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Report to Congressional Committees

December 2003

MILITARY PERSONNEL

Information on Selected National Guard Management Issues

GAO-04-258

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Highlights

Highlights of GAO-04-258, a report to congressional committees

MILITARY PERSONNEL

Information on Selected National Guard Management Issues

Why GAO Did This Study

In the past few years, the nation's media have focused public attention on a series of misconduct and mismanagement issues within the Army National Guard and the Air National Guard.

As part of the Bob Stump National Defense Authorization Act for fiscal year 2003, Congress directed GAO to examine four issues related to the management of the National Guard. In this report, GAO assesses the effectiveness of the (1) procedures that the Army National Guard and the Air National Guard have established and implemented to deal with service members who stop attending required training; (2) procedures that the National Guard uses for federally recognizing state promotions of senior National Guard officers; (3) process that the National Guard uses for disciplining senior officers (colonels and generals) who are guilty of misconduct; and (4) federal protections for National Guard members or civilian federal employees who report allegations of waste, fraud, abuse, or mismanagement (whistleblowers) and the extent to which disciplinary action is taken against those in the National Guard who retaliate against whistleblowers.

www.gao.gov/cgi-bin/getrpt?GAO-04-258.

To view the full product, including the scope and methodology, click on the link above. For more information, contact Derek B. Stewart at (202) 512-5559 or stewartd@gao.gov .

What GAO Found

The Army National Guard and the Air National Guard have effective systems in place for identifying and removing nonparticipating members when appropriate. By placing greater attention on the accuracy of end-strength reports the Army National Guard has reduced the number of nonparticipating soldiers (so-called "ghost soldiers") on its rolls to less than 1 percent of end strength. The Air National Guard has not placed the same degree of command emphasis on the issue, but under existing procedures the guard had a nonparticipation rate of 1.6 percent as of July 30, 2003.

The Federal Recognition Examination process has an effective set of checks and balances that provide a reasonable assurance that senior National Guard officers who are promoted by their state are federally qualified for their grade and position, and moreover, that any significant issues relating to their leadership potential or moral character are disclosed. Our analysis of past board examinations showed that about 7 percent of Army National Guard officers and about 3 percent of Air National Guard officers examined for recognition as generals were denied recognition because they were found not qualified or had conduct issues. This would seem to indicate that information relating to the officers' leadership potential or moral character is disclosed.

The Army National Guard and the Air National Guard have established effective processes for taking action against senior National Guard officers (colonels and generals) involved in misconduct cases. Specifically, most officers found guilty of misconduct are punished. For example, 57 of 76 officers in our review received some administrative action ranging from a letter of reprimand to verbal counseling; 3 resigned or retired at the request of their commanders; and only 6 had no action taken against them. The remaining 10 cases were closed under special Army procedures used primarily in cases involving inconsequential allegations in which the officers involved had already retired.

The effectiveness of the federal protection for military and National Guard whistleblowers rests principally on a two-stage process of investigation and administrative review. The first stage involves a service or guard Inspector General's investigation of the specific facts and interpretation of issues associated with a reprisal allegation. In the second stage of the investigation/administrative review process, the Defense Department's Inspector General reviews and approves the findings of the service or guard Inspectors General. For the reprisal allegations that GAO reviewed, the military services took some disciplinary action against most guard management officials who had retaliated against guard members. However, federal whistleblower protection does not meaningfully apply to civilian federal employees ("technicians") of the guard.

DOD concurred with our report.

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Abbreviations

DOD	Department of Defense
GAO	General Accounting Office

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Washington, DC 20548

December 2, 2003

Congressional Committees

In the past few years, the nation's media have focused public attention on a series of misconduct and mismanagement issues within the Army National Guard and the Air National Guard. Among these issues are allegations that the National Guard has inflated guard member strengths with absent or so-called "ghost" soldiers;[1] has promoted unfit officers; has been reluctant to punish senior National Guard officers[2] for misconduct; and has condoned retaliation against guard members who report wrongdoing (whistleblowers). The Department of Defense's (DOD) ability to take action in these matters is complicated by the fact that the National Guard has a dual state-federal status. Under state status, the National Guards in each of the 50 states, the District of Columbia, and three territories (Puerto Rico, Guam, and Virgin Islands) provide emergency relief support during natural disasters, search and rescue operations, and civil defense crises, among other missions. In each jurisdiction, the guard is under the command of the governor of the state and the governor's principal deputy for guard administration—the state adjutant general.[3] When guard members are conducting state operations, they are under state authority. Under federal status,[4] the National Guard's mission is to maintain well-trained, well-equipped units that can be mobilized promptly during national emergencies and wartime. During these times, guard members are under federal authority. This dual status sometimes creates jurisdiction and control issues.

[1]We identified problems with the Army National Guard's personnel strength reporting in U.S. General Accounting Office, *Military Personnel Strengths in the Army National Guard*, GAO-02-540R (Washington, D.C.: Mar. 12, 2002).

[2]Senior officers are defined as those at the rank of colonel and general.

[3]Adjutants General are appointed by their respective governors (but are elected by popular vote in South Carolina, elected by the legislature in Vermont, and appointed by the President in the District of Columbia).

[4]The U.S. Constitution, article I, section 8, provides Congress with the power to organize, arm, discipline, and govern (when in federal status) the National Guard and reserves to the states the appointment of officers and the authority to train the guard according to the discipline prescribed by Congress.

As part of the Bob Stump National Defense Authorization Act for Fiscal Year 2003,[5] Congress directed us to examine four issues related to the management of the National Guard. In this report, we assess the effectiveness of (1) the procedures that the Army National Guard and the Air National Guard have established and implemented to deal with service members who stop attending required training (information on nonparticipation rates in the reserve components is also provided in appendix II); (2) the procedures that the National Guard uses for federally recognizing state promotions of senior National Guard officers; (3) the process that the National Guard uses for disciplining senior officers who are guilty of misconduct; and (4) the federal protections for National Guard members or employees who report allegations of waste, fraud, abuse, or mismanagement (whistleblowers) and the extent to which disciplinary action is taken against those in the National Guard who retaliate against whistleblowers.

To conduct our reviews of the four issues, we interviewed officials from a variety of military offices, including the National Guard Bureau, the Army National Guard, the Air National Guard, the Army and Air Force Chiefs of Staff, and the DOD, Army, and Air Force Inspectors General. We also examined relevant guidance, regulations, instructions, and legal decisions, and we collected and analyzed quantitative data for the sections on nonparticipation rates within the guard, senior officer misconduct, and whistleblower protections. A detailed description of our scope and methodology for the four issues is presented in appendix I. We conducted our review from May through December 2003 in accordance with generally accepted government auditing standards.

Results in Brief

The Army National Guard and the Air National Guard have systems in place that are effective in identifying and removing nonparticipating members when appropriate. The Army National Guard is paying greater attention to the accuracy of personnel strength reports than it did when we reported 2 years ago, and by using existing administrative procedures, it has reduced the number of nonparticipating soldiers (so-called "ghost soldiers") on its rolls to less than 1 percent.[6] The existing procedures involve identifying soldiers who have not been paid for the previous 3 months of training and encouraging unit managers to resolve their status

[5]Pub. L. No. 107-314, § 511(a), 116 Stat. 2458, 2536-37.

[6]See GAO-02-540R.

in a timely manner. The Air National Guard has not placed the same degree of command emphasis on the problem as the Army National Guard has but, in general, the routine administrative procedures that the Air Guard uses to process nonparticipating members appear effective. As of July 30, 2003, the Air National Guard had a nonparticipation rate of 1.6 percent. According to Air Guard personnel officials, the Air Guard is currently over strength, so units have little motivation to retain members who do not attend required training. A detailed discussion of this issue is presented in appendix II.

The effectiveness of the Federal Recognition Examination process rests on a system of checks and balances that provide a reasonable assurance that senior National Guard officers who are promoted by their state are federally qualified for their grade and position and, moreover, that any significant issues relating to their leadership potential or moral character are disclosed. These checks and balances include (1) an examination by a senior-level review board that is independent of the guard organization that submitted the nomination, (2) a stringent background investigation for those nominated to Army and Air National Guard general officer and Air Guard colonel positions, (3) a DOD policy that requires the relevant military department to disclose any adverse information uncovered on general officer nominees during presidential approval and Senate confirmation proceedings, and (4) active management of the process by the National Guard Bureau and the offices of the Army and Air Force Chiefs of Staff. While we did not examine specific judgments reached by the boards, Army and Air Force data show that these checks and balances ensure that pertinent information on each candidate is available to the board. For example, our examination of past board proceedings found that about 7 percent of Army Guard general officer candidates were found to be not qualified by experience or conduct and about 3 percent of Air Guard general officer candidates were found to be not qualified by experience or conduct. Detailed information on this issue is presented in appendix III.

The Army National Guard and the Air National Guard have established effective processes for taking action against senior National Guard officers (colonels and generals) involved in misconduct cases. We judged the effectiveness of the Army National Guard's and the Air National Guard's processes for taking action against senior National Guard officers involved in misconduct cases by whether administrative action was taken against the officers involved. In the majority of cases some action was taken. From January 1997 through December 2001, the DOD, Army, and Air Force Inspectors General substantiated wrongdoing by 80 senior National Guard

officers, and we were able to determine the actions taken for 76 of the 80 officers. We found that the investigative files for 66 of the 76 officers were sent to the officer's immediate commander for a decision and that 57 (75 percent) officers had an administrative action imposed, ranging from a letter of reprimand to verbal counseling; 3 officers (4 percent) resigned or retired at the request of their commander; and 6 officers (8 percent) had no administrative action taken against them. Ten officers (13 percent) did not have their investigative file sent to their immediate commander. All 10 were Army officers whose cases were closed under special Army procedures for processing cases involving minor violations. For seven of the officers, the procedures were used in part because the officer had already retired before the investigation was started. Detailed information on this issue is presented in appendix IV.

The effectiveness of the federal protection for military and National Guard whistleblowers rests principally on a two-stage process of investigation and administrative review.[7] The first stage involves a service's or guard's Inspector General's investigation of the specific facts and interpretation of issues associated with a reprisal allegation. In our review of 122 allegations (60 investigations) that covered the period 1997 to 2002, we found that Inspectors General did not substantiate 98 of these allegations (80 percent). Inspectors General were unable to substantiate many of these allegations because they did not meet certain required criteria; for example, the communication was not protected or there was not an unfavorable personnel action. In the second stage of the investigation/administrative review process, the DOD Inspector General reviews and approves the findings of the service's or guard's Inspectors General. This review offers assurance that the findings and recommendations are substantiated and legally sufficient. In a review of 19 allegations (8 of the 60 investigations), we found that the DOD Inspector General did not agree with the other Inspectors General's interpretation of certain issues, such as the role of the chain of command, the sufficiency of the evidence, and the quality of the investigation. As an overall observation, under this process, Inspectors General interpret issues associated with whistleblowing on an allegation-by-allegation basis without relying on established guidance from past similar allegations and decisions. In contrast, decisions made under the civilian whistleblower

[7]We last reviewed federal protections for military whistleblowers in U.S. General Accounting Office, *Whistleblower Protection: Continuing Impediments to Protection of Military Members* (GAO/NSIAD-95-23, Feb. 2, 1995).

protection statutes rely on case law.[8] For the reprisal allegations we reviewed, the military services took some disciplinary action against most guard management officials who had retaliated against guard members. Federal civilian employees of the National Guard ("technicians"), however, are not protected by the military protection statute because, as civilians, it does not apply to them, nor are they well protected by civilian whistleblower statutes. Detailed information on these issues is in appendix V.

GAO is making no recommendations in this report.

Agency Comments and Our Evaluation

In commenting on a draft of this report, the Assistant Secretary of Defense (Reserve Affairs), concurred with the report as written. DOD also provided technical changes that we made where appropriate. The department's written comments are incorporated in their entirety in appendix VI.

We are sending copies of this report to the Secretary of Defense; the Secretaries of the Army, the Air Force, the Navy, and the Commandant of the Marine Corps; the Director of the Office of Management and Budget; and other interested congressional committees. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

Please contact me on (202) 512-5559 if you or your staffs have any questions concerning this report.

Derek B. Stewart, Director
Defense Capabilities and Management

[8]See 5 U.S.C. chapters 12 and 23. We reviewed the government's processing of whistleblower reprisal complaints under these statutes in U.S. General Accounting Office, *Whistleblower Protection: Determining Whether Reprisal Occurred Remains Difficult* (GAO/GGD-93-3, Oct. 27, 1992).

List of Congressional Committees

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Chairman
The Honorable Carl Levin
Ranking Minority Member
Committee on Armed Services
United States Senate

The Honorable Duncan Hunter
Chairman
The Honorable Ike Skelton
Ranking Minority Member
Committee on Armed Services
House of Representatives

Appendix I: Scope and Methodology

In conducting our reviews of our four objectives (see p. 2), we visited a number of National Guard and other military offices, examined a variety of documents, and collected and analyzed different datasets. Although we used Department of Defense (DOD) data in our analysis we did not independently test it for reliability.

To assess the effectiveness of the processes used by the Army National Guard and the Air National Guard for taking action against members who stop attending required training, we determined whether the services identified nonparticipating individuals and took action to resolve their status. There is no guidance on when guard commanders must take action to remove members who stop attending training. However, DOD officials agreed that it was reasonable to expect commanders to adjust unit strength if an individual had not been paid for training for at least 7 months. To determine if unpaid individuals remain on units' rolls for more than 7 months, we obtained Non-Validation of Pay reports from the Army National Guard that identify unpaid soldiers. These reports are not available to the Air Guard, so we used data from the Defense Manpower Data Center to make this determination. We also interviewed senior officials at the Army National Guard, Air National Guard, and National Guard Bureau headquarters, all located in Arlington, Virginia, to discuss the policies and procedures used for processing service members who were not attending required training and obtained copies of pertinent instructions, directives, and regulations. Finally, to observe procedures used by the Army National Guard for identifying and processing nonparticipating service members, we visited the headquarters of the Alabama Army National Guard, Montgomery; the Georgia Army National Guard, Atlanta; and the Louisiana Army National Guard, Jackson Barracks, New Orleans. To identify the procedures used by Air National Guard units, we sent questionnaires and conducted phone interviews with officials in the 190th Mission Support Flight, Kansas Air National Guard, Forbes Field; the 109th Mission Support Flight, New York Air National Guard, Schenectady; and Detachment 1, Headquarters, Washington (state) Air National Guard, Camp Murray. Also as required by the act, we collected similar information for the reserve components. To determine the procedures that the reserve components use for processing members who stop attending required training, we visited the Army Reserve Command, Fort McPherson, Georgia; the Air Force Reserve Command, Robbins Air Reserve Base, Georgia; and the Naval Reserve Forces and Marine Corps Reserve Forces in New Orleans, Louisiana. Because the Naval Reserve, Marine Corps Reserve, and Air Force Reserve did not have data on nonparticipants, we obtained and analyzed data from the Defense Manpower Data Center, Monterey, California, which identified members

who had not been paid for the previous 7 months of training. To observe how reserve units process nonparticipants, we visited the 427th Medical Logistics Battalion, U.S. Army Reserve, Fort Gillam, Georgia; the 94th Airlift Group, U.S. Air Force Reserve; and the Marine Air Group 42, U.S. Marine Corps Reserve, both at Dobbins Air Base, Georgia; and Naval Reserve units in New Orleans, Louisiana.

To assess the effectiveness of the federal recognition processes/procedures that the Army National Guard and the Air National Guard use to ensure that state-promoted officers also meet federal promotion requirements, we examined the checks and balances in the system to determine if they contribute to a fair and balanced analysis. Specifically, we examined the membership of federal recognition boards, the information available to those boards, the scope of their examination to determine the veracity of the boards' examinations, and the recommendations made by the boards. To do this we obtained and analyzed the DOD guidance on federal recognition and each service's implementing regulations and procedures that govern the process, federal recognition applications that show the information that applicants provide, and documentation detailing federal recognition examination board proceedings. We then interviewed officials in the offices of the Army Chief of Staff, the Air Force Chief of Staff, and the National Guard Bureau—all located in Arlington, Virginia—who are responsible for managing the federal recognition process for officers seeking federal recognition within the general officer grades to determine how they verify each applicant's qualifications and to ensure that their procedures are in accordance with the applicable instructions and regulations. We also met with service officials in the offices of the Personnel Directorate, Army National Guard, Arlington, Virginia; and the Personnel Directorate, Air National Guard, Arlington, Virginia, who are responsible for managing the process for officers seeking federal recognition as colonels to determine how they verify each applicants qualifications and to ensure their procedures were in accordance with the applicable instructions and regulations. Finally, we obtained historical data from (1) the Air National Guard on the decisions of past federal recognition examination boards for general officers for calendar years 1991 through 2000 and past federal recognition examination boards for colonels for calendar years 1998 through 2002 and (2) the Army National Guard on the decisions of past federal recognition examination boards for general officers for the period June 1998 through December 2002. Historical data on the decisions of past federal recognition boards for Army colonels was not available. These data were used to verify that federal recognition examination boards examine the qualifications and background of federal recognition applicants and

use that information in reaching a judgment. We did not examine the specific judgments reached by prior federal recognition boards.

To assess the effectiveness of the processes used by the National Guard for determining administrative action when Inspectors General substantiate misconduct by senior National Guard officers, we determined if an administrative action was taken against senior officers with substantiated misconduct. To do this, we analyzed all cases of substantiated wrongdoing involving senior officers that were closed by the DOD and service Inspectors General from January 1997 through December 2001, to determine if a disciplinary action was imposed. This time frame was used because congressional Members requesting this report asked in January 2002 for an analysis of all cases closed in the previous 5 years. Where case outcomes were not available in the files, we either worked with the appropriate service General Counsel or the Adjutant General of the state involved to determine how the case was resolved. We also interviewed senior officials in the offices of the Chief of Staff of the Army, the Chief of Staff of the Air Force, the National Guard Bureau, the office of the DOD Inspector General, the Army Inspector General, and the Air Force Inspector General who are responsible for managing senior officer misconduct cases to identify their administrative processes and adjudication procedures. We did not assess the adequacy of the investigations conducted by the Inspectors General, nor did we make any judgment on the appropriateness of the disciplinary action taken.

To examine the effectiveness of whistleblower protections, we reviewed (1) Inspectors General's interpretation of issues associated with reprisal allegations and (2) the DOD Inspector General's review and interpretation of reprisal-related decisions by other Inspectors General. In order to do the first part of this examination, we collected information on 122 reprisal allegations that were part of 60 investigations conducted by Inspectors General during the period 1997 to 2002. Generally, these allegations included those made against senior guard officers accused of misconduct that we discuss in appendix IV and all allegations that were investigated during 2001 and 2002. We reviewed the interpretation of issues in terms of the criteria that Inspectors General used to determine whether to substantiate a reprisal allegation. We did not evaluate the appropriateness of the decisions made. In order to place the interpretation of issues associated with these allegations in a broader context, we reviewed decisions by the Merit Systems Protection Board and U.S. Court of Appeals for the Federal Circuit that applied to federal civilian employees who claimed whistleblower protection. While we did not formally compare these decisions with those made by the DOD and services'

Inspectors General, they were used to help us make our overall observation. We also did not examine the broadly analogous appeals process available to military and guard whistleblowers, including recommendations of service boards for the correction of military records. In order to do the second part of this determination, we examined selected issues over which the DOD Inspector General and other Inspectors General disagreed. Issues associated with 19 allegations in 8 of the 60 investigations we reviewed formed the basis of this examination. We did not evaluate the resolution of these disagreements. We also examined issues associated with administrative action taken against those who retaliated against guard whistleblowers. Eleven of the 60 investigations we reviewed had at least one substantiated allegation of reprisal. The administrative actions taken as a consequence of these investigations, plus decisions by the Merit Systems Protection Board and U.S. Court of Appeals for the Federal Circuit on an additional case involving a federal civilian employee of the National Guard formed the basis of this examination. We did not evaluate the appropriateness of the administrative actions taken.

We performed our work from May through December 2003 in accordance with generally accepted government auditing standards.

Appendix II: National Guard and Reserve Components Personnel Strengths

Background

In March 2002 we reported that the Army National Guard had overstated its personnel strength for fiscal years 2000 and 2001 by including soldiers on its roll who were no longer participating in training (so-called "ghost soldiers") and who should have been removed from guard rolls. For example, on September 30, 2000, the guard had about 4,048 soldiers, or 1.3 percent of its 301,140 drilling members, who had not been paid for 7 months or more, and on September 30, 2001, the guard had about 4,254 soldiers, or 1.4 percent of its 296,430 drilling members, who had not been paid for 7 months or more. This occurred because commanders did not take timely action to remove soldiers from the rolls when they stopped attending drill and training. We also reported that the guard was taking steps to improve its end strength accounting.

The requirements for participation in training vary slightly between the National Guard and reserve components. According to a DOD Directive, Army and Air National Guard members must participate in 48 drills and 15 days of training annually, and reserve component members must participate in a minimum of 48 drills and 14 days of training each year. A drill is a 4-hour training period, and according to service officials the typical "one weekend per month" of reserve training generally consists of two drill periods on a Saturday and two drill periods on a Sunday. Attendance is verified during unit formations held at the beginning and the end of each drill period.

DOD has set up procedures to follow when a guard or reserve member fails to participate in training. When a guard or reserve member misses a regularly scheduled drill period or training day, the absence may be excused or unexcused. Excused absence includes failure to attend scheduled assemblies or training periods because of unforeseen emergency situations. Unit commanders are responsible for determining whether an absence is excused, and they have some flexibility in making this determination. Excused absences may be made up with pay at a later time. According to DOD Instruction 1215.18, if a guard or reserve member has nine unexcused absences from scheduled training within a 12-month period, he or she is considered not to be meeting the participation requirements of the organization. The instruction spells out the actions that may be taken against nonparticipating members. The actions are imposed at the discretion of the Secretary of the military service concerned and vary depending on the member's rank and whether the member has fulfilled his or her military service obligation. According to the instruction, some of the actions that may be taken against an individual include (1) ordering the individual to active duty, (2) ordering the individual to active duty for training for a period of not more than 45

days, (3) reclassifying the individual to a nondrilling status, and (4) discharging the individual.

To determine whether the Army National Guard, Air National Guard and reserve components are resolving the status of members who stop attending required training, DOD monitors pay data on individuals who have not been paid for the previous 3 and 7 months. A 3-month period represents 12 drills, and 9 consecutive absences represent 2-1/4 months of missed training. Thus, an individual who has not been paid for 3 months should have the attention of his/her commander. However, the 3-month period is not always a good indicator of unsatisfactory participation because there are numerous reasons why an individual might not have been paid for 3 months but still be listed on unit rolls. These reasons include the transfer of an individual from one unit to another, the inability to train for medical reasons, and being paid late for training. The 7-month period is a better indicator because, as DOD officials agreed, it would be reasonable to expect unit commanders to adjust unit strength if an individual has not been paid for at least 7 months or more.

The Army National Guard and the Air National Guard Have Effective Procedures for Removing Ghost Soldiers from Rolls

Increased attention by the Office of the Secretary of Defense and the Army National Guard on improving the accuracy of personnel strength reports, coupled with existing procedures for resolving the status of members who stop attending required training, has reduced the nonparticipation rates in the Army National Guard. By comparison, the Air National Guard has not placed the same degree of command attention on lowering the number of nonparticipants on its rolls; instead, the Air Guard's existing administrative procedures appear to be effective in maintaining low rates.

Focused Attention by Army National Guard Has Helped Reduce End Strength Inflation

In March 2002 we reported that although the Army National Guard's personnel strength was overstated because it contained large numbers of soldiers who were no longer attending drill, the guard was taking steps to correct these overstatements.[1] In our recent discussions with Army National Guard officials, they described these steps for improving end-strength accounting as a "top down, educational approach." They stated that the National Guard Bureau has no authority to regulate the states in removing soldiers who stop participating, but by focusing attention on the matter, they have gained the cooperation of the states. In addition to more

[1]See GAO-02-540R.

attention, the Army National Guard uses a tool known as the nonvalidation of pay report. This report identifies soldiers who are required to drill but have not received pay for the previous 3 months. Unit commanders are urged to review the status of soldiers in this report and determine if they should be removed from, or reclassified to a nondrilling status in the Army National Guard's end-strength report. The Army National Guard's goal is to reduce the number of soldiers who have not been paid for the previous 3 months to less than 2 percent of the force. By taking early action to resolve the status of soldiers when they first start missing drills, Army National Guard officials believe they can minimize the number of ghost soldiers on its rolls.

Table 1 shows the results of the Army National Guard's efforts to reduce the number of nonparticipating soldiers on its rolls. As shown in the table, between September 2000, and July 30, 2003, the Army Guard reduced the number of soldiers not paid for the previous 3 months from 3.7 percent of the force to 0.5 percent of the force, and the number not paid for the previous 7 months from 1.3 percent of the force to 1.0 percent of the force.

Table 1: Assigned Army National Guard Members Not Paid for Inactive Duty Training for 3 and 7 Months, September 30, 2000-July 30, 2003

Date	Total number assigned	Number not paid for previous 3 months	Percent not paid for previous 3 months	Number not paid for previous 7 months	Percent not paid for previous 7 months
September 2000	301,140	11,025	3.7	4,048	1.3
September 2001	296,430	8,701	2.9	4,254	1.4
September 2002	296,248	4,248	1.4	1,481	.5
July 2003	294,012	1,526	.5	3,094	1.0

Sources: DOD (data); GAO (analysis).

Our visits to Army National Guard headquarters in Louisiana, Alabama, and Georgia confirmed that significant management attention is being paid to resolving the status of potential nonparticipating soldiers. In each state, headquarters personnel officials acknowledged that they are placing an emphasis on resolving the status of potential nonparticipants. Although the specific procedures that each state uses to manage nonparticipation vary, in general, they all encourage subordinate units to work with soldiers to return them to drill status, and they authorize units to discharge individuals they deem will not be returning. Each of the three state headquarters monitors its subordinate units, and if a unit fails to take action, the headquarters steps in and discharges the individual. However, the point at which the headquarters takes action varies. For example,

Georgia took action if a unit had not resolved a soldier's status after 7 months without pay, while Alabama National Guard officials took action if a unit had not resolved a soldier's status after 12 months without pay. However, as table 1 indicates, the status of most soldiers is resolved in 3 to 7 months.

Air National Guard Relies Primarily on Existing Administrative Procedures

The Air National Guard has not placed the same level of command emphasis on reducing the number of nonparticipants on its rolls. Instead, it relies on existing administrative procedures to process members whose performance is unsatisfactory. Air Force Instruction 36-3209 gives unit commanders the discretion to separate individuals whose participation is unsatisfactory (nine unexcused absences) if the individual has no potential for useful service. The Air Force cannot monitor attendance above the unit level because its personnel and financial data systems are incompatible. However, data from the Defense Manpower Data Center show that as of July 30, 2003, the Air National Guard had 1,415 members out of an assigned strength of 91,217 that had not been paid for the previous 7 months. This is a nonparticipation rate of 1.6 percent. Air National Guard officials report that they are currently over their authorized strength, so units have little motivation to retain members that stop attending required training.

The Reserve Components Nonparticipation Rates Are Slightly Higher Than the Guard's

As shown in table 2, as of July 2003, the percentage of individuals in the reserve components who had not been paid for the previous 7 months ranged from 2.0 percent in the Naval Reserve to 4.6 percent in the Marine Corps Reserve. DOD has not provided the reserve components with guidance for managing nonparticipation. According to a DOD official, nonparticipation in the Air Force Reserve, Marine Corps Reserve, and Naval Reserve averages about 23 to 28 individuals per state and territory and those numbers do not indicate a problem in those components. Nonparticipation in the Army Reserve, however, averages about 100 soldiers per state and territory. The Army Reserve is taking aggressive action to reduce this number and, according to its Chief, has established control procedures that include a goal of reducing potential nonparticipants (3 months without pay) to less than 1 percent of end strength, approval by a general officer before any soldier can accrue more than 12 months without pay, and an expedited review to resolve the status of all soldiers currently on the rolls that have not been paid for the previous 12 months.

Table 2: Number of Reserve Component Members Not Paid for 7 or More Months, July 2003

Component	Total number assigned	Number not paid for previous 7 months	Percent not paid for previous 7 months
Army Reserve	174,617	5,162	3.0
Air Force Reserve	55,762	1,501	2.7
Marine Corps Reserve	32,399	1,502	4.6
Naval Reserve	60,468	1,223	2.0

Sources: DOD Defense Manpower Data Center and U.S. Army Reserve Non-Validation of Pay Reports.

Visits to each of the reserve component headquarters and a small number of units within each component confirmed that in most cases timely action was being taken to resolve the status of individuals who miss training. Each component requires unit commanders to take action when a member's participation becomes unsatisfactory. In general, commanders are required to attempt to contact the members by telephone or by registered mail, with an emphasis on retaining the member and returning the member to a satisfactory status. Units typically work with an individual for several months before initiating separation paperwork, which can take several additional months to process. Our visits to the reserve component units found that delays in processing separation paperwork accounted for many of the nonparticipants. We also noted that members remain on the rolls (and on the nonparticipation list) until the separation paperwork is completed and that separation paperwork was in process for many individuals identified as nonparticipants. For example, at the time of our visit to Marine Corps Reserve Headquarters discharge packages were in process for about 400 Marines who had not been attending drill.

Appendix III: Federal Recognition Process for Recently Promoted Senior Officers

Background

According to the U.S. Constitution, states have the authority to appoint officers in their state National Guard units.[1] However, because National Guard officers also have a federal status, state-promoted officers must go through a second review process—the Federal Recognition Examination—to ensure that they meet federal promotion requirements. The Chief of the National Guard Bureau is responsible for federally recognizing state promotions under regulations prescribed by the Secretaries of the Army and the Air Force.[2] Officers who are federally recognized in a particular grade are tendered an appointment at the same grade as reserve commissioned officers of the Army or Air Force. Officers who are appointed to a higher grade by the states, but have not been federally recognized in that grade, are not permitted to wear the uniform or insignia of the grade until the National Guard Bureau has federally recognized the promotion. One exception to this provision is that an adjutant general may wear the insignia of the next higher grade, up to that of a major general, than his/her federally recognized grade. Federal recognition of a state promotion authorizes federal pay and benefits at that grade. Adjutants general do not have to be federally recognized unless such recognition is required by the state code. Adjutant generals, for the most part, serve at the pleasure of the governor of their state.

The implementing service regulations, along with memoranda of instructions to review boards, identify the criteria that are to be used for the examination. Some examples of these criteria are shown in table 3. Some criteria are defined very specifically in the regulations, such as military and civilian education requirements, years of required service for promotion, and medical fitness standards. Other more difficult-to-define criteria, such as experience, integrity, and character, are identified but with less specificity.

[1]The Constitution specifies the appointment of officers in the militia. The National Guard is that component of the militia trained by the states. 10 U.S.C. § § 101(c); 311; and 10107.

[2]The National Guard Bureau is both a staff and operating agency that administers the federal functions of the Army and the Air National Guard.

Table 3: Examples of Eligibility Requirements for Appointment as a General Officer in the Army and Air National Guards

• Complete a minimum number of years of service at the lower grade	• Be a citizen of the United States
• Possess a security clearance	• Meet specified height and weight standards
• Meet specified military professional education requirements	• Meet specified civilian education requirements
• Meet specified experience requirements	• Possess good moral character

Sources: National Guard Regulation (Air Force) 36-1 and National Guard Regulation (Army) 600-100.

The federal recognition process for individuals promoted to or within the rank of general officer is managed and overseen by general officer management offices located within the National Guard Bureau and the Offices of the Chiefs of Staff of the Army and Air Force. These offices review the files of nominated officers and confirm that they meet all objective promotion criteria before the nominations are sent to the federal recognition board for review. They also ensure that the required background checks are conducted in order to identify any adverse information about an individual.

Federal Recognition Examination Process Contains Reasonable Checks and Balances

While we did not examine specific cases, our examination of the checks and balances built into the federal recognition examination process indicates that they provide reasonable assurance that state-promoted officers meet federal promotion standards and that adverse information relating to their leadership potential or moral character will be disclosed. These checks and balances include (1) an examination by a senior-level review board comprising officers who are independent of the guard organization that submitted the nomination, (2) a stringent background investigation for those nominated to Army National Guard and Air National Guard general officer positions, and Air Guard colonel positions, (3) a DOD policy that requires that the department disclose any adverse information uncovered on general officer nominees during presidential approval and Senate confirmation proceedings, and (4) active management of the process by the National Guard Bureau and the Offices of the Chiefs of Staff of the Army and Air Force.

Army and Air Force data show that some senior National Guard officers with evidence of misconduct in their record have been federally recognized. However, the procedures suggest that the adverse information

was known or available to those who were responsible for approving or confirming the promotion.

Senior Guard Officers Must Pass Federal Recognition Examination

A key check and balance is the composition of federal recognition examination boards. The U.S. Code states that to be eligible for federal recognition as an officer of the National Guard, a person must pass an examination for physical, moral, and professional fitness to be prescribed by the President, conducted by a board of three commissioned officers designated by the respective service Secretary from members of the regular service, the National Guard, or both, and subscribe to an oath of office. The implementing service regulations add other requirements for the three-person federal recognition review boards. The members are to be appointed by the Secretary of the military service concerned. Both the Army and Air Force require that the members be at least one grade senior to the officer who is to be examined and that one or more members come from the active-duty ranks.[3] The inclusion of active-duty officers provides a measure of independence from the state guard organization that originated the nomination.

Another important check and balance is that DOD requires, by instruction, background investigations for officers nominated to be general officers.[4] The instruction requires the services to examine all systems of records maintained by DOD for any adverse information that may exist on a nominee. According to service officials, this examination would include files in the offices of the state and service Inspectors General, the Judge Advocate General, the General Counsel, the Equal Employment Opportunity Office, and the appropriate service criminal investigation agency. If adverse information emerges during the process, there are established processes for the disclosure of that information to the review boards. If an allegation emerges during the process, the nomination is held in abeyance until necessary investigations are completed. If no adverse information is found, the service must provide a certificate stating so.

[3]National Guard Regulation (AR) 600-100; Commissioned Officers-Federal Recognition and Related Personnel Actions, Apr. 15, 1994; National Guard Regulation (AF) 36-1; Federal Recognition of General Officer Appointments and Promotion in the Air National Guard of the United States and as a Reserve of the Air Force, Mar. 8, 1993; and National Guard Regulation (AF) 36-3; Federal Recognition Boards for Appointment or Promotion in the Air National Guard below General Officer, May 28, 1993.

[4]DOD Instruction 1320.4; Military Officer Actions Requiring Approval of the Secretary of Defense or the President, or Confirmation by the Senate, Mar. 14, 1995.

DOD Instructions require that adverse information on officers below general officer grades be reported only if, in the judgment of the Secretary of the military service concerned, it is appropriate. Nonetheless, the Air National Guard checks state files for adverse information on all individuals nominated for promotion to colonel. The Army National Guard conducts no additional checks on individuals nominated for promotion to colonel.

A third check and balance is that the nominations of individuals being promoted to, or within, the general officer rank must be approved by the Secretary of Defense and the President and confirmed by the Senate. It is DOD's policy to fully inform these parties of any adverse information known about a nominee.[5] Thus, even if a federal recognition board elects to overlook some misconduct in a nominee's past, the Secretary of Defense, the President, and the Senate must all agree with the decision.

Finally, general officer management offices within the National Guard Bureau, and the offices of the Chiefs of Staff of the Army and Air Force manage the general officer promotion process, and personnel offices within the Army National Guard and the Air National Guard manage the promotion process for colonels. These offices provide an important level of oversight for the entire process.

Some National Guard Officers Are Denied Federal Recognition

A review of Federal Recognition Examination Board recommendations shows that boards find some applicants not qualified for federal recognition on the basis of experience or conduct. As table 4 shows, of 347 Army National Guard officers who were reviewed for promotion to a general officer grade from June 1998 through December 2002, 24, or 6.9 percent, were denied federal recognition because of performance, experience, or conduct issues. A smaller percentage of officers (3.3 percent) who were considered for promotion to a general officer grade in the Air National Guard were denied federal recognition because of similar issues. The percentages are lower among officers who were considered for federal recognition as colonels. In the Air National Guard, less than 1 percent were denied federal recognition because of performance, experience, or conduct issues. The Army National Guard did not have data on numbers of colonel nominees denied federal recognition.

[5]DOD Instruction 1320.4; Military Officer Actions Requiring Approval of the Secretary of Defense or the President, or Confirmation by the Senate, Mar. 14, 1995.

Table 4: Disposition of Applicants (Promotion to General and Colonel) Reviewed by Army and Air National Guard Federal Recognition Boards

		Number of cases denied		
	Number of cases reviewed	Not fully qualified	Conduct	Percent of cases denied
Promotion to General				
Army National Guard[a]	347	16	8	6.9
Air National Guard[b]	307	0	10	3.3
Promotion to Colonel				
Army National Guard	N.A.	N.A.	N.A.	
Air National Guard[c]	859	3	0	0.3

Sources: DOD (data); GAO (analysis).

Legend

N.A. = not available.

[a]Data for 4.5-year-period—June 1998 through December 2002.

[b]Data for 10-year-period—January 1991 through December 2000.

[c]Data for 4-year period—March 1998 through October 2002.

Some National Guard Officers with Substantiated Misconduct Have Been Federally Recognized

Using data from our review of National Guard misconduct, we found that a small number of senior officers with substantiated misconduct were later federally recognized. Service officials told us that federal recognition boards do not have a "zero defects" mentality. They said that if an officer whose career has otherwise been exemplary has made a mistake and recognizes that mistake, the officer should not automatically be precluded from promotion or from the federal recognition process. Because all of the promotions were at the general-officer grade, if the process were followed, the information on the officer's misconduct would have been known or available to those responsible for approving or confirming federal recognition of the promotion.

Appendix IV: National Guard Senior Officer Misconduct Cases

Background

The National Guard is a state instrumentality under the command of the governor of the state, and the governor's principal deputy for the guard's administration is the state adjutant general. Only when called or ordered into federal service is the National Guard subject to the authority of the President, the Secretary of Defense and other civilian and military authorities of the federal defense establishment. Thus, under federal law, federal officials do not have direct control over the actions taken by state officials in administering the guard when it is in a state status.[1]

The Uniform Code of Military Justice, codified in title 10 of the United States Code, is the legal foundation for maintaining discipline in the military services. However, National Guard members are subject to the federal code only when they are performing federal duty. If they are in state status or in title 32 U.S.C. status, they are subject to the state's Uniform Code of Military Justice. The state codes generally follow the federal code for traditional military offenses, but they rely on state criminal statutes for other offenses. The National Guard Bureau is currently working with the states to standardize the states' Uniform Code of Military Justice.

DOD's Inspector General maintains oversight and, in some cases, investigative authority over cases involving general officers in the National Guard.[2] Generally, the DOD Inspector General investigates only cases that have broad ramifications for the department: cases that involve generals in the two highest grades (lieutenant generals and full generals), cases that include officers in multiple services; and reprisal cases. Cases without a broad ramification are generally referred back to the individual service's Inspector General's office for investigation, which conducts about 90 percent of the investigations involving general officers and colonels being considered for the rank of general officer.

Each service's Inspector General maintains oversight and investigative authority over cases involving National Guard officers at the rank of colonel.[3] The nature of the allegation largely determines which Inspector General office or level of command conducts the investigation. The Army

[1]See generally *Solorio v. U.S.*, 483 U.S. 435 (1987); 10 U.S.C. § 12405.

[2]See DOD Directive 5505.6, Investigations of Allegations Against Senior Officials of the Department of Defense, July 12, 1991.

[3]Air Force Instruction 90-301, Inspector General Complaints, Jan. 30, 2001, and Army Regulation 20-1, Inspector General Activities and Procedures, Mar. 29, 2002.

and Air Force Inspectors General investigate allegations involving colonels selected for promotion to general and forward inquiries involving colonels not selected for promotion to the states for investigation.

Although they conduct the investigations, DOD's and the services' Inspectors General play no role in imposing discipline, nor do they recommend disciplinary action, in misconduct cases. The Air Force Inspector General refers all substantiated cases of misconduct involving Air National Guard personnel to the Chief of the National Guard Bureau who notifies the appropriate state authority for corrective action. Title 10 U.S.C. establishes the National Guard Bureau as the channel of communication between the services and the states. The Army Inspector General handles substantiated allegations of wrongdoing somewhat differently. While it refers cases that involve colonels back to state Army National Guard authorities, it refers cases that involve generals and colonels who have been selected for promotion to general to the Army Vice Chief of Staff. An Army legal official stated that the Army's authority to administratively reprimand an officer for misconduct derives from the officers underlying federal status.

Commanders, supervisors, and superiors have several administrative actions available to them in correcting officers who have been found guilty in noncriminal misconduct cases. According to service guidance, these actions are intended to be corrective rather than punitive.[4] They include "reprimands," which carry a strong implication of official censure; "admonishments," which are similar to reprimands but carry a lesser degree of severity and censure; verbal reprimands, which are used in less severe situations; and no action. Administrative actions may or may not be filed in an officer's records at the discretion of the individual imposing the action, usually the officer's commander.

Most Officers Found Guilty of Misconduct Are Punished

In the majority of cases that we examined, the senior Army National Guard and Air National Guard officers found guilty of noncriminal misconduct received some type of administrative action. In our review of all DOD, Army, and Air Force Inspector General investigations that were completed from January 1, 1997, to December 31, 2001, we identified 75 senior National Guard officers with substantiated acts of wrongdoing. Five of

[4]Army Regulation 27-10, Military Justice, Sept. 6, 2002; and Air Force Instruction 36-2907, Unfavorable Information File Program, May 1, 1997.

these officers had two substantiated acts of wrongdoing, which brought the total number of incidents to 80. The incidents involved 46 Army officers and 29 Air Force officers. Four Army officers and 1 Air Force officer had two misconduct incidents each. Because the Army and Air Force have different processes for adjudicating cases involving senior officers, we have arranged our data in table 5 to show the number of officers with substantiated misconduct in each of the services to better illustrate the nature and extent of the actions.

Table 5: Number of Senior Officers Involved in Substantiated Cases of Misconduct in the Army and Air National Guards, by Officer Category, from January 1997 through December 2001

Senior officer category	Army National Guard	Air National Guard	Total
Generals	26	9	**34**
Colonels	20	20	**41**
Total	**46**	**29**	**75**

Sources: DOD (data); GAO (analysis).

The substantiated allegations against the 75 officers consisted of noncriminal administrative violations, such as smoking in a military vehicle or a reprisal against an individual. In some cases, the Inspectors General substantiated more than one violation. To provide a clearer understanding of the cases, we categorized the wrongdoings into five types on the basis of what we considered to be the most serious violation in each case. The categories are (1) reprisal, (2) noncriminal fraud, waste, or abuse; (3) improper relationship; (4) violation of ethics regulations; and (5) abuse of authority or poor judgment. As table 6 shows, the most common wrongdoing category is abuse of authority or poor judgment.

Table 6: Number of Substantiated Misconduct in Army and Air National Guard Investigations, by Type of Misconduct, Closed from January 1997 through December 2001

Type of misconduct	Army National Guard colonels and generals	Air National Guard colonels and generals	Total
Reprisal	5	4	**9**
Fraud, waste, or abuse	9	4	**13**
Improper relationship	3	2	**5**
Ethics	0	2	**2**
Abuse of authority/poor judgment	33	18	**51**
Total	**50**	**30**	**80**

Sources: DOD (data); GAO (analysis).

We reviewed Inspector General investigation files and determined the outcome for 76 of the 80 incidents. (See table 7.) We could not determine the outcome for four incidents. In 66 of the incidents, the officers involved went through a decision process, in which an individual, senior to the officer and with the authority to impose a punishment, reviewed the case and determined what administrative sanction should be imposed. Our review found that 57officers (75 percent) had some administrative action imposed on them, ranging from verbal counseling to a letter of reprimand placed in the officer's official military personnel file. Three officers (4 percent) resigned or retired and no further action was taken. In the other six incidents (8 percent) a decision was made to take no action against the officers involved. These incidents generally involved lesser offenses, such as improperly administering an annual leave policy, or failing to take a physical fitness test.

Table 7: Number of Actions Taken in Senior National Guard Officer Misconduct Incidents, by Type of Action, Closed from January 1997 through December 2001

Type of action	Army National Guard colonels and generals	Air National Guard colonels and generals	Total
Cases forwarded for a decision			
Letter/memorandum of reprimand	18	4	**22**
Letter/memorandum of censure or concern	13	5	**18**
Letter/memorandum of admonishment	1	3	**4**
Verbal counseling/reprimand	2	11	**13**
Total	**34**	**23**	**57**
Forced resignation or retirement	1	2	**3**
Decision made to take no action	3	3	**6**
Total	**38**	**28**	**66**
Cases not forwarded for a decision			
Case dropped as inconsequential	10	0	**10**
Total	**10**	**0**	**10**
Total cases	**48**	**28**	**76**

Sources: DOD (data); GAO (analysis).

Ten officers (13 percent) did not have their cases forwarded to their immediate commander for a decision. These cases were closed under Army procedures for cases involving inconsequential allegations. An inconsequential allegation is misconduct that is minor and has no lingering adverse effect upon the Army or any other organization or person. Before an incident can be processed as inconsequential, the Army requires that the officer involved confirm the validity of the allegation, or be deceased or retired, and that the office of the Army Inspector General, the office of the General Counsel, and the office of the Army Judge Advocate General all approve the classification decision. In 7 of the 10 cases the officer involved had retired before the investigation was conducted. Table 8 contains summaries of the misconduct and the actions taken.

Table 8: Summary of Inspector General Investigations Involving Substantiated Allegations of Wrongdoing by Senior Officers, January 1, 1997, through December 31, 2001

Air Force Investigations	
Substantiated allegation of reprisal	**Action taken**
Reprised against a subordinate with an improper referral for a mental health evaluation and an adverse officer efficiency report.	Relieved of command and left the National Guard.
Reprised against an individual by initiating an administrative separation and suspending individual's security clearance.	Verbal counseling.
Reprised against an individual with an improper referral for a mental health examination.	Letter of reprimand from the state Adjutant General.
Reprisal against complainants; abused authority; unprofessional conduct.	Verbal reprimand by the Adjutant General.
Substantiated allegation of fraud, waste, or abuse	**Action taken**
Condoned the backdating and falsification of transfer and promotion orders.	Verbal counseling by the state Governor.
Made false statements to government officials.	Letter of admonishment from the state Adjutant General.
Misused military aircraft; also, trip was scheduled for the individual's personal gain.	Verbal reprimand from the state Adjutant General.
Falsified time and another person's initials on a pay log.	Verbal counseling.
Substantiated allegation of unprofessional relationship	**Action taken**
Adultery, unprofessional relationships, and false testimony.	Retired at the request of the state Adjutant General and removed from the promotion list.
Engaged in an unprofessional relationship with a subordinate.	Verbal counseling by the state Governor.
Substantiated allegation of ethics violation	**Action taken**
Accepted gift in excess of limit in ethics regulation.	Letter of admonishment from the state Adjutant General and reimbursed cost of the gift.
Accepted gift in excess of limit in ethics regulation.	Letter of admonishment from the state Adjutant General and reimbursed cost of the gift.
Substantiated allegation of abuse of authority	**Action taken**
Abused authority by assisting son's promotion.	Letter of reprimand from the state Adjutant General.
Improperly administered annual leave policy.	No adverse action taken. Problem was administratively corrected.
Improperly administered annual leave policy.	No adverse action taken. Problem was administratively corrected.
Improperly administered annual leave policy.	No adverse action taken. Problem was administratively corrected.
Abused authority.	Unknown.
Failed to provide a complainant's legal rights; abused authority by ordering the complainant to leave the workplace.	Letter of concern from the state Adjutant General.
Undue command influence; abused authority; derelict in duty.	Verbal counseling by the Governor.
Directed that an individual be detailed to another unit in excess of the limits prescribed in the regulations.	Verbal counseling by the commander.

Substantiated allegation of abuse of authority (cont.)	Action taken
Allowed use of government property for other than authorized purposes; directed or requested subordinates to use official time for unauthorized purposes.	Memorandum of censure from the state Adjutant General.
Placed an individual in a controlled grade position without requiring the individual to perform any of the duties associated with the position.	Verbal counseling from the state Adjutant General.
Substantiated allegation of poor judgment	**Action taken**
Failed to take action when notified of a sexual harassment allegation and did not give honest testimony to an Inspector General.	Letter of counseling from the Secretary of the Air Force.
Failed to ensure a complainants legal rights were protected; abused his authority.	Letter of concern from the state Adjutant General.
Failed to carry out his responsibilities as an Inspector General.	Letter of concern from the state Adjutant General.
Swore at private contractors; did not get approval for passenger on aircraft; misused government aircraft	Letter of reprimand from the state Adjutant General.
Misused aircraft.	Letter of reprimand from the state Adjutant General.
Public intoxication.	Verbal counseling.
Exercised during duty hours.	Unknown (case file destroyed).
Used government equipment and time to send e-mail information to others that was political in nature.	Verbal reprimand by the Commander.
Army investigations	
Substantiated allegation of reprisal	**Action taken**
Reprised against a fellow officer with an adverse efficiency report; initiated an investigation to discredit an individual; used government equipment for personal use; gave preferential treatment to an individual; and threatened an individual's right to make statements to the press and the Inspector General.	Received two letters of reprimand from the Vice Chief of Staff of the Army; both filed in official military personnel file.
Reprised against a fellow officer with an adverse efficiency report and signed a false official document.	Letter of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Reprised against an individual by improperly forcing a mental health examination.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Reprised against a fellow officer; illegal political support.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Reprised against a subordinate.	Memorandum of concern from the Vice Chief of Staff of the Army.
Substantiated allegation of fraud, waste, or abuse	**Action taken**
Provided false information in medical history.	Memorandum of concern from the Vice Chief of Staff of the Army.
Scheduled government trips for own personal gain; misused state postage stamps for personal gain; sexually harassed females; improperly tried to influence an Inspector General investigation.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Improperly upgraded his airline travel and conducted a circuitous travel route during a trip.	Retired. Case closed under noncredible/inconsequential procedures.

Substantiated allegation of fraud, waste, or abuse (cont.)	Action taken
Received payment and retirement point credit for duty not performed; failed to carry out duty as a noncommissioned officer evaluation report reviewer.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official personnel file.
Received pay and retirement point credit for duty not performed.	Retired. Case closed under noncredible/inconsequential procedures.
Failed to ensure that an officer was properly rated; mistreated subordinates; falsified physical fitness test results.	Memorandum of concern from the Vice Chief of Staff of the Army.
Directed personnel to falsify personal strength accounting by delaying discharge processing; provided false testimony to an Inspector General.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Authorized, approved, and participated in non-mission-essential temporary duty; improper relationships; tolerated misconduct.	Memorandum of reprimand from the Vice Chief of Staff of the Army.
Signed a subordinate's efficiency report knowing it contained false information.	Memorandum of concern from the Vice Chief of Staff of the Army.
Substantiated allegation of unprofessional relationship	**Action taken**
Engaged in an adulterous affair.	Forced resignation, unfavorable evaluation report, and Memorandum of Reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Improper relationship with a subordinate.	Memorandum of concern from the Vice Chief of Staff of the Army.
Substantiated allegation of abuse of authority	**Action taken**
Gave preferential treatment to a subordinate.	Letter of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Improperly used a government vehicle, personnel, and equipment; improperly accepted and retained an active duty identification card; scheduled unnecessary temporary duty travel.	Memorandum of reprimand from the Vice Chief of Staff of the Army.
Improperly authorized time off awards for a subordinate.	Memorandum of concern from the Vice Chief of Staff of the Army.
Ordered the promotion of subordinates.	Retired before the investigation took place. Case closed under noncredible/inconsequential procedures.
Ordered the promotion of subordinates, and attempted to influence the results of a promotion board.	Retired before the investigation took place. Case closed under noncredible/inconsequential procedures.
Improperly directed a soldier's removal from unit training.	Memorandum of admonition from Vice Chief of Staff of the Army.
Misused aircraft for personal business; failed physical fitness test; abused subordinates.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file. Individual never received federal recognition.
Improperly directed an officer's relief from command and coerced individual into resigning.	Letter of reprimand from the state Adjutant General.
Improperly directed an officer's relief from command and coerced individual into resigning.	Letter of reprimand from the state Adjutant General.
Failed to take a required physical fitness test; diverted an aircraft from its flight plan for personal business.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.

Substantiated allegation of poor judgment	Action taken
Failed to take a required physical fitness test, and did not verify the accuracy of the height and weight entries on efficiency report.	Memorandum of concern from the Vice Chief of Staff of the Army.
Failed to comply with physical fitness test requirements.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Conduct disrespectful toward a superior officer.	Retired. Case closed under noncredible/inconsequential procedures.
Used guard employees to support a community project.	Case disposed of in accordance with noncredible/inconsequential procedures.
Used National Guard unit patch in a commercial endeavor.	Memorandum of concern from the Vice Chief of Staff of the Army.
Failed to take a required physical fitness test.	Memorandum of concern from the Vice Chief of Staff of the Army.
Drunk in a public place; operated a vehicle in a drunken and reckless manner.	Memorandum of reprimand from the Vice Chief of Staff of the Army filed in official military personnel file.
Used military aircraft for travel in violation of DOD and Army guidance.	Retired. Case closed under noncredible/inconsequential procedures.
Used names and addresses of guard members in an advertising campaign.	Memorandum of concern from the Vice Chief of Staff of the Army.
Wore uniform after retiring.	Retired. Case closed under noncredible/ inconsequential procedures.
Misused government resources for a private social function.	Memorandum of concern from the Vice Chief of Staff of the Army.
Failed to take a required physical fitness test.	Retired. Case closed under noncredible/ inconsequential procedures.
Coerced guard members to join the National Guard Association.	Memorandum of concern from the Vice Chief of Staff of the Army.
Used position to facilitate employment of a family member by a civilian contractor supporting a DOD contract.	Verbal counseling by the state Assistant Adjutant General
Allowed smoking in a federal building.	Unknown.
Failed to meet height, weight, and fitness standards.	Unknown.
Wore uniform of a brigadier general when only a lieutenant colonel. Individual had been appointed as Deputy Adjutant General but had not been federally recognized.	Case closed under noncredible/inconsequential procedures.
Coerced guard members to join the National Guard Association.	Memorandum of concern from the state Adjutant General.
Smoked in a military vehicle; conduct unbecoming an officer; false statements to an Inspector General.	Letter of reprimand from the Director, Army National Guard.
Failed to take a required physical fitness test.	No action taken.
Improperly administered the Army weight control and physical fitness test programs.	No action taken.
Coerced guard members to join the National Guard Association.	Verbal counseling from the state Adjutant General. Counseling not recorded in official military personnel files.

Substantiated allegation of poor judgment (cont.)	Action taken
Condoned the promotion of one soldier over another who was in a higher position on the promotion list.	No action taken.
Improper relationships with subordinate civilian employees, military officers, and noncommissioned officers.	Retired and name removed from promotion list.

Sources: DOD (data) GAO (analysis).

Appendix V: Federal Protections for National Guard Whistleblowers

Background

Federal protections for National Guard whistleblowers are limited by the dual federal-state status of the guard. Federal protections apply only to guard members who are in federal duty or training status; these protections derive from the military whistleblower statute (10 U.S.C. § 1034), DOD directives, and Inspector General guidance. Federal protections do not apply to guard members who are in state active duty status; their protections, if any, derive from state law.

The military whistleblower protection statute requires the DOD Inspector General to expeditiously investigate a whistleblower's allegations of reprisal that it receives within 60 days of the service member's initial awareness of an adverse action. If an investigation cannot be completed within 90 days of the receipt of the allegation the Inspector General is to notify the Secretary of Defense and the member about the reason and the expected date of the report. The Inspector General then submits the results of an investigation to the Secretary of Defense, the service Secretary, and the service member.

The law also allows the service Board for the Correction of Military Records to review the results of the investigation in considering a service member's request for correction of records. Furthermore, the law permits the service member to appeal to the Secretary of Defense the final disposition of the service Secretary's decision concerning the correction of records.

Since 1988, Congress has strengthened military whistleblower protections by

- prohibiting the use of mental health evaluations as reprisals against whistleblowers that make protected disclosures (1992);
- protecting communications not only to a Member of Congress or an Inspector General but also to a member of a DOD audit, inspection, investigation, or law enforcement organization, and certain other designated persons; and requiring the DOD Inspector General to ensure that the investigating service Inspector General is outside the immediate chain of command of both the whistleblower and the individual alleged to have taken the retaliatory action; and incorporating under the protection act allegations of sexual harassment and unlawful discrimination (1994);
- extending authority to services' Inspector General to grant whistleblower protection for reprisal allegations presented directly to them by service members (service members were no longer required to submit allegations directly with the DOD Inspector General) (1998).

Effectiveness of Federal Protection for Guard Whistleblowers Rests on Two-Stage Investigation and Approval Process by DOD Inspector General

The effectiveness of the federal protection for military and guard whistleblowers rests principally on a two-stage process of investigation and administrative review. The first stage involves a DOD, service, or guard Inspector General's investigation of the specific facts and interpretation of issues associated with a reprisal allegation. In the second stage of the investigation/ administrative review process, the DOD Inspector General reviews and approves the findings of the service or guard Inspectors General. This review offers assurance that the findings and recommendations were made in compliance with applicable investigatory guideless and legally sufficient. As an overall observation, under this process, Inspectors General interpret issues associated with whistleblowing on an allegation-by-allegation basis without relying on published guidance from past similar allegations and decisions. In contrast, decisions made under the civilian whistleblower protection statutes rely on published case law.

Stage One: Inspectors General's Investigation and Interpretation of Issues

Every reprisal allegation made by a guard member is examined and, if warranted,[1] investigated by an Inspector General. Investigations are conducted to determine the validity of a reprisal allegation. To be valid, the allegation must meet the following criteria: (1) the communication was protected, (2) the personnel action was unfavorable, (3) the personnel action occurred after the protected communication took place,[2] (4) management knew about the protected communication before taking action, and (5) management would not have taken the personnel action in the absence of a protected communication. In our review of 122 allegations that covered the period 1997 to 2002, we found that Inspectors General did not substantiate 98 of the allegations (80 percent). Below, we discuss variances to the five criteria that raised interpretative issues for Inspectors General, guard whistleblowers and guard management in some of the investigations we reviewed.[3]

[1]As noted, no investigation is required when a complaint is made to an Inspector General more than 60 days after a member of the military became aware of the personnel action at issue. According to a DOD Inspector General official, the Inspector General extends the filing deadline to 120 days in most cases.

[2]The DOD Inspector General's guidance to investigators does not make this a separate criterion, but investigators determine the timing of a protected communication.

[3]In military whistleblower investigations the evidentiary standard is preponderance of evidence, which means that the evidence that the investigator must determine is of greater weight or more convincing than the evidence presented in opposition to it.

Communications Were Not Protected

Our review showed that Inspectors General did not substantiate four National Guard members' reprisal allegations, at least in part, because investigators found that their disclosures were not protected by statute. The military whistle-blower protection statute recognizes two types of protected communications. First, a protected communication is any lawful communication to a Member of Congress or an Inspector General; it does not have to disclose wrongdoing. Second, a protected communication also is a disclosure that a member of the military reasonably believes constitutes evidence of a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety.[4] Such disclosures can be made only to any of the following: [5] a Member of Congress; an Inspector General; a member of a DOD audit, inspection, investigation, or law enforcement organization; or any other person or organization, including any person in the chain of command designated under regulations or established administrative procedures to receive such communications.

In some of the allegations we examined, guard members made disclosures that were not protected for a variety of reasons. For example, in one situation a guard member made a disclosure to the "officer in charge," but this officer was outside the chain of command. In other words, he did not have administrative, disciplinary or mission responsibility associated with command, and he was not designated under regulations to receive protected communications. In another example, a guard member alleged wrongdoing in testimony before the Merit Systems Protection Board (a federal civilian agency that, among other functions, adjudicates whistleblower cases), and subsequently alleged reprisal for having done so. However, because of the military whistleblower statute's limitation on who can receive a protected disclosure, a disclosure in a federal civilian investigation is not protected. In a third example, a guard member alleged wrongdoing to a state ethics board, but disclosure to a state agency is also not protected by the military whistleblower protection act. And in a fourth example, an Inspector General rejected the argument by a guard whistleblower that audit work, by itself, is a protected disclosure. The Inspector General noted "we do not consider every document prepared by

[4]Some of the subjects of a protected disclosure are substantially the same as those in the civilian whistleblower protection statute [5 U.S.C. § 1213 (a) (1)].

[5]10 U.S.C. § 1034 (b)(1)(A) and (B).

a DOD auditor . . . to constitute a protected communication even if such work should contain disclosures of wrongdoing." The inspector further noted that the military whistleblower protection statute "was not intended to shield members of a DOD audit organization from the unfavorable personnel actions that might legitimately be taken because of deficient performance."

Personnel Actions Were Not Unfavorable

Our review also showed that at least four reprisal allegations were not substantiated because an Inspector General did not consider the personnel action that was being contested to be unfavorable. The DOD directive on military whistleblower protection describes an unfavorable personnel action as "any action taken on a member of the Armed Forces that affects or has the potential to affect that military member's current position or career." For some of the cases we reviewed, unfavorable personnel actions included suspension of a security clearance, withdrawal of a promotion nomination, a letter of reprimand, an adverse officer evaluation report, improper restriction of flying hours, improper referral for mental health evaluation, and involuntary retirement.

In the first example, an Inspector General concluded that being placed on paid administrative leave (nonduty status with pay) was not an adverse personnel action: the whistleblower's personnel record would not reflect nonduty status, and this action would not have any future impact on promotion or reassignment. In the second example, an Inspector General found that reassignment was not per se an unfavorable personnel action: Guard management was well within its authority to move personnel for the needs of the organization and the morale and welfare of a group, such reassignments are "not uncommon." A guard whistleblower alleged in the third example that guard management had retaliated against him by restricting him in writing to using the chain of command to make a protected communication. An Inspector General dismissed the allegation: the guard management's letter had not actually restricted the guard member to using the chain of command, but had only suggested that he do so when management wrote to the member, "Let me encourage you to express your interests and concerns through your direct chain of command . . . always do your best to try to find solutions within your unit of assignment." In the fourth example, an Inspector General found that a "satisfactory" personnel evaluation is not per se unfavorable, but the Judge Advocate General who reviewed this finding for legal sufficiency disagreed, noting that a satisfactory rating that followed "excellent" and "superior" ratings ought to be considered an unfavorable personnel action.

Unfavorable Personnel Actions Were Made Before a Protected Disclosure

We reviewed 10 guard cases in which an Inspector General did not substantiate a reprisal allegation, in whole or in part, because guard management was in a variety of ways preparing to take or had initiated an unfavorable personnel action before a guard member's protected disclosure was made. Logically, if guard management took an unfavorable personnel action against a guard member before the member made a protected disclosure, management could not be found to have retaliated against the member. At issue, however, is when management first considered, contemplated, or decided to take an unfavorable personnel action and whether that has the same legal meaning as actually "taking" such an action.[6]

In one example of this timing issue, an Inspector General declined to investigate a reprisal allegation because documented "events" (guard whistleblower's disruptive behavior) leading to an unfavorable personnel action occurred before he made a protected communication. In a more complex example, guard management initiated formal action to separate a guard member from the guard for misconduct. The paperwork associated with the separation action was apparently misplaced and the member subsequently made a protected disclosure. Upon learning of the disclosure, guard management promptly resubmitted the paperwork, but the Inspector General determined that the second submission was made in retaliation for the disclosure, deciding, in effect, that there were two personnel actions separated by a disclosure rather than one action that was first initiated prior to a disclosure, and then reinitiated after the disclosure had been made. The Inspector General noted that had guard management followed through on the first personnel action the whistleblower "would have no basis to claim reprisal.

Guard Management Did Not Know about a Protected Disclosure Before Taking an Unfavorable Personnel Action

We reviewed four cases (seven reprisal allegations) in which guard management did not know about a guard member's protected disclosure before taking an unfavorable personnel action against that individual. The DOD Inspector General's guidance cautions investigators, "if the evidence is insufficient to determine who knew what and when, give the benefit of the doubt to the complainant and proceed with the investigation." The guidance also notes that suspicion, belief, or knowledge of rumors of a

[6]The DOD Inspector General's guidance instructs investigators to verify the date the "responsible management official first contemplated taking the action or decided to take, withhold, or threaten the personnel action." According to DOD Inspector General officials, the mere contemplation of action before a disclosure, without collaboration, should not stop a reprisal allegation from being further investigated.

protected communication by a responsible management official are sufficient for proceeding with the investigation. In general, the deciding factor in these four cases was whether whistleblowers could provide sufficient evidence in support of their assertion that management knew about a disclosure before taking an unfavorable personnel action.

Whether management knew about a protected disclosure cannot always be easily established. In one example of this issue, investigators decided that guard management knew that someone had made a protected disclosure and that management "had reason to believe" that a specific guard member made one, thus giving the benefit of the doubt to the whistleblower. However, the Inspector General did not substantiate the reprisal allegation on other grounds; guard management had determined to take a personnel action "well in advance" of the whistleblower's protected communication.

Guard Management Would Have Taken the Same Course of Action in the Absence of a Protected Disclosure

While the first four criteria are associated with a guard whistleblower's reprisal allegation, for the fifth criterion guard management must establish by a preponderance of evidence that it would have taken the action it did even if the whistleblower had not made or prepared a protected communication.

Inspectors General consider five variables when assessing the validity of management's assertion:[7]

- Reason(s) stated by guard management for taking, withholding, or threatening the action.
- Reasonableness of the action(s) taken, withheld, or threatened considering a guard member's performance and conduct.
- Consistency of guard management's actions with past practice.
- Motive of guard management for deciding, taking, or withholding a personnel action.
- Procedural correctness of the action.

[7]In cases involving federal civilian employees, the Merit Systems Protection Board has considered similar variables: (1) strength of evidence in support of personnel action; (2) existence and strength of any motive to retaliate; and (3) evidence that agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated. (*Yunus v. Department of Veterans Affairs*, Merit Systems Protection Board, 84 M.S.P.B. 78, 1999). In civilian cases, management must prove by clear and convincing evidence that it would have taken a personnel action regardless of a protected disclosure. Clear and convincing evidence requires a degree of proof more demanding than preponderance but less than the "beyond a reasonable doubt" required in criminal cases.

For most of the reprisal allegations we reviewed, guard management demonstrated to the satisfaction of an Inspector General that it would have taken the same course of action in the absence of a protected disclosure. We also reviewed 24 allegations where guard management failed to demonstrate this. The most frequently cited reason for this failure was that the personnel action was inconsistent with similar past circumstances or that it was not reasonable. One form of inconsistency occurred when a guard whistleblower was singled out for retaliation for actions that others also engaged in but who were not similarly punished. A lack of reasonableness occurred when a rater gave a whistleblower good marks on an evaluation report but the senior rater made adverse remarks that he could not explain and that were not preceded by a counseling session. In another example, an Inspector General questioned the consistency of guard management's actions to separate a whistleblower from a state National Guard because he criticized the performance, integrity, competence and leadership of three senior guard officials. These senior officials all had substantiated allegations of misuse of government funds against them from previous Inspector General investigations initiated by the whistleblower and others. None of the senior officials were processed for administrative discharge, and two of the three officials had their letters of counseling reduced to verbal counseling. Guard management in this example was so unaware of the military whistleblower protection statute that it actually cited the whistleblower's protected communication as a reason for his discharge from the guard. Guard management did not note poor performance or document moral or professional dereliction as reasons for its actions.

Stage Two: Review and Approval of Whistleblower Reprisal Investigations by DOD's Inspector General

The military whistleblower protection statute provides whistleblowers with a guarantee that the findings of a reprisal investigation will be reviewed and approved by the DOD Inspector General. Specifically, the statute requires the DOD Inspector General to (1) review a military service's Inspector General's decision to terminate a reprisal inquiry for lack of sufficient evidence[8] and (2) approve of the results of all whistleblower investigations, regardless of who conducted the investigation.[9]

[8] 10 U.S.C. § 1034 (c)(3)(C).

[9] 10 U.S.C. § 1034 (c)(3)(E).

The DOD Inspector General's review and approval of all investigation results is an important protection because a military whistleblower, including a National Guard member, cannot appeal on the same basis as a civilian complainant to a federal appeals court under the military whistleblower protection statute.[10] In order to gauge the significance of this protection, we reviewed 19 allegations in which Inspectors General disagreed with each other on a variety of issues.[11] In particular, eight reprisal allegations in three investigations underscore the significant differences between Inspectors General in their interpretations of certain issues.

- *Sanctity of chain of command*—In one example, the Army Inspector General preliminarily found that guard management (brigadier general) did not retaliate against a guard whistleblower. The DOD Inspector General disagreed, stating that its investigation "clearly determined" that the guard whistleblower was reprised against "to a degree rarely seen in our years of conducting this form of investigation." The Army countered, stating that the guard whistleblower "was seeking refuge under the [military whistleblower protection statute] to avoid being disciplined by a chain of command not satisfied with his performance . . . ." Senior Army management concurred with the DOD Inspector General and gave the brigadier general a letter of reprimand reminding him that "your concern for a member of your staff 'jumping' the chain of command is inappropriate in this situation and indicates a lack of knowledge on the use and role of the [Inspector General] system" (i.e., any disclosure made to an Inspector General, no matter its content, is protected by statute).

- *Interpretation of evidence*—In a second example, a state National Guard Inspector General substantiated six reprisal allegations by a guard whistleblower, including an improper referral for a mental health examination. However, the Air Force Inspector General ruled that there was insufficient evidence to substantiate the allegations, and the DOD Inspector General concurred. The state Inspector General

[10]In *Acquisto v. United States*, 70 F. 3d 1010 (8th Cir. 1995), the court decided that the military whistleblower protection statute provides strictly administrative remedies and therefore does not afford plaintiffs an independent cause of action. A Guard member could appeal an Inspector General's finding to a service board for the correction of military records, and finally to the Secretary of Defense [10 U.S.C. § 1034(f) and (g)]. Title 5 U.S.C. § 7703, on the other hand, provides authority for a civilian whistleblower to appeal adverse decisions by the Merit Systems Protection Board to federal court.

[11]These 19 allegations were in 8 of the 60 investigations we reviewed.

discounted the whistleblowers' health issues (treatment for alcoholism and depression) because they were "common knowledge" to the individual's "local supervisors," and substantiated the mental health reprisal allegation because evidence showed guard management was increasingly exasperated with dealing with someone who complained a lot. In contrast, the Air Force noted that the "evidence is overwhelming" that the guard whistleblower's "mental state [mood swings] had so deteriorated" that "any reasonable commander" would have made a mental health referral.

- *Quality of investigation*—In a third example, a state National Guard Inspector General did not substantiate a guard whistleblower's three reprisal allegations, but the Army Inspector General considered the original and subsequent amended investigation deficient, although it too did not substantiate the allegations. The DOD Inspector General reviewed the investigation and informed the Army that the state Inspector General had not properly framed the reprisal allegations; interviews with responsible management officials were "leading and superficial" and "worthless as credible evidence;" and the investigator "did not obtain a preponderance of evidence" to support the finding that "responsible management officials did not take the unfavorable actions in reprisal." The DOD Inspector General first requested and then withdrew its request that the case be reinvestigated, deciding instead to "complete the additional investigation and ensure" that the guard whistle-blower's "allegations are fully addressed." The DOD Inspector General subsequently substantiated two of the three reprisal allegations.

Inspectors General Have Not Compiled an Authoritative Record of their Interpretations of Whistleblower Issues

Unlike the military, the civilian whistleblower process has developed and published a body of authoritative interpretation of issues. For example, in response to reprisal allegations by civilian federal employees, the civilian process (the Merit System Protection Board and the U.S. Court of Appeals for the Federal Circuit) has considered the question, "When is a disclosure protected by statute?" As an answer, the Federal Circuit determined that certain disclosures may not be protected if they are directed at the alleged wrongdoer [*Horton v. Department of Navy*, *66 F. 3d 279 (Fed Cir. 1995)*]; made to a supervisor as part of the performance on one's job duties [*Willis v. Department of Agriculture*, *141 F. 3d 1139 (Fed Cir. 1998)*]; and made about information that is "publicly known" [*Meuwissen v. Department of Interior*, *234 F. 3d 9 (Fed. Cir. 2000)*].

An advantage of a publicly documented record of interpretation of issues, such as the meaning of a protected disclosure, is that it can serve as the

basis for amending the civilian whistleblower protection statutes. For example, congressional reaction to so-called "judicially created exceptions" [12] formed the basis of an unsuccessful attempt in the 107th Congress to amend the civilian statute. The amendment, if enacted, would have covered the disclosure of information "without restriction to time, place, form, motive or context, or prior disclosure made to any person by an employee or applicant, including a disclosure made in the ordinary course of an employee's duties . . . ."

A similar procedure to codify a body of authoritative interpretations of whistleblower issues has not been developed for military personnel. The examination of a whistleblower's reprisal allegation by Inspectors General is done largely in isolation of other cases. Their decisions (to substantiate or not substantiate a reprisal allegation) rely on experience, including continuing guidance and training to ensure consistent interpretation of issues, but are made without explicit reference to other associated decisions, and the decisions are not readily available to the public or Congress. DOD Inspector General officials told us they would like to see a codification of issues associated with whistleblower decisions made by Inspectors General; in short, a DOD organization similar to the Merit Systems Protection Board which would render and publish decisions on the interpretation of the military whistleblower statute.

Military Services Took Administrative Action in Most Substantiated Whistleblower Reprisal Investigations

The limited jurisdiction of the federal government over National Guard officials means that it cannot order the state Adjutant General to take administrative action against guard management officials who retaliate, or take corrective action on behalf of whistleblowers. However, the Army and Air Force can take administrative action against military members of the guard, and service boards for the correction of military records can recommend to service Secretaries corrective action for guard whistleblowers. None of the whistleblower protection statutes meaningfully apply to civilian federal employees of the guard.

Eleven of the 60 investigations we reviewed resulted in at least one substantiated allegation of reprisal. We determined that the military services or state National Guard took administrative action against guard

[12] As termed by Sen. Daniel K. Akaka, who introduced an amendment to the civilian whistleblower protection statute [S. 995, 107th Cong. (2001)].

officials after completing seven of these investigations.[13] In one investigation, the Army declined to take action against two guard officials who retaliated against a guard member by including unfavorable comments on the individual's evaluation report, even though the rating itself was favorable. In five investigations, a military service or state guard issued letters of reprimand. In one investigation, a guard official was verbally counseled, and in another investigation, a guard management official was removed from consideration for promotion, and two officials were "given an opportunity to retire."

Among all National Guard whistleblowers, federal civilian employees of the National Guard (technicians) [14] face the most difficult jurisdictional and corrective action issues. They are not protected from reprisal by the military whistleblower protection statute because, as civilians, it does not apply to them.

Civilian guard technicians who allege reprisal for making a protected disclosure face at least two "severe and significant restrictions" according to a decision by the U.S. Court of Appeals for the Federal Circuit [*Singleton v. Merit Systems Protection Board*, *244 F. 3d 1331 (Fed. Cir. 2001)*]. First, some adverse actions (for example, suspension, furlough without pay, reduction in rank, or compensation) against civilian technicians cannot be appealed to the Merit Systems Protection Board.[15] Second, adverse actions not covered by the guard technicians act can be appealed to the Merit Systems Protection Board, but the appeal is meaningless because of the board's limited enforcement powers. The board has determined that its orders are not enforceable against state National Guards, and for that reason, the board is without power to supply

[13]The DOD Inspector General considers one investigation as "open" and was not able to provide information on two investigations.

[14]A technician's employment, use, and status are defined by 32 U.S.C. § 709.

[15]The Federal Circuit noted in *Singleton*, that the guard technicians act provides, "notwithstanding any other provision of law" (including the civilian whistleblower protection statutes), a technician's right of appeal to an adverse personnel action, as enumerated in the technicians act, "shall not extend beyond the adjutant general of the jurisdiction concerned." Consequently, the Federal Circuit observed "when it comes to protection under the [civilian whistleblower protection statutes] the [guard technicians act] by its clear terms bars a technician from federal appeal rights under [the civilian whistleblower protection statutes] when the adverse action is one of those enumerated in the [guard technicians] statute."

an effective remedy even in the instance of a federal employee who can prevail on the merits of a civilian whistleblower protection act claim.

Appendix VI: Comments from the Department of Defense

RESERVE AFFAIRS

ASSISTANT SECRETARY OF DEFENSE
1500 DEFENSE PENTAGON
WASHINGTON, DC 20301-1500

Mr. Derek B. Stewart
Director, Defense Capabilities Management
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Stewart:

This is the Department of Defense (DoD) response to the GAO draft report GAO-04-258, "MILITARY PERSONNEL: Information on Selected National Guard Management Issues," GAO Code 350378 (formally GAO Codes 350221, 350242, 350284 and 350285). I appreciate the opportunity to review and comment on the draft GAO report.

We concur with the GAO report as written. We have no specific comments/concerns on recommendations, since GAO made no specific recommendations in the report.

Technical changes that were identified by reviewers will be forwarded to the GAO staff separately.

Sincerely,

for T. F. Hall

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