

The Integrated Active and Reserve Division: Background, Legal Foundation, and the Role of Judge Advocates

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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

The United States Army has three major components: the Active Component, the U.S. Army Reserve, and the National Guard of the United States.⁶ Members of the National Guard of the United States also serve a dual role as members of their state's National Guard under control of the state governors and adjutants general (TAG).⁷ Although 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,

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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/a1999062424thid.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. § 311 (2000); 32 U.S.C. §§ 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. I, § 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. § 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).

National Guard, and the other Reserve forces into a homogeneous 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

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

This country has but one army—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, §§ 1101-1137, 106 Stat. 2315, 2536-42 (codified at 10 U.S.C. § 10105).

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 Study²³ 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, National Guard soldiers enjoy a constitutionally enshrined dual status as members not only of their individual state militias, but also as Reserve members of the U.S. armed forces.²⁷ Title 32 of the United States Code governs the conduct, training, and command relationships of National Guard members when they are not mobilized but are engaged in military training.²⁸ As state militia, they fall under the authority of their state TAG and governor.²⁹ When they are mobilized in the service of the United States, Title 10 of the United States Code governs their conduct, training, and command relationships.³⁰

The distinction between state and federal status is critical to understanding the legal foundation of the integrated divisions, as well as their legal complexities. By design and of necessity, the National Guard operates differently from the Active Component. Under the Constitution, the states have the authority to select the officers who will lead their units.³¹ Title 32 recognizes the authority of those officers and the National Guard command structure.³²

18. *Id.* § 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. § 1119, 106 Stat. at 2539.

20. *Id.* § 1111.

21. *Id.* §§ 1131-1132.

22. *See id.* § 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, § 8, cl. 16.

28. 32 U.S.C. § 501 (2000).

29. *Id.* § 109.

30. 10 U.S.C. §§ 10105-10106 (2000).

31. U.S. CONST. art. I, § 8, cl. 16.

32. 32 U.S.C. §§ 101(4)(D), 310.

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 The MOA between FORSCOM, the National Guard Bureau (NGB), and TAGs of the six contributing states supplements this authority.³⁶ The MOA is a broadly worded agreement covering everything from command and control relationships to budgets. 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.

33. MOA, *supra* note 25, § X, para. A.1.

34. *See, e.g.*, 32 U.S.C. § 107; MOA, *supra* note 25, § X, para. A.1.

35. 10 U.S.C. § 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.* § X, paras. 1.A-1.B.

38. *Id.* § X, para. 1.B.

39. *Id.* § 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.* § VI, para. A.1.

41. *Id.* § VI.

42. *Id.* § VI, para. A, § VII, para. A.1.

43. *Id.* § VIII.

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 part of 1st Army, and the 7th Infantry Division (L) is part 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 headquarters.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 divi-

sions, 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

44. *Id.* § VI, para. A.1.

45. *See, e.g., id.* § 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.* § 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, § 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, § 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, § IX, para. A.2.

53. MOA, *supra* note 25, § 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].

There is no such thing as integrated money in integrated divisions; National Guard units rely on different funding sources than Active Component units.⁵⁶ Funding in the integrated divisions includes several different “colors” of money: Operations and Maintenance Army (OMA), Operations and Maintenance National Guard (OMNG), Other Procurement Army (OPA), and National Guard Pay and Allowances (NGPA).⁵⁷ Thus, 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

56. See, e.g., 10 U.S.C. § 115(d), (g) (2000) (providing for separate appropriations to pay Active and Reserve Component personnel); 32 U.S.C. § 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, § X.

58. *Id.* § X, para. A.

59. *Id.* § X, para. B.2.

60. *Id.* § 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 § 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 Title 10 or Title 32. 10 U.S.C. § 12310 (2000); 32 U.S.C. § 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. § 502.

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 centers⁷⁰ and deployments to places as diverse as Egypt⁷¹ 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 com-

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 E-mail]. 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 & COURIER, 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, § IX, para. A.

76. *Id.* § IX, paras. A.1-A.2.

77. *Id.* § IX.

mander 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 eas-

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. § 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. § 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. § 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).

ier 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.

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.

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. §§ 4301-4333 (2000).

92. *Id.* §§ 4311-4313.