Congress Amends Performance of Civil Functions Restriction

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Introduction

Most judge advocates are undoubtedly familiar with the general prohibition against engaging in the private practice of law while serving on active duty as a judge advocate.[1] Most also know that this rule becomes applicable to reserve component judge advocates when they are on active duty for periods in excess of thirty days.[2] Along these same lines is a proscription against the pursuit and even the holding of certain positions while on active duty. Affected positions include: elected Federal officials, elected state officials, Presidential appointees, executive schedule employees, and appointed state officials.

The prohibitions placed on these individuals are found in section 973 of title 10.[3] When one first considers this relatively commonsensical notion,[4] there is an impulse to wonder whether the law has any true practical significance. How often would one run across an individual serving, for example, as an officer in the Army and as a congressman? As it turns out, those

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[1] U.S. DEP'T OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 4-3c (30 Sept. 1996) ("An attorney of the [Judge Advocate Legal Service] will not engage in private law practice without the prior written approval of [The Judge Advocate General]."

[2] *Id.*

[3] The text of the legislation is as follows:

> (a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.
> (b) (1) This subsection applies----
> (A) to a regular officer of an armed force on the active--duty list (and a regular officer of the Coast Guard on the active duty promotion list);
> (B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days; and
> (C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 270 days.
> (2)
> (A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States----
> (i) that is an elective office;
> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.
> (3) Except as otherwise authorized by law, an officer to whom this subsection applies by reason of subparagraph (A) of paragraph (1) may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State (or of any political subdivision of a State).
> (4) (A) An officer to whom this subsection applies by reason of subparagraph (B) or (C) of paragraph (1) may not hold, by election or appointment, a civil office in the government of a State (or of any political subdivision of a State) if the holding of such office while this subsection so applies to the officer----
> (i) is prohibited under the laws of that State; or
> (ii) as determined by the Secretary of Defense or by the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, interferes with the performance of the officer's duties as an officer of the armed forces.
> (B) Except as otherwise authorized by law, while an officer referred to in subparagraph (A) is serving on active duty, the officer may not exercise the functions of a civil office held by the officer as described in that subparagraph.
> (5) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.
> (6) In this subsection, the term "State" includes the District of Columbia and a territory, possession, or commonwealth of the United States.
> (c) An officer to whom subsection (b) applies may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.
> (d) The Secretary of Defense, and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section.

10 U.S.C. § 973 (LEXIS 2004).

[4] Section 973 dates back to 1870. Lieutenant John H. Stassen, *The Civil Office Prohibition (10 U.S.C. § 973(b): Applicability to Office of Notary Public*, 26 JAG. J. 268, 269 (1972). Congress believed that a military officer could not suffer militarily for the consequences of an illegal act performed while serving in a civil office. *Id*. Additionally, they felt that a concurrent holding might serve to supplant civilian control of the government. *Id*. *See also* Riddle v. Warner, 522 F.2d 882, 884 (9th Cir. 1975).

times—when an individual wants to run for public office prior to terminating a period of active duty or concluding a military career—are rare,[5] but the law has come into focus following the mobilization of many reserve component members.[6] This note explains section 973's application, including a recent amendment to section 973 which removed a restriction on activated guardsmen, reservists and retirees serving on tours of active duty for more than 270 days, and the regulatory implementation.

Section 973's Main Provisions

As a preliminary matter, it is well to keep in mind that section 973 applies not only to those who would mobilize—come to active duty—from the reserve components, but also to Soldiers in the regular active-duty component. The law sets out a fundamental notion that officers on active duty, from a reserve or regular component, should not go about trying to engage in additional employment if it interferes with their duties and assignments.[7]

Section 973 next outlines more specific proscriptions against holding public office. First, the statute states that it is applicable to regular active duty officers, retired regular officers who are back on active duty for more than 270 days,[8] and reserve officers who are on active duty for more than 270 days.[9] Next, the statute prohibits those three categories of officers from holding Federal elective offices, a Presidential appointment requiring Senate confirmation, or an executive schedule position.[10] Finally, it also carries a prohibition against "hold[ing] or exercise[ing]" state[11] and local government positions.[12]

The statute indicates, however, that "[a]n officer . . . may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation."[13] Additionally, officers can serve in other Federal positions—non-senior executive service positions not requiring a Presidential appointment or executive schedule positions—"when assigned or detailed to that office or to perform those functions."[14]

There are several practical upshots to these portions of the legislation. One is that officers on active duty could not campaign for public office in advance of a pending retirement or release from active duty, let alone be elected and begin performing the function of that office. Similarly, elected officials who happen to be members of the reserve component or retired regular officers brought to active duty[15] for more than 270 days[16] would not be allowed to hold or exercise the

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[5] *See, e.g.*, Jolley v. Grantham, 206 Ga. App. 100, 424 S.E.2d 362 (Ga. Ct. App. 1992).

[6] Normally, members of the reserve components, the Army, the Air Force, the Navy, the Marine Corps, and Coast Guard Reserves and the Army and Air National Guards of the United States, are protected under the Uniformed Services Employment and Reemployment Rights Act (USERRA). *See generally,* 38 U.S.C. §§ 4301-4333 (2000). This law offers a range of benefits to members of the reserve components and, as its name implies, guarantees the reemployment of guardsmen and reservists following tours of duty. *See id*. at § 4312. It works much like any other anti-discriminatory legislation. Among its stated purposes is one "prohibit[ing] discrimination against persons because of their service in the uniformed services." *Id*. at § 4301(a)(3). On the other hand, even USERRA does not offer all of its protections to everyone as it excepts or otherwise limits the rights of certain members of the intelligence community. *See id*. at § 4315. Although this does not affect all members of the intelligence community, those who are affected would be from the FBI, CIA, DIA, NSA, and the National Imagery and Mapping Agency. *Id*. *See also* 5 U.S.C. § 2302(a)(2)(C(ii) (2000). Additionally, there is some doubt concerning whether USERRA is enforceable against the states as employers under the 11th Amendment. *See* Lieutenant Colonel H. Craig Manson, *The Uniformed Services Employment and Reemployment Rights Act of 1994*, 47 A.F.L. REV. 55, 81-3 (1999). *See also* Lieutenant Colonel Paul Conrad, *The 1998 USERRA Amendments*, ARMY LAW., Aug. 1999, at 52.

[7] 10 U.S.C. § 973(a).

[8] *See id.* § 688.

[9] *Id.* § 973(b)(1).

[10] *Id*. § 973(b)(2).

[11] The definition of "State includes the District of Columbia and a territory, possession or commonwealth of the United States." *Id*. § 973(b)(6).

[12] *Id*. § 973(b)(3).

[13] *Id*. § 973(c).

[14] *Id*. § 973(b)(2)(B). *See also* U.S. DEP'T OF DEFENSE, DIR. 1000.17, DETAIL OF DOD PERSONNEL TO DUTY OUTSIDE THE DEPARTMENT OF DEFENSE (24 Feb. 1997 (C1, 24 Nov. 1998).

[15] There are a number of ways for an officer to be called to active duty. *See, e.g.*, 10 U.S.C. § 12301(a) (full mobilization); *id.* at § 12302 (partial mobilization); *id*. at § 12304 (Presidential reserve call-up).

[16] The 270-day benchmark of Section 973 obviously means to bring the provision in line with the Presidential reserve call-up authority, an authority which limits the activation period to 270 days. *Id*. at § 12304. *See also* Exec. Order No. 13076, 63 Fed. Reg. 9719 (Feb. 24, 1998) ("for the effective conduct of operations in and around Southwest Asia"), *amended by* Exec. Order No. 13286, 68 Fed. Reg. 10,623 (Feb. 28, 2003); Exec. Order No. 13,286, 64 Fed. Reg. 23,007 (Apr. 27, 1999) (for "operations in and around the former Yugoslavia"), *amended by* Exec. Order No. 13,286, 68 Fed. Reg. 10,623 (Feb. 28, 2003).

functions of the civilian office they leave behind. Retired regular officers and members of the reserve components brought to active duty for periods of 270 days or less, on the other hand, would be able to hold and exercise their elected or appointed civilian positions unless they were to run afoul of the fundamental requirement that any additional employment must not interfere with their official duties.[17]

The prohibitions and restrictions found in section 973 may seem to be of little practical consequence, but occasions where one might wish to seek an elected governmental position do arise[18] and, under the current two-year partial mobilization for the war against terrorism,[19] there is a possibility that a significant number of activated reservists could currently be serving as elected or appointed state and local officials.[20] Fortunately, there is some leeway built into the remainder of section 973. The applicable regulatory provisions likewise soften some of the statute's main provisions.

Further Implementation

In late 2003, Congress passed the National Defense Authorization Act for Fiscal Year 2004.[21] Among its many provisions is section 545,[22] which amended section 973. The amendment works to remove any strict prohibition for retired regular army officers and reserve component officers on active duty for more than 270 days from merely holding a state office.[23] These officers may not hold the office, however, if doing so is prohibited by state law[24] or if the Secretary of Defense or Secretary of Homeland Security determines that there is "inter[ference] with the performance of the officer's duties as an officer of the armed forces."[25]

The Department of Defense (DoD) implements section 973 in its recently updated *DoD Directive Number 1344.10, Political Activities by Members of the Armed Forces on Active Duty. (DoD Dir. 1344.10).*[26] This publication echoes much of

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[17] 10 U.S.C. § 973(a).

[18] *See, e.g.*, Jolley v. Grantham, 206 Ga. App. 100, 424 S.E.2d 362 (Ga. Ct. App. 1992).

[19] *See* 10 U.S.C. § 12302. *See also* Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001)("Declaration of National Emergency by Reason of Certain Terrorist Attacks"); Exec. Order No. 13,223, 66 Fed. Reg. 48,201 (Sept. 18, 2001) (authorizing activation of Ready Reserve to active duty in response to terrorist attacks against the United States).

[20] A partial mobilization allows for the augmentation of the active armed forces with the activation of up to 200,000 members of the selected reserve. 10 U.S.C. § 12302. In response to the current crisis, the numbers of those on active duty has waxed and waned. At this writing, the number of reservists on active duty totaled 159,702. U.S. DEP'T OF DEFENSE, News Release: National Guard and Reserve Mobilized as of August 18, 2004 (Aug. 18, 2004), *available at* http://www.defenselink.mil/news/Aug2004/d20040818ngr.pdf (also on file with the author). Unfortunately, these statistics, published weekly, do not reveal the numbers of officers or retired officers activated.

[21] National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, 117 Stat. 1392 (2003).

[22] *Id*. § 545, 117 Stat. 1479 (codified as amended at 10 U.S.C. § 973(b)(4)(A) (LEXIS 2004)).

[23] 10 U.S.C. § 973(b)(4)(A).

[24] Georgia prohibits the simultaneous holding of a state "civil office" and most federal offices. Those precluded from holding civil office include

> Persons holding any office of profit or trust under the government of the United States other than that of postmaster and officers and enlisted men of the reserve components of the armed forces of the United States, or of either of the several states, or of any foreign state; provided however, that without prejudice to his right to hold public office, any person may accept appointment to, and may receive his expenses and compensation arising from, membership upon any commission, board, panel, or other fact-finding or policy-making agency appointed by the President of the United States or other federal authority, where such appointment is of a temporary nature and the duties are not such as to interfere materially with the person's duties as a public officer.

GA. CODE ANN. § 45-2-1(4) (2004). The Georgia Supreme Court has held, however, that an enlisted active duty member of the U.S. Navy could exercise and hold a position as a city councilman because that position was not included within the meaning of "civil office." Only state offices are considered within the statute's reach. *See* Westberry v. Saunders, 250 Ga. 240, 241, 296 S.E.2d 596, 598 (1982). Other states seem to take a different approach. *See, e.g.,* IDAHO CODE § 59-407 (2004) (elective state officials who cannot appear to take their oaths of office because of military service may nonetheless take their oath and be sworn in). Still other states fail to address the question directly, but they too tend to indicate that the mere absences for periods of military service will not terminate a person's holding of a civil office. *See, e.g.*, CAL. MIL & VET. § 1690 (2004) ("Any elected officer of the State who is called to serve with the armed forces of the United States has a right to return to and to re-enter upon his office after the termination of his active service with the armed forces if the term for which he is elected has not expired."). *See also id*. § 395.8 (providing city elective and other officers right to restoration following military service).

[25] 10 U.S.C. § 973(b)(4)(B).

[26] U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY (2 Aug. 2004) [hereinafter DOD DIR. 1344.10]. Section 973 serves as a centerpiece for this directive, but the directive also, and perhaps more importantly, contains general guidance on political activities:

> 4.1.1. A member on active duty may:

section 973. For example, it restates the prohibition against holding Federal elective office, an office requiring a Presidential appointment with Senate confirmation, or an executive schedule position.[27] It also reaffirms that retirees and reservists on active duty for less than 270 days can hold and exercise their Federal elective, appointed, and executive service offices so long as their activities do not interfere with the performance of their active duty responsibilities.[28] The same treatment is also given to state and local positions.[29] The regulation expresses the inherent logic of section 973 against members of the armed forces becoming candidates for partisan office.[30]

One major step the directive takes, however, is to extend section 973 prohibitions to enlisted members of the armed forces. In many of its provisions, it makes no distinction between officers and enlisted personnel in its reference to "members of the Armed Forces" and "members."[31] The directive also goes beyond the statutory language in other ways. It echoes the statute when it allows officers to participate on installation school boards, [32] but it goes further, stating, "enlisted member[s] may seek, hold, and exercise the functions of nonpartisan[33] civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, provided that the office is held in a non-military capacity and there is no interference with the performance of military duties."[34] Most importantly, *DoD Dir. 1344.10* defines the 270 day activation period. It clarifies that any such period of active duty for reservists and retirees begins on the first day of active duty. This means that Soldiers on tours in excess of 270 days are precluded from exercising their civilian office from the first day of active duty.[35] In other words, they receive no grace period during the first 270 days.[36]

> 4.1.1.1. Register, vote, and express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.
> 4.1.1.2. Make monetary contributions to a political organization.
> 4.1.1.3. Attend partisan and nonpartisan political meetings, rallies, or conventions as a spectator when not in uniform.
> 4.1.2. A member on active duty shall not:
> 4.1.2.1. Use his or her official authority or influence for interfering with an election; affecting the course or outcome of an election; soliciting votes for a particular candidate or issue; or requiring or soliciting political contributions from others.
> 4.1.2.2. Be a candidate for, hold, or exercise the functions of civil office
> except as authorized in paragraphs 4.2. and 4.3., below.
> 4.1.2.3. Participate in partisan political management, campaigns, or conventions (unless attending a convention as a spectator when not in uniform).
> 4.1.2.4. Make campaign contributions to another member of the Armed Forces or an employee of the Federal Government.

Id. para. 4.1. *See also id*. para. E3.

[27] *Id*. para. 4.3.1.

[28] *Id*. para. 4.3.2. The directive also repeats that service members may be detailed to civil offices in the Federal government *Id*. para. 4.3.3.

[29] *Id.* para. 4.3.5.3.

[30] The directive brings this out in its section dealing with general prohibitions. *See id*. para. 4.1.2.2. It later reiterates this general proposition, but creates four exceptions. *Id*. para. 4.2.1. One exception is for federal offices where the member is not on active duty for more than 270 days. *Id*. paras. 4.2.1.1 and 4.3.2. The others are for enlisted members in nonpartisan positions, for officers in nonpartisan school board positions on the installation, and for state and local positions where the member is on active duty for less than 270 days. *Id*. paras. 4.2.1.2, 4.3.5.1, 4.3.5.2, and 4.3.5.3.

There have been times when Section 973, or an earlier version, has been in issue. In the *Jolley* case for example, an Army Warrant Officer filed for candidacy for the position of the Harris County, Georgia Sheriff. Jolley v. Grantham, 206 Ga. App. 100, 424 S.E.2d 362-3, (Ga. Ct. App. 1992). Although the main challenge to his candidacy concerned a portion of the Hatch Act, codified at section 7324(a) of title 5, United States Code, the court went on to address a claim that Jolley had also violated section 973. Normally one might think of section 973 being considered internally within the DoD. In his case, however, the challenge came from outside the DoD. In ruling on the second issue, the court considered the section 973(a) proscription against employment that interferes with assigned duties as well as the public office proscription. *Id*. at 101-2. Considering both, the court held "that the prohibition is on holding the office, not seeking it." *Id*. at 102. While the Georgia court may have been correct in its interpretation of the statute, it should be noted that the DoD generally restricts how and whether one can file and become a candidate for public office. DOD DIR. 1344.10, *supra* note 26, para. 4.1.2.2.

[31] *See, e.g.*, DOD DIR. 1344.10, *supra* note 26, para. 4 ("It is DoD policy to encourage members of the Armed Forces . . . to carry out the obligations of citizenship").

[32] *Id*. para. 4.3.5.2

[33] The directive defines "nonpartisan political activity," as:

> Activity supporting or relating to candidates not representing, or issues not specifically identified with, national or State political parties and associated or ancillary organizations. Issues relating to constitutional amendments, referendums, approval of municipal ordinances, and others of similar character are not considered under this Directive as specifically being identified with national or State political parties.

Id. para. E2.1.4.

[34] *Id*. para. 4.3.5.1.

[35] *Id*. para. 4.3.2.

Department of Defense Directive 1344.10 also better defines what constitutes a "civil office":

> A non-military office involving the exercise of the powers or authority of civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof. This term does not include a non-elective position as regular or reserve member of a civilian law enforcement, fire or rescue squad.[37]

This is an important definition because there have been a few times when this terminology has been in issue[38] and of some concern.[39]

Significant matters, not addressed in the text of the legislation, concern how to handle situations when the member desires to become or remain a candidate for office or must continue to exercise a position that will interfere with that member's duty performance. *Department of Defense Directive 1344.10* gives those individuals the option to "request retirement (if eligible), discharge, or release from active duty";[40] however, any such request is not automatic and must be approved by the Secretary concerned.[41] Requests will not be approved for service members: with an active duty service commitment;[42] serving in a combat zone or like location;[43] under investigation;[44] accused of an offense;[45] serving a sentence;[46] pending administrative separation;[47] indebted to the United States;[48] or in violation of *DoD Dir. 1344.10*.[49] The request could also be denied if the member was from "a Reserve component and serving involuntarily . . .[for] more than 270 days during a period of declared war or national emergency, or other period when a unit or individual of the National Guard or other Reserve component has been involuntarily called or ordered to active duty as authorized by law."[50] Those who

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[36] *Id. See also id*. para. 4.3.5.3 (state and local offices).

[37] *Id*. para. E2.1.3.

[38] In one interesting case involving an earlier version of section 973, the military plaintiff sought to have the legislation applied to him and to thereby bring an end to his service obligation. Riddle v. Warner, 522 F.2d 882 (9th Cir. 1975). Lieutenant Riddle graduated from the United States Naval Academy and attended law school. *Id*. at 883. As a consequence of his Naval Academy schooling, he was obligated to "the service for some time to come." *Id*. During his first assignment as a legal assistance attorney he "was granted a commission as a notary public for the State of California." *Id*. His argument was that the commission as a notary public amounted to a civil office necessitating the termination of his commission. *Id*. The court found his position to be untenable. Instead, it noted that Section 973 and its historical antecedents were founded on a desire to avoid military control of the civilian government and preventing any interference with military duties. *Id*. at 884. The court summarized the application of these goals to Riddle's situation:

> In our view, the office of notary public when held by a military officer cannot be said to offend either of the purposes underlying the statute. Certainly, there would be no danger that military officers becoming notaries public would threaten the civilian preeminence in government. Nor would the responsibilities of a notary public adversely affect the efficiency of a military officer, especially a military lawyer like Riddle. His value and efficiency, rather than being jeopardized, are perhaps enhanced because of a lawyer's constant need for notary service.

Id. at 884-5.

[39] *See* Stassen, *supra* note 4.

[40] DOD DIR. 1344.10, *supra* note 26, para. 4.4.1. Compare this provision with one from the previous version of *DoD Dir1344.10. Directive 1344.10* indicating that a "civil office" was "[a] nonmilitary office involving the exercise of the powers or authority of civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof." U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY para. E2.1.2 (15 June 1990) [hereinafter Former DOD DIR. 1344.10].

[41] DOD DIR. 1344.10, *supra* note 26, para. 4.4.1.

[42] *Id*. para. 4.4.1.1.

[43] *Id*. para. 4.4.1.2 In broader terms, the request may be denied if the member is "[s]erving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone or a hostile fire pay area." *Id*.

[44] *Id.* para. 4.4.13.

[45] *Id*. para. 4.4.1.4.

[46] *Id*.

[47] *Id*. para. 4.4.1.5. It is not clear that this separation would have to be adverse or otherwise unfavorable, but logic indicates that it should.

[48] *Id*. para. 4.4.1.6.

[49] *Id*. para. 4.4.1.8.

[50] *Id*. para. 4.4.1.7.

persist with exercising an office or who have a civilian office which interferes could also be found in violation of the directive and be subjected to punitive sanctions.[51]

One obvious question that comes from the text of the statutory amendment concerns the statement that the Secretaries of Defense and Homeland Security will determine whether the holding of an office "interferes with the performance of the officer's duties as an officer of the armed forces."[52] The question is whether consideration of interference can be determined at some level below the actual secretary. *Department of Defense Directive 1344.10* answers this in part by establishing that the service secretaries are to make the determination.[53] This of course begs another obvious question about how the Army adjudicates or anticipates adjudicating whether the holding of a particular office interferes with a tour of active duty. It currently appears that responsibility would lie within the Office of the Deputy Chief of Staff, G1.[54]

Army Implementation

One matter to still consider is the Army's implementation of Section 973. The latest version of *Army Regulation 600-20* (*AR 600-20*) came out in 2002.[55] Thus, it is unfair to discuss whether *AR 600-20* is wholly consistent with either *DoD Dir. 1344.10* or section 973 as amended. Practitioners should, nonetheless, continue to carefully consult *AR 600-20* as well as *DoD Dir. 1344.10*. Despite some archaic usage[56] and outdated provisions,[57] *AR 600-20* provides more specific guidance in certain instances. For example, it gives greater detail about how to file for candidacy while on active duty[58] and in a manner consistent with *DoD Dir. 1344.10's* prohibition against campaigning for office while on active duty.[59]

Of perhaps greatest importance is *AR 600-20's* short statement that the political activities provisions are applicable to "[S]oldiers (including full-time National Guard)."[60] This is significant because *DoD Dir. 1344.10* calls on the "Chief, National Guard Bureau [to] issue policy guidance similar to that included in this Directive that is applicable to members of the National Guard serving in a full-time National Guard duty status."[61] Given the Secretary of the Army's guidance, there would seem to be little need to address the Army side of the National Guard. The Secretary of the Army, speaking through *AR 600-20*, confirms that the political activity rules are applicable to members of the Army National Guard serving on full-time National Guard duty.[62]

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[51] *Id*. para. 4.4.4.

[52] 10 U.S.C. § 973(b)(4)(a)(ii) (LEXIS 2004).

[53] DOD DIR. 1344.10, *supra* note 26, para. 4.3.5.4.2.

[54] The Army provides specific guidance consistent with *DoD Dir. Directive 1344.10* and section 973 in *Army Regulation 600-20, Army Command Policy*. *See* U.S. DEP'T OF ARMY REG, 600-20, ARMY COMMAND POLICY, para. 5-3 (13 May 2002) [hereinafter AR 600-20]. That regulation states that "[t]he DCS, G-1 is responsible for policy on soldier participation in political activities." *Id*.

[55] *Id*.

[56] *Army Regulation 600-20* uses, for example, the terminology of "EAD" or "extended active duty." *Id*. para. 5-3d(3)("As long as they are not serving on EAD, enlisted members and Reserve officers may hold partisan and nonpartisan civil office if such office is held in a private capacity and does not interfere with the performance of military duties."). It does not define what it means by "EAD." The previous version of *DoD Dir. 1344.10*, however, defined EAD as "a period in excess of 270 days." Former DOD DIR. 1344.10, *supra* note 40, para. E2.1.4.

[57] *Army Regulation 600-20* does not, for example, allow reserve officers to hold office if they are on active duty for more than 270 days. AR 600-20, *supra* note 54, para. 5-3d(3). Again, section 973 would at least open up the way for theses individuals to hold civil office even if on active duty for more than 270 days. *See* 10 U.S.C. § 973(b)(4)(A) (LEXIS 2004).

[58] AR 600-20, *supra* note 54, para. 5-3c. Although *AR 600-20* prohibits campaigning, "[w]hen circumstances warrant, the installation commander (or general court-martial convening authority) may permit the soldier to file such evidence of nomination or candidacy for nomination, as may be required by law." *Id*. para. 5-3c(1).

[59] DOD DIR. 1344.10, *supra* note 26, para. 4.1.2.2.

[60] AR 600-20, *supra* note 54, para. 5-3a. This type of duty is defined in title 10 of the United States Code:

> The term "full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

10 U.S.C. § 101(d)(5) (2000).

[61] DOD DIR. 1344.10, *supra* note 26, para. 5.3.

Conclusion

This article has considered a recent amendment to section 973 of title 10 which removed a restriction on activated guardsmen, reservists, and retirees serving on tours of active duty for more than 270 days. Under the revision, these individuals are no longer precluded from merely holding certain civilian positions unless the holding interferes with their active duty roles.[63] What has not changed is the prohibition against exercising the functions of the office. The note also examined the DoD's recent implementation. Judge advocates may rarely have a need to consider these authorities. Careful consideration of and attention to the statutory and regulatory law, however, is warranted when the need does arise.

[62] The Chief of the National Guard has issued specific instructions to the Air National Guard. *See* NATIONAL GUARD BUREAU, AIR NATIONAL GUARD, INSTR. 36-101, THE ACTIVE GUARD/RESERVE PROGRAM para. 3.10 (3 May 2002).

[63] 10 U.S.C.§ 973(b)(4)(A) (LEXIS 2004).