

CHAPTER 13

RESERVE COMPONENT SOLDIERS AND OPERATIONS

I. TYPES OF OPERATIONALLY DEPLOYED RESERVE COMPONENT SOLDIERS

A. **Overview.** The Army's Reserve Components (RC) consist of the U.S. Army Reserve (USAR) and the Army National Guard of the United States (ARNGUS).¹ USAR units are combat service or combat service support type units, whereas ARNGUS units are typically combat or combat support type units.

B. **USAR.** The USAR consists of Soldiers assigned to units called Troop Program Units (TPUs), and various individual Soldiers not assigned to units. Typically, USAR units and Soldiers serve under the U.S. Army Reserve Command (USARC). Most of the individuals who are not assigned to units belong to a manpower pool known as the Individual Ready Reserve (IRR).²

C. **ARNGUS.** The ARNGUS is the RC consisting of federally recognized units and organizations of the Army National Guard (ARNG) and members of the ARNG who are also Reserves of the Army.³ Members of the ARNGUS/ARNG may serve as members of the ARNGUS in a federal status under the command of the President, or as members of their individual state's ARNG in a state status under the command of their governor.⁴ However, they will only serve in one status at a time.⁵

1. **Federal (ARNGUS) Status.** Soldiers serve in their ARNGUS status when in Federal (Title 10, U.S. Code) status. In this federal status, ARNGUS Soldiers are commanded and controlled by a federal chain of command, are subject to the UCMJ, and are typically subject to Army regulations applying to the Army Reserve and active component. Judge Advocates (JA's) should look to the "applicability" paragraph of a regulation in determining whether the regulation applies to Soldiers serving in an ARNGUS status. Consequently, National Guard Soldiers serving outside the Continental United States (OCONUS) performing their federal mission must serve in their ARNGUS, Title 10 status.⁶

2. **State (ARNG) status.** Unless ordered into service in a federal ARNGUS status, ARNG Soldiers serve under a state chain of command, with the governor as commander-in-chief. Soldiers serving in this ARNG status can generally either serve under Title 32, U.S. Code, or State Active Duty (SAD).

a. Service under Title 32, U.S. Code. National Guard Soldiers serving under Title 32, U.S. Code, are federally funded yet remain commanded and controlled by state authorities. ARNG Soldiers serving under Title 32 are regulated by various, but not all, Army regulations. Judge Advocates should look to the "applicability" paragraph of the regulation in determining whether the regulation applies to Soldiers serving in an ARNG status, for example the Army National Guard of Nevada.

(1) Training status. ARNG soldiers serving under Title 32 are generally, and historically, in a "training" status. ARNG soldiers typically attend drill periods and annual training in this "training" status as they train for their federal mission if federalized in their ARNGUS status.⁷

¹ See 10 U.S.C. § 3062(c)(1)(2013). The other RC's are the Air National Guard of the United States, the Air Force Reserve, the Navy Reserve, the Marine Corps Reserve, and the Coast Guard Reserve. *Id.* § 10101.

² The IRR is a part of the broader Ready Reserve. See *id.* Although individuals who belong to the IRR "are available for mobilization in time of war or national emergency," they should not be confused with those who serve as drilling individual mobilization augmentees (DIMAs). As a technical matter, DIMAs belong to the Selected Reserve. U.S. DEP'T OF ARMY, REG. 140-10, para. 2-4a(2) (15 Aug. 05). See also U.S. DEP'T OF ARMY, REG. 140-145, ARMY RESERVE: INDIVIDUAL MOBILIZATION AUGMENTATION (IMA) PROGRAM (22 Mar. 2007).

³ 10 U.S.C. § 10105.

⁴ See Lieutenant Colonel Steven B. Rich, *The National Guard, Drug Interdiction and Counterdrug Activities, and Posse Comitatus: The Meaning and Implications of "In Federal Service,"* ARMY LAW., June 1994, at 35, 35-40 (detailed discussion of the various types of status for National Guardsmen).

⁵ *Id.*

⁶ U.S. DEP'T OF ARMY, REG. 350-9, OVERSEAS DEPLOYMENT TRAINING, para. 4-2a (8 Nov. 2004) [hereinafter AR 350-9]. See also U.S. DEP'T OF ARMY, NATIONAL GUARD, REG. (AR) 350-1, NATIONAL GUARD TRAINING tbl. 3-2 (4 Aug. 2009) [hereinafter NGB 350-1].

⁷ 32 U.S.C. § 502(a)(2013).

(2) Operational status. Limited and specific statutory authorities also exist for ARNG personnel to conduct operational missions under Title 32, U.S. Code. Examples include Drug Interdiction and Counterdrug (CD) Missions,⁸ Weapons of Mass Destruction Civil Support Teams (WMD CSTs),⁹ Homeland Defense Activities,¹⁰ and recent statutory authority to support operations or missions undertaken by the member's unit at the request of the President or Secretary of Defense.¹¹

b. Service in SAD. National Guard Soldiers serving in their home state (or other state pursuant to the Emergency Management Assistance Compact (EMAC))¹² in such roles as disaster relief or control of civil disturbances typically serve in SAD.¹³ Service in this status is completely governed by state law and regulations, is state funded, and commanded and controlled by state authorities. For example, any injuries suffered by ARNG Soldiers are processed through their state's workman's compensations system. In SAD, ARNG members serve in a pure "militia" status.

3. **Legal Considerations for ARNGUS / ARNG Service.** The distinction between federal and state status often assumes critical legal importance. The UCMJ does not apply to ARNG Soldiers when serving under Title 32, U.S. Code, or in SAD.¹⁴ Instead, state law provides for military justice.¹⁵ Further, the *Posse Comitatus Act*¹⁶ does not apply to National Guard Soldiers when serving under Title 32, U.S. Code, or SAD. Thus, they may legally participate in law enforcement activities if authorized by state law.

II. STATUTORY AUTHORITY TO ORDER THE USAR AND ARNGUS TO ACTIVE DUTY TO TRAIN OR PERFORM OPERATIONS

A. Reserve and National Guard Soldiers and units may be ordered to perform annual training under statutory authority, and may be mobilized to participate in operations under several different statutory authorities.¹⁷ The list below summarizes some of the more important ones.

1. **Annual Training.** Members of the USAR serve fourteen days of annual, active duty training and forty-eight periods of inactive duty training (IDT).¹⁸ Members of the National Guard, however, perform fifteen days of annual training and forty-eight periods of IDT per year, typically in a Title 32 status.¹⁹ If training is conducted OCONUS, ARNG members serve in their ARNGUS, Title 10 status.²⁰

2. **15 Days Without Consent.** Service Secretaries may bring members of the RC to active duty for not more than fifteen days per year without the member's consent.²¹ This type of secretarial authority is useful for

⁸ *Id.* § 112 (2013).

⁹ 10 U.S.C. § 12310(c) (2013).

¹⁰ 32 U.S.C. § 901 (2013).

¹¹ *Id.* § 502(f)(2)(A) (2013).

¹² See Emergency Management Assistance Compact, Pub. L. No. 104-321, 110 Stat. 3877 (1996).

¹³ See, e.g., N.Y. MIL. LAW § 6 (WESTLAW 2010); GA. CODE ANN. § 38-2-6 (WESTLAW 2010); W. VA. CODE § 15-1D-1 (WESTLAW 2010).

¹⁴ The UCMJ is specific on this point, indicating that it is applicable to "members of the Army National Guard of the United States or the Air National Guard of the United States only when in Federal service." UCMJ, art. 2(a)(3) (2008). See also U.S. DEP'T OF ARMY, REG. 135-200, ACTIVE DUTY FOR MISSIONS, PROJECTS, AND TRAINING FOR RESERVE COMPONENT SOLDIERS para. 1-11g(9) (30 June 1999) [hereinafter AR 135-200]; U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 21-2b (16 Nov. 2005) [hereinafter AR 27-10].

¹⁵ See, e.g., COLO. REV. STAT. §§ 28-3.1-101 to -607 (WESTLAW 2010); CONN. GEN. STAT. §§ 27-145 to -274 (WESTLAW 2010); MISS. CODE ANN. § 33-13-1 to -627 (WESTLAW 2010); TEX. GOV'T CODE §§ 432.001 to 432.048 (WESTLAW 2010).

¹⁶ 18 U.S.C. § 1385 (2006).

¹⁷ For an alternative discussion of the mobilization continuum, See U.S. FORCES COMMAND, REG. 500-3-1, FORSCOM MOBILIZATION AND DEPLOYMENT PLANNING SYSTEM (FORMDEPS): FORSCOM Mobilization Plan para. 3 (15 Apr. 1998).

¹⁸ 10 U.S.C. § 10147 (2006) (USAR battle assembly and annual training provision). Soldiers typically perform two IDT periods per day (minimum of four hours each), four IDT periods per weekend. See U.S. DEP'T OF ARMY, REG. 140-1, MISSION, ORGANIZATION, AND TRAINING (2004).

¹⁹ 32 U.S.C. § 502(a) (2013).

²⁰ AR 350-9, *supra* note 5, para. 4-2a; see also NGB 350-1, tbl. 3-2.

²¹ 10 U.S.C. § 12301(b) (2013) Members of the National Guard can only be brought to active duty under this authority with the consent of their governor. *Id.*

training and processing in advance or anticipation of a longer mobilization period. It is distinct from those authorities that require performance of duty during weekend drills and a two week period of annual training.²²

3. **With Consent.** RC members may be ordered to active duty at any time with their consent under 10 U.S.C. § 12301(d). There is no limit to the duration of this duty aside from normal mandatory retirement dates and the expiration of enlistment contracts. Other than budgetary constraints, there is no cap on the number of reservists who may be on active duty.²³ Active duty for operational support (ADOS) orders fall within this category.²⁴ If the purpose of ADOS orders is to support a contingency operation, such orders are referred to as CO-ADOS orders.²⁵ If the purpose of ADOS orders is a RC related special project and the orders are funded from COMPO 2/3 funds, the orders are referred to as ADOS-RC orders.²⁶ If the purpose of the ADOS orders is an AC related special project and the funding for the orders comes from COMPO 1 funds, the orders are referred to as ADOS-AC orders.²⁷

4. **Selective Mobilization.** This authority exists for peacetime domestic mobilization to suppress insurrection, enforce Federal authority, or prevent interference with state or Federal law.²⁸

5. **Presidential Reserve Call-Up (PRC).** Up to 200,000 reservists from the Selected Reserve and IRR may be involuntarily called to active duty for up to 365 days, for purposes related to external threats to U.S. security.²⁹ Soldiers may not be retained under this authority for more than 365 days, including time spent on active duty prior to and after deployment. The statute allows for the activation of units or individual Soldiers not assigned to a unit. Sometimes, special units (referred to as “derivative UICs”) may be created to mobilize individual or groups of unit members without mobilizing entire units. These derivative units can be comprised of particular skill sets needed in theater.

6. **Partial Mobilization.** Upon presidential proclamation of a national emergency, up to one million Reserve Soldiers may be involuntarily called to duty for not more than twenty-four consecutive months.³⁰ Partial mobilization authority has been the primary means by which RC members have been mobilized and deployed in support of contingency operations since 11 September 2001.

7. **Full Mobilization.** Under public law or Congressional resolution, all reservists may be involuntarily ordered to active duty for the duration of the war or emergency, plus six months.³¹

8. **Response to Major Disaster or Emergency.** The National Defense Authorization Act for Fiscal Year 2012 (NDAA 2012) provides a new authority under which the Secretary of Defense may involuntarily mobilize members of the federal reserve to active duty for up to 120 days, based upon a state Governor’s request for federal assistance.³²

9. **Preplanned Missions in Support of the Combatant Commands.** The NDAA of 2012 provides a new authority under which the Secretary of a military department may involuntarily mobilize up to 60,000 members who are assigned to units of the Selected Reserve to active duty for not more than 365 days.³³ To utilize this authority, the costs must be specifically included in defense budget materials.³⁴

²² *Id.*

²³ *Id.* § 12301(d)(WESTLAW 2010). National Guard Soldiers activated under this authority come to active duty with their governor’s consent. Those who have volunteered to serve through the active guard reserve (AGR) program with the USAR are on active duty pursuant to this authority. Congress does establish an upper limit on the number of AGR Soldiers who may be on duty at any time. *See, e.g.*, Department of Defense Authorization Act, 2006, Pub. L. No. 109-163, § 412, 119 Stat. 3136. *See also* U.S. DEP’T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM (1 Nov. 2004).

²⁴ *See generally* AR 135-200, *supra* note 13.

²⁵ *See* Memorandum by Assistant Secretary of Army for Manpower and Reserve Affairs, to Deputy Chief of Staff G-1, subject: Policy for Management of Reserve Component Soldiers on Active Duty for Operational Support and Full-Time National Guard Duty for Operational Support (21 Feb. 2008).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *See* 10 U.S.C. §§ 331-333.

²⁹ *Id.* § 12304. No more than 30,000 may come from the IRR. *Id.*

³⁰ 10 U.S.C. § 12302(a) (2006).

³¹ *Id.* § 12301(a).

³² The NDAA 2012, § 515, 10 U.S.C. § 12304a.

³³ The NDAA 2012, § 516, 10 U.S.C. § 12304b.

³⁴ 10 U.S.C. § 12304b(b)(1).

B. Determining when a Soldier's active duty service terminates can be critically important. Some types of duty end by operation of law. For example, no authority exists to extend a 365-day PRC. Therefore, the command must either complete actions pertaining to such a Soldier or initiate the Soldier's continuation under other authority. Similarly, a unit present on a 15-day annual training tour cannot be retained involuntarily, even if its continued presence is essential to the success of a mission.

C. Continuation of duty beyond the limits of the authorization to active duty is one matter. It is another for a Soldier to be continued on active duty pursuant to some other authorization. Servicemembers ordered to active duty under a PRC, for instance, may be ordered to perform a consecutive period of active duty pursuant to a partial mobilization. Individuals may also volunteer to extend their activation.³⁵ This latter option not only works to extend the period, but can also work to avoid the strength limitations in the event the mobilization calls for more personnel than authorized.

III. ADVERSE ACTIONS AGAINST DEPLOYED RC SOLDIERS

A. **Overview.** Mobilized RC Soldiers in Federal service have rights and obligations comparable to Active Army Soldiers. However, the JA advising commanders of these Soldiers and units must take care to avoid some RC-specific problem areas.

B. **Authority to take UCMJ action.** Two points loom large when assessing the implications of UCMJ action against RC Soldiers. They are (1) jurisdiction over the RC Soldier at the time of the offense and (2) jurisdiction over the RC Soldier at the time of the UCMJ action.

1. **Status at the time of the offense.** In order to be subject to UCMJ liability, a Soldier has to be in a Federal³⁶ duty status at the time of commission of the offense. Proving this can sometimes present problems. For example, consider the case where a Soldier submits a urine sample shortly after beginning a tour of active duty. It may show ingestion of an illegal drug, but the command will need to prove that the Soldier was in a duty status at the time of drug ingestion.³⁷

2. **Status at the time of the action.** In order to take UCMJ action against a RC Soldier, the Soldier must be in a duty status. This makes it critically important that the command know when the Soldier's duty concludes. An RC Soldier may be retained on active duty for court-martial if action with a view toward court-martial is taken prior to the normal end of the Soldier's period of active duty. An Active Army General Court-Martial Convening Authority (GCMCA) can also order an RC Soldier back to active duty for court-martial or Article 15 punishment under this authority.³⁸

3. **Assignment or attachment.** In addition to determining duty status, these situations also call for a careful review of the RC Soldier's orders. If a Soldier is officially assigned to a command, there should be no issues. However, if the orders specify that a Soldier is attached to a command, counsel must ensure that the terms of the attachment vest UCMJ jurisdiction in the command. If they do not, the attachment command may contact the assigning command to request any necessary amendments.

4. **Witnesses.** The authority to retain or call back a Soldier to active duty for court-martial does not apply to witnesses. In cases where RC Soldiers will be needed as witnesses after their release from active duty, the command may contact the Reserve Soldier's chain of command to secure the witness' presence under other authorities.

5. **State jurisdiction over UCMJ violations.** Many State Codes of Military Justice lose jurisdiction over its National Guard Soldiers when serving in or mobilized into Title 10 (ARNGUS) status.³⁹ Consequently, when the Soldier is demobilized and returns to his ARNG status, the State is unable to prosecute the Soldier under its State Code of Military Justice for crimes committed when in Title 10 status. If the Federal authorities wish to court-

³⁵ U.S. DEP'T OF ARMY, REG. 135-18, THE ACTIVE GUARD RESERVE (AGR) PROGRAM, para. 4.1.1 (1 Nov. 2004). *See also* 10 U.S.C.A. § 12301(d).

³⁶ The UCMJ is inapplicable to members of the National Guard serving in State Active Duty status or Title 32 status. UCMJ art. 2(a)(3) (2008). *See also* AR 135-200, *surpa* note 13, para. 1-11g(9); AR 27-10, *supra* note 13, para. 21-2b.

³⁷ *See, e.g.* United States v. Chodara, 29 M.J. 943 (ACMR, 1990).

³⁸ *See generally* AR 27-10, *supra* note 13, chapter 21.

³⁹ *See, e.g.*, W. Va. Code § 15-1-3 (WESTLAW 2010) ("This [code] applies to all members of the state military forces who are not in federal service.").

martial the Soldier, he must be recalled to active duty. Otherwise, the State is likely only authorized to pursue administrative action against the Soldier.

C. **Administrative Actions.** Administrative actions against a deployed RC Soldier pose fewer jurisdictional issues than UCMJ actions, but must still be approached carefully.

1. Unlike UCMJ jurisdictional requirements, a Soldier need not be in a duty status when committing misconduct subject to administrative action. However, the command must have authority to take the action. Here again, the RC Soldier's orders require careful examination. Assigned RC Soldiers generally fall under the command's administrative authority like any other Soldier, but attachment orders may reserve authority for administrative actions to the Soldier's reserve chain of command.

2. Generally, Active Army regulations will apply to mobilized RC Soldiers. For example, an administrative separation action against a mobilized Soldier would proceed under AR 635-200⁴⁰ rather than AR 135-178.⁴¹ Practical considerations are also a factor. It is imperative to check the applicable regulation carefully and to determine its effect when a RC Soldier is involved. Often, the duration of a Soldier's remaining active duty may be important. For example, what if a Soldier has only a week of active duty remaining? The Active Army command may determine an administrative separation is appropriate, but it may lack sufficient time to complete a separation. Because a court-martial is not contemplated, there is no authority to extend the Soldier on active duty. The better alternative may be to ensure the documentation is forwarded to the Soldier's RC chain of command for appropriate action. In such a case, coordination with the RC unit is critical. With other actions, the Active Army chain of command processes the action to completion even after the RC Soldier departs.⁴²

IV. JUDGE ADVOCATES IN THE RESERVE COMPONENTS⁴³

A. This chapter has outlined some key terminology relevant to the RC. It has also discussed some of the important authorities for and issues related to the mobilization of RC Soldiers. Assistance with those matters and the fuller spectrum of RC legal issues is available from JA's who serve in the RC.

B. JA's are "embedded" as command JA's in some brigades and other brigade-level units in the USAR and ARNG. Legal Operational Detachments (LODs) are USAR units comprised solely of JA's and paralegal specialists. All LODs are assigned to the USAR's Legal Command. Within the USAR, if JA's are not part of the Legal Command, they may serve in brigade or division headquarters, at certain higher echelon commands, such as a theater support command or a theater signal command, and at functional command headquarters. National Guard JA's are typically found at the fifty-four state and territorial Joint Force Headquarters and at divisions in the National Guard.

⁴⁰ U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS (6 Sep. 2011).

⁴¹ U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS (13 Mar. 2007/RAR 13 Sep. 2011).

⁴² *See, e.g.*, U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4d (19 Dec. 1986) (providing for the completion of the memorandum of reprimand process following the departure of a Soldier from the command).

⁴³ For a further discussion of the roles of ARNG / ARNGUS and USAR JA's and their organizations, see U.S. DEP'T OF ARMY, FIELD MANUAL 1-04, LEGAL SUPPORT TO OPERATIONS paras. 2.1.5 and 2.1.6 (15 Apr. 2009). *See also* U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES ch. 11 (30 Sept. 1996).

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