U.S.C. [section] 502.

(67.) The 24th Infantry Division has an SJA, a Chief of Operational Law, a legal assistance attorney, and two NCOs. E-mail from Chief Warrant Officer Two Richard Flores, Legal Administrator, 24th Infantry

Division and Fort Riley, to author (Dec. 19, 2002) (on file with author) [hereinafter Chief Warrant Officer Two Flores Email]. The 7th Infantry Division has an SJA, a Deputy SJA, a Chief of Administrative Law, a Paralegal Sergeant Major, Chief Paralegal NCO, and a Paralegal NCO. E-mail from Chief Warrant Officer Two Jeff Martin, Legal Administrator, 7th Infantry Division and Fort Carson, to author (Dec. 20, 2002) (on file with author) [hereinafter Chief Warrant Officer Two Martin E-mail].

(68.) Chief Warrant Officer Two Flores E-mail, supra note 67; Chief Warrant Officer Two Martin E-mail, supra note 67.

(69.) Chief Warrant Officer Two Flores E-mail, supra note 67; Chief Warrant Officer Two Martin E-mail, supra note 67.

(70.) See, e.g., Terry Joyce, S.C. Guard Trains for Desert Warfare, CHARLESTON POST & COUPLER, July 30, 2000 (discussing the deployment of the 218th HSB, part of the 24th Infantry Division, to the NTC); Rob Martindale, Oklahoma Troops Endure Intensities of Simulation, TULSA WORLD, June 15, 2002 (discussing the deployment of the 45th SIB, part of the 7th Infantry Division, to the Joint Readiness Training Center (JRTC)).

(71.) Arkansas Unit Officially Activated for Duty in Egypt, ASSOCIATED PRESS STATE & LOCAL WIRE, Oct. 6, 2001, LEXIS, News Group File (discussing the deployment of a battalion from the 39th SIB, part of the 7th Infantry Division, to the Sinai).

(72.) Drew Brown, Troops Head for Bosnia, MACON TELEGRAPH, Mar. 19, 2001, LEXIS, News Group File (discussing the deployment of the 48th HSB, part of the 24th Infantry Division, to Bosnia for peacekeeping duty).

(73.) U.S. DEP'T OF ARMY, FIELD MANUAL 27-100, LEGAL SUPPORT TO OPERATIONS glossary (1 Mar. 2000).

(74.) Telephone Interview with Captain James Smith, Operational Law Attorney, 218th HSB (M) (Apr. 25, 2002) (discussing role of 218th BOLT during a recent NTC rotation) [hereinafter Captain Smith Interview].

(75.) See generally MOA, supra note 25, [section] IX, para. A.

(76.) Id. [section] IX, paras. A. 1-A.2.

(77.) Id. [section] IX.

(78.) Telephone Interview with Lieutenant Colonel Randall L. Keys, Staff Judge Advocate, U.S. Army Aviation Center and Fort Rucker, former Deputy Staff Judge Advocate, Fort Riley, Kansas, from June 2000 to June 2002 (Dec. 18, 2002) [hereinafter Lieutenant Colonel Keys Interview]; see generally U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS para. 2-1(a)(2)(c) (30 Sept. 1996).

(79.) Lieutenant Colonel Keys Interview, supra note 78.

(80.) 32 U.S.C. [section] 315(a) (2000) (authorizing Regular Army officers to command Army National Guard units, or serve them in other key positions). Pursuant to an MOA between Deputy Chief of Staff for Personnel (DCSPER), FORSCOM, and the Director, Army Reserve and National Guard (ARNG), those officers also receive a dual commission in the state National Guard. Memorandum of Agreement Between Deputy Chief of Staff for Personnel, FORSCOM, and Director, Army Reserve and National Guard, Annex A (Legal) (undated copy of Annex on file with the author).

(81.) N.C. GEN. STAT. [section] 127A-51 (2002) (stating that any commander of the National Guard, not in the service of the United States, can impose non-judicial punishment). The North Carolina National Guard interprets this provision to mean that an officer holding a dual federal and state commission cannot impose non-judicial punishment on his soldiers. Telephone Interview with Lieutenant Colonel Wayne Woodard, North Carolina State Judge Advocate (May 5, 2000). This is North Carolina's interpretation of its own state code. Other states may interpret their own military justice codes differently.

(82.) The Posse Comitatus Act states:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. [section] 1385 (2000).

(83.) One of Fort Riley's armor battalions, 2d Battalion, 34th Armor, is commanded by a National Guard officer brought on active duty from the Texas National Guard. See Press Release, Fort Riley, Kansas, National Guard Officer Takes Command of Active Duty Unit (June 2001) (on file with author).

(84.) Master Sergeant Bob Haskell & Sergeant First Class Dan Brazell, Brigade of New Active Component/RC Division Goes to Battle at NTC, ARMY NEWS SERVICE, July 23, 2000, available at http://www.dtic.mil/armylink/news/Jul2000/a20000725ntc.html.

(85.) Captain Smith Interview, supra note 74.

(86.) AR 27-10, supra note 55, para. 21-13(c).

(87.) Telephone Interview with Major James Friend, Fort Riley Chief of Administrative Law, and Captain Chris Olive, 7th Infantry Division Deputy Staff Judge Advocate (Jan. 26, 2001) (notes on file with author).

(88.) E-mail from Major Gerald Nixon, G8, 24th Infantry Division, to author (Oct. 12, 2001) (on file with author) (discussing the fiscal issues involved with obtaining barracks upgrades at Fort Stewart for a National Guard brigade mobilizing for a deployment to Bosnia) [hereinafter Major Nixon E-mail].

(89.) Id. In the end, the brigades were forced to compete with other National Guard units within their states to field some of this equipment. Id. The Purpose Statute, 31 U.S.C. 1301(a), frequently limits

commanders' fiscal options. The effect of this law is that funds Congress appropriates for the Active Component are rarely available to fund the needs of the National Guard. See generally id.

(90.) Major Nixon E-mail, supra note 88.

(91.) 38 U.S.C. [subsections] 4301-4333 (2000).

(92) Id. [subsections] 4311-4313.

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