BAD PAPER: REFORMING THE ARMY REPRIMAND PROCESS

CAPTAIN MARK E. BOJAN*

You are hereby reprimanded. Your conduct falls below the standard I expect from a Soldier in this division. I question your ability to lead and your potential for future military service.[1]

I. Introduction

American servicemembers are held to a higher standard of conduct than civilians.[2] When misconduct occurs, commanders have a broad range

* Judge Advocate, United States Army Reserve (Active Guard and Reserve). Presently assigned as Reserve Liaison Officer, Headquarters, United States Army Trial Defense Service, United States Army Legal Services Agency, Fort Belvoir, Virginia. LL.M., 2016, The Judge Advocate General's Legal Center and School, Charlottesville, Virginia; J.D., 2000, The John Marshall Law School, Chicago, Illinois; B.A., 1991, Dominican University, Forest Park, Illinois. Previous assignments include Chief, Military Justice, 200th Military Police Command, Fort George G. Meade, Maryland, 2011–2015; Legal Assistance Attorney, Military Magistrate, and OIC, Sergeant Brett T. Christian Tax Center, 101st Airborne Division (AASLT), Fort Campbell, Kentucky, 2010–2011; and Legal Assistance Attorney, 91st Legal Operations Detachment, Forest Park, Illinois, 2009–2010. Member of the bars of Illinois, the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit, and the United States Court of Appeals for the Armed Forces. This article was submitted in partial completion of the Master of Laws requirements of the 64th Judge Advocate Officer Graduate Course.

[1] This is a hypothetical scenario. Any resemblance to actual persons or events is entirely coincidental.

[2] *See* Kori Schake, *Yes, The Military Has Higher Standards*, BLOOMBERG VIEW (Nov. 15, 2012), http://www.bloombergview.com/articles/2012-11-16/why-military-is-held-to-higher-personal-standards (observing that the "men and women who fight the nation's wars accept intrusions into their activities most of us would balk at"). The Uniform Code of Military Justice (UCMJ) criminalizes many acts that are not otherwise criminal for civilians. *See, e.g.*, UCMJ art. 134 (2012) (making adultery a criminal offense); *see also* MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 62c(2) (2012) [hereinafter MCM] (providing that in order to "constitute an offense under the UCMJ, the adulterous conduct must either be directly prejudicial to good order and discipline or service discrediting"). These strictures are unique to the military. "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." *Id.* pt. I, ¶ 3.

of disciplinary options.[3] One such option is an administrative reprimand.[4] Reprimands are in widespread, routine use in the Army.[5] When a general officer either issues a reprimand or directs that one issued by a subordinate be filed permanently in a soldier's Official Military Personnel File[6] (OMPF), the document is commonly referred to as a General Officer Memorandum of Reprimand, or GOMOR.[7]

---

[3] *Compare* MCM, *supra* note 2, app. 12 (listing maximum possible punishments for offenses under the UCMJ, up to and including death), *and* UCMJ art. 15, *supra* note 2 (describing commanders' limited non-judicial punishment authority), *with* Rule for Courts-Martial 306(c)(2) (MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 306(c)(2) (June 2015 update)) (authorizing commanders to dispose of offenses under the UCMJ by administrative action characterized as "corrective" or "withholding of privileges").

[4] *See* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986) [hereinafter AR 600-37] (describing the administrative reprimand process).

[5] *Id.*

[6] The Official Military Personnel File (OMPF) is a subset of a soldier's Army Military Human Resource Record (AMHRR). *See* U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT para. 1-6 (7 Apr. 2014) (hereinafter AR 600-8-104) (noting that "[T]he naming convention AMHRR is an umbrella term encompassing human resource (HR) records for [s]oldiers, retirees, veterans, and deceased personnel. The AMHRR includes, but is not limited to, the official military personnel file (OMPF), finance related documents, and non-service related documents deemed necessary to store by the Army."). Although it encompasses a wide range of matters, the OMPF subset is limited to "permanent documentation within the AMHRR that documents facts related to a [s]oldier during the course of his or her entire Army career, from time of accession into the Army until final separation, discharge, or retirement." AR 600-8-104, ¶ 1-6b. "The purpose of the OMPF is to preserve permanent documents pertaining to enlistment, appointment, duty stations, assignments, training, qualifications, performance, awards, medals, disciplinary actions, insurance, emergency data, separation, retirement, casualty, and any other personnel actions." *Id.* ¶ 1-6b(1). "The OMPF remains in Army control for [sixty-two] years from a [s]oldier's final separation date. At the end of [sixty-two] years, the OMPF is transferred to the control of the [National Archives and Records Administration] as a public record." *Id.* ¶ 1-6b(2). The Military Personnel Record Jacket (MPRJ), on the other hand, refers to the now-defunct DA Form 201, which was literally a paper jacket or file folder that units in the field used to maintain records. AR 600-8-104 defines the MPRJ as the "individual military personnel records maintained in a DA Form 201 (Military Personnel Records Jacket) (Inactive) normally kept by brigade or battalion S1, UA, or MPD serving the [s]oldier's unit. The Military Personnel Records Jacket / DA Form 201 have been eliminated." *Id.* § 2, Terms. However, the term MPRJ is still commonly used in the Army when referring to any soldier's personnel file maintained by a unit in the field.

[7] For purposes of this discussion, the terms reprimand, memorandum of reprimand (MOR), and general officer memorandum of reprimand (GOMOR) are used interchangeably, except with respect to GOMOR filing approval authorities. *See* AR 600-37, *supra* note 4, ¶ 3-4b (requiring the order of a general officer (to include one frocked to the rank of brigadier general) senior to the recipient or the direction of an officer having general court-martial jurisdiction over the individual in order for a reprimand to be filed permanently in a soldier's OMPF).

Arguably, GOMORs have been over-used to the point of abuse. They have become *de facto* punishment not subject to the extensive due process protections of the Uniform Code of Military Justice (UCMJ). This article proposes reforming the reprimand process in Army Regulation (AR) 600-37, Unfavorable Information.[8] The revised regulation should require written legal review not only of reprimands, but of all unfavorable information intended for filing in the OMPF. The reviewing judge advocate should affirm that adverse information intended for filing is supported by a preponderance of evidence. Inclusion of unproven criminal offenses in administrative reprimands should be prohibited. Policy guidance should emphasize that OMPF filing is a significant, potentially career-ending action, and that alternative options should be carefully considered. The revised regulation should also stress the use of the unfavorable information referral process in AR 600-37.[9]

Electronic record-keeping, new evaluation systems, and aggressive record review protocols for promotion boards have obviated the GOMOR's secondary function of preserving records of soldier misconduct. Written reprimands once served as an efficient, one-page summaries of misconduct in paper-only personnel records.[10] However, it is no longer overly burdensome to scan and transmit entire administrative investigations to a soldier's OMPF. Technology has rendered this summary function obsolete. As a result, the GOMOR has become—at best—an unnecessarily punitive cover letter.

Contrary to popular belief, GOMORs are not the only way to transfer unfavorable information into a soldier's OMPF. Since 1955, the Army has had procedures in place that allow OMPF filing of almost any

---

[8] *Id.* ¶ 3-4.

[9] *See* AR 600-37, *supra* note 4, ¶ 3-6; *see also infra* section III.A.2 for discussion.

[10] Paper-only personnel records were standard through the end of the twentieth century. The Army did not maintain centralized electronic personnel records until the relatively recent introduction of the Interactive Personnel Electronic Records Management System (iPERMS). *See* AR 600-8-104, ¶ 3-5a.

> OMPF records pertaining to a [s]oldier currently serving, discharged, retired, or deceased while in service on or after 1 October 2002 are maintained in iPERMS. Official information and documents stored in the OMPF or other previously authorized files prior to 1 October 2002 are maintained at the NPRC in St. Louis, Missouri and are in paper or microfiche format.

Id. See infra section C2 for further discussion.

unfavorable information, so long as it is first referred to the soldier for comment.[11] Consistent use of existing referral procedures will ensure that soldiers will be called to answer for misconduct before boards of inquiry, particularly when combined with candid evaluations, without continued overreliance on GOMORs.

General Officer Memorandum of Reprimand recipients receive certain limited procedural due process protections, specifically notice and an opportunity to respond, before an OMPF filing determination is made.[12] However, in their present form and in the context of modern Army practice, these protections have become hollow. Despite soldiers' acknowledged liberty interests in their military careers, the GOMOR has evolved over the last thirty years to become—and is widely acknowledged as—a virtually unchecked Army career-killer.[13] Such broad recognition speaks to the adequacy of the GOMOR's associated due process. For these reasons, an update to AR 600-37 is long overdue.

II. Background

A. Punitive Administrative Actions

The U.S. Department of Defense (DoD) continues to focus on enforcing standards of conduct in the military, including the prevention of sex-based offenses.[14] The National Defense Authorization Act (NDAA) for Fiscal Year 2014 contained several measures intended to deter such

---

[11] AR 600-37, *supra* note 4, ¶ 3-6.

[12] *Id.* ¶ 3-4b.

[13] *See infra* note 37, 98 for further discussion.

[14] In early 2004, prompted by reports of sexual assault against servicemembers deployed in Iraq and Kuwait, former Secretary of Defense Donald H. Rumsfeld directed a review of the Department of Defense (DoD) process for treatment and care of military sexual assault victims. Memorandum from Secretary of Defense to Under Secretary of Defense (Personnel and Readiness), subject: Department of Defense Care for Victims of Sexual Assaults (5 Feb. 2004). *See generally Mission and History*, U.S. DOD SEXUAL ASSL'T PREV'N AND RESPONSE OFF., http://www.sapr.mil/index.php/about/mission-and-history (discussing the establishment of the DoD's Sexual Assault Prevention and Response (SAPR Office)). The DoD SAPR reflects the DoD's policy goal of establishing a "culture free of sexual assault, through an environment of prevention, education and training, response capability . . . , victim support, reporting procedures, and appropriate accountability that enhances the safety and well being [*sic*] of all persons." U.S. DEP'T OF DEF., DIR. 6495.01, SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM para. 4b (23 Jan. 2012) (C2, 20 Jan. 2015).

offenses.[15] In section 1745 of NDAA 2014, Congress introduced a new term to the military disciplinary lexicon, "punitive administrative action" (PAA):

> If a complaint of a sex-related offense is made against a member of the Armed Forces and the member is convicted by court-martial or receives non-judicial punishment or *punitive administrative action* for such sex-related offense, a notation to that effect shall be placed in the personnel service record of the member, regardless of the member's grade.[16]

Unfortunately, Congress neglected to define the term.

In addition to being left undefined, the term PAA is also internally inconsistent. Disciplinary actions may be either punitive (related to punishment for criminal offenses) or administrative (non-punitive, albeit potentially adverse).[17] What exactly is a PAA and why is the appearance of the term so important?

Former Secretary of the Army John M. McHugh answered the first question in Army Directive 2014-29, the implementing directive for section 1745 of NDAA 2014.[18] Secretary McHugh defined PAAs expansively as "any adverse administrative action initiated as a result of

---

[15] *See generally* National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, §§ 1701–1747, 127 Stat. 672, 950-983 (2013) (NDAA 2014) (implementing multiple reforms of the UCMJ and administrative provisions related to sexual harassment and assault). Congress has clearly stated that deterring sexual assault and harassment in the military should be a legislative priority. *See, e.g.*, *Sexual Assault in the Military: Prevention: Hearing Before the Subcom. on Military Personnel of the H. Armed Services Comm.*, 111th Cong. (2009) (statement of Rep. Susan A. Davis, Chairwoman, H. Subcom. on Military Personnel) ("Just as we have a responsibility to ensure that victims of sexual assault receive all the support that can be provided following an attack, we also have an obligation to do all we can to prevent such attacks from ever taking place.").

[16] National Defense Authorization Act for Fiscal Year 2014, § 1745(a)(1) (emphasis added).

[17] The DoD has not defined the word "punitive." JOINT CHEIFS OF STAFF, PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (15 Nov. 2015). However, the word is commonly understood to mean "[r]elating to punishment; having the character of punishment or penalty; [or] inflicting punishment or a penalty." *Punitive*, Black's Law Dictionary (10th ed. 2014).

[18] U.S. DEP'T OF ARMY, DIR. 2014-29, INCLUSION AND COMMAND REVIEW OF INFORMATION ON SEX-RELATED OFFENSES IN THE ARMY MILITARY HUMAN RESOURCE RECORD 4a (9 Dec. 2014) [hereinafter ARMY DIR. 2014-29].

the sex-related offenses identified [herein, which] includes, but is not limited to, memorandum or [*sic*] reprimand, admonishment or censure from all levels of command."[19]

The significance of PAAs lies not in how they entered the military lexicon,[20] but in how the service Secretaries interpreted the term.

---

[19] *Id*. Despite the qualifier "included, but is not limited to," the intent of this provision on any fair reading is plainly to classify reprimands as PAAs. *Id.* The Air Force defines a PAA as a "Letter of Reprimand" without further qualification. U.S. DEP'T OF AIR FORCE, INSTR. 36-2406, OFFICER AND ENLISTED EVALUATION SYSTEMS para. 1.1 (2 Jan. 2013) (C2, 24 Aug. 2015); *see also* U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM ch. 4 (26 Nov. 2014) (describing the Air Force administrative reprimand process); *but see* Navy Administrative Message, 189/14, 202029Z Aug. 14, Chief, Naval Operations, subject: Inclusion and Command Review of Information on Sex-Related Offenses in Personnel Service Records para. 7 [hereinafter NAVADMIN Message 189/14] (limiting PAAs to "punishments imposed by court-martial or [non-judicial punishment] (e.g., punitive letters of reprimand)").

[20] A detailed examination of the legislative history of NDAA 2014 is beyond the scope of this article. However, legislative records suggest that the introduction of the term PAA in § 1745 was an unintended byproduct of House and Senate staff negotiators' hurried reconciliation of their respective proposed NDAA 2014 bills, and not a deliberate expression of specific legislative intent. The proposed bills were House Resolution 1960 (H.R. 1960) and Senate Bill 1197 (S. 1197). H.R. 1960, 113th Cong. § 547 (2013); S. 1197, 113th Cong. § 534 (2013). *See also* STAFF OF H. COMM. ON THE ARMED SERVICES, 113TH CONG., LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 3304, PUBLIC LAW 113-66 715-16 (Comm. Print Dec. 2013), https://www.gpo.gov/fdsys/pkg/CPRT-113HPRT86280/pdf/CPRT113HPRT86280.pdf [hereinafter JOINT EXPLANATORY STATEMENT] (describing the development of NDAA 2014). The final text of NDAA 2014 and the material in the Joint Explanatory Statement were the product of an agreement between the Chairmen and the Ranking Members of the House and Senate Armed Services Committees. JOINT EXPLANATORY STATEMENT, at III (note by Mr. Zach Steacy, Dir., Legis. Operations, H. Comm. on the Armed Services). The Senate was unable to complete the regular processing of S. 1197 in time to ensure "the enactment of an annual defense bill by the end of the calendar year," and so "was unable to initiate a formal conference with the House" on the bill. *Id.* Instead, the Chairmen and Ranking Members of the respective Committees directed their staffs to finalize a compromise bill with only three days left before the House recessed for the holidays. 159 Cong. Rec. S8548 (daily ed. Dec. 9, 2013) (statement of Sen. Levin). The PAA language first appeared in House Resolution 441 (H.R. 441), which contained the resulting agreed joint text. JOINT EXPLANATORY STATEMENT, at III; H.R 441, 113th Cong. § 1745(a)(1) (2013). The Joint Explanatory Statement indicates that the proposed Senate provision requiring "administrative action" for sex-related offenses to be noted in offenders' service records was adopted in the joint text with a clarifying amendment. *Id.* at 716. That clarifying amendment must have added the word "punitive," as the joint text was not subsequently amended prior to final adoption. *Id*. However, since no formal conference committee was convened on H.R. 441, direct support for this conclusion is lacking. In any event, whether the term was intentionally introduced is secondary. Because the term is now law, practitioners must understand and accommodate the focus on reprimands in Army

Secretarial-level classification of administrative reprimands as punitive actions raises serious concerns.[21] How much punitive character may an administrative action acquire before it is no longer merely administrative but *de facto* punishment? If such an action rises to the level of punishment, is administrative due process still sufficient to protect soldiers' rights?

Importantly, the designation of administrative reprimands as punitive conflicts directly with a contrary statement in the Manual for Courts-Martial (MCM). The MCM describes administrative reprimands as "corrective measures that promote efficiency and good order and discipline."[22] According to the MCM, reprimands and other administrative corrective measures "are not punishment."[23]

Given this statement, the fact that the Secretaries of the Army and the Air Force clearly believed that administrative reprimands in their respective services were sufficiently punitive to justify placing them under the rubric of PAAs is troubling.[24] Indeed, the Secretaries' guidance raises

---

Directive 2014-29. ARMY DIR. 2014-29, *supra* note 18, ¶ 4a. "If you like laws and sausages, you should never watch either one being made." (Attributed to German statesman Otto von Bismarck (1815–1898)). *But see* Robert Pear, *If Only Laws Were Like Sausages*, N.Y. TIMES (Dec. 4, 2010), http://www.nytimes.com/2010/12/05/weekinreview/05pear.html (observing that "[von Bismarck's] quotation is offensive to sausage makers; their process is better controlled and more predictable.").

[21] The Secretaries of the Army and the Air Force—the only services that use administrative reprimands—both defined PAAs to include reprimands. *See supra* notes 16-18 and accompanying sources. Punitive administrative actions are not limited to sex-related offenses. Neither section 1745 of NDAA 2014 nor Army Directive 2014-29 contains any such limitation. To the contrary, section 1745 simply lists PAAs as one possible disposition of a sex-related offense, along with courts-martial and non-judicial punishment. *See supra* note 14 and accompanying sources. The same possible dispositions apply to all offenses. Although Army Directive 2014-29 does not expressly amend AR 600-37, it both lists the regulation as a reference and directs the Army Deputy Chief of Staff, G-1, to "incorporate the provisions of this directive into the next version of [AR 600-37] as soon as practicable." ARMY DIR. 2014-29, *supra* note 18, ¶ 9, and encl., ¶ k.

[22] MCM *supra* note 2, part V, ¶ 1g.

[23] *Id.*; *see also id.* R.C.M. 306(c)(2) (describing administrative reprimands as "corrective" as opposed to punitive).

[24] Recall that, despite the introduction of PAAs to the mix, the regulatory distinction between punitive reprimands (those imposed as punishment following judicial or non-judicial disciplinary proceedings) and administrative reprimands under AR 600-37 persists. *See supra* note 4 distinguishing the underlying authorities for punitive and administrative reprimands). The fact that section 1745 of NDAA 2014 was passed—thereby legitimizing the concept of punitive administrative actions contrary to those authorities and the prior stance of the MCM—is, of course, the larger issue. To be sure, administrative reprimands are "subject to regulations of the Secretary concerned." MCM, *supra* note 2, R.C.M. 306(c)(2). However, in this case there appears to be a need to reconcile the Secretaries'

significant, disturbing questions about the role and impact of reprimands in today's military disciplinary process, which the remainder of this article will address.

Among the questions raised is: what level of due process that should be associated with such actions? Generally, the more severe the possible consequences of punishment, the greater the degree of due process that is typically afforded to the individual subject to that punishment.[25] Therefore, we must also ask: just how punitive is an administrative reprimand in the context of modern Army practice?[26] Does an administrative reprimand have sufficient punitive character and impact to obviate its due process protections? With these questions in mind, we turn next to military due process generally, examine the due process protections available to soldiers in adverse administrative actions, and consider the Army's reprimand process.

B. Due Process

The Fifth and Fourteenth Amendments to the United States Constitution prohibit deprivations of life, liberty, or property without due process of law.[27] Due process protections may generally be considered either substantive or procedural.[28] Substantive due process protects against "government power arbitrarily and oppressively exercised," whereas procedural due process protects against "arbitrary takings."[29]

Constitutional due process protections plainly extend to members of the military.[30] However, courts give "particular deference to the determination[s] of Congress, made under its authority to regulate the land

---

designations of administrative reprimands as punitive with both the imperative of section 1745 and the existing strictures of the MCM.

[25] *Compare* MCM part V (describing the limited protections afforded in nonjudicial punishment proceedings) *with* MCM part II (laying out the extensive body of procedural rules with respect to courts-martial).

[26] Air Force Instruction 36-3406 notwithstanding, the primary focus of this article is on Army practice.

[27] U.S. CONST. amends. V, XIV.

[28] *City of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

[29] *Id.*

[30] *See Weiss v. United States*, 510 U.S. 163, 176–77 (1994) (observing that Congress is "subject to the requirements of the Due Process Clause when legislating in the area of military affairs").

and naval forces[.]"[31] The Supreme Court has acknowledged that the specific "tests and limitations [of due process] may differ because of the military context."[32] "The difference arises from the fact that the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.'"[33] Accordingly, the due process available to military members in adverse administrative actions is built into the regulations governing those actions.[34]

Courts have observed with respect to Army regulations that the "requirements of procedural due process apply only to the deprivation of interests encompassed by the due process protection of liberty and property."[35] Absent such an interest, procedural due process is not offended so long as the Army adheres to its own regulations.[36] Significantly, courts have held that although service members do not have a property interest in military service or employment, they do have a liberty interest in being able to pursue such continued service or employment where military action to terminate that employment might stigmatize them.[37]

---

[31] U.S. CONST., art. I, § 8. *Weiss*, 510 U.S. at 177 (quoting *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (noting that judicial deference is "at its apogee" in this area); *see also Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981) (observing that "perhaps in no other area has the Court accorded Congress greater deference" than with respect to "Congress' authority over national defense and military affairs").

[32] *Weiss*, 510 U.S. at 177 (quoting *Goldberg*, 453 U.S. at 67).

[33] *Id.* (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

[34] *See* MCM, *supra* note 3, R.C.M. 306(c)(2) (noting that commanders' options for administrative disposition of misconduct—including reprimands—are "subject to regulations of the Secretary concerned"); *accord Weiss*, 510 U.S. at 177 (recognizing Congress' plenary control over military regulations). For an extended discussion of the nature of due process and its application to military administrative actions, see former Deputy Judge Advocate General of the Navy Rear Admiral Robert D. Powers, Jr.'s excellent article on the subject. Robert D. Powers, Jr., *Administrative Due Process in Military Proceedings*, 20 WASH. & LEE L. REV. 1, 4–10 (1963).

[35] *Rich v. Sec'y of the Army*, 735 F.2d 1220, 1226 (10th Cir. 1984).

[36] *See Rich*, 735 F.2d at 1226 (finding that because plaintiff had no property right to continued military service, the Army regulation allowing plaintiff to be honorably discharged for fraudulent enlistment without a hearing did not violate his right to procedural due process).

[37] *See Golding v. United States*, 48 Fed. Cl. 697, 726 (2001) (quoting *Canonica v. United States*, 41 Fed. Cl. 516, 524 (1998)).

> Persons are entitled to due process before they can be deprived of property or liberty. Courts have held that an enlisted member of the

Accordingly, we next examine the Army's reprimand process. Although the protections built into the process are limited, the history of the regulation governing reprimands clearly indicates that the Army has considered those protections to be adequate for more than fifty years.

C. Evolution of Army Reprimands

The Army reprimand process is relatively straightforward. Army Regulation 600-37, Unfavorable Information, describes the procedure for imposing administrative reprimands.[38] However, the reprimand procedure did not always exist in its current form. It is the result of decades of regulatory development, which informs the due process discussion.

1. Army Regulation 640-98 (1955)

Army Regulation 640-98, descriptively titled *Filing of Adverse Matter in Individual Records and Review of Intelligence Files Consulted Prior to Taking Personnel Action* (AR 640-98), is a 1955 precursor to AR 600-37.[39] Part of the purpose of AR 640-98 was to preclude certain matters

> armed forces does not have a property interest in his employment because he may be discharged 'as prescribed by the Secretary' of his service. However, courts have held that an enlisted member of the armed forces has a liberty interest in his employment. . . . This liberty interest prevents the military from discharging a service member without due process—but only in cases where a 'stigma' would attach to the discharge.

Id. at 727. These principles apply equally to officers. *See also Gonzalez v. United States*, 44 Fed. Cl. 764, 766 (1999) (concluding that a summary Department of the Army Active Duty Board (DAADB) separation violated the subject officer's constitutional liberty interest where it imposed a stigmatizing general discharge without an adversary hearing); *see generally* John A. Wickham, *The Total Force Concept, Involuntary Administrative Separation, and Constitutional Due Process: Are Reservists On Active Duty Still Second Class Citizens?*, Oct. 2000, ARMY LAW., at 23–24 (discussing the interplay between a soldier's liberty interest in continued military employment and Army separation procedures).

[38] U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION para. 3-4 (19 Dec. 1986).

[39] U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (14 Nov. 1955) (TAGO 2749B-Nov. 360481-55) [hereinafter AR 640-98] (*superseded by* U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (19 July

from being "filed in an individual's record maintained in the field or by The Adjutant General."[40] Those matters included "[u]nsupported or unacted upon adverse matter[s], other than counterintelligence information, which will prejudice the individual's reputation or future in the military service," and "[a]llegations which have been successfully rebutted and/or have not resulted in elimination or disciplinary action."[41]

Paragraph four of AR 640-98 will have a familiar ring to today's practitioners:

> No adverse matter . . . will be made a part of an individual's record without his knowledge and an opportunity being afforded him either to make a written statement in reply to the adverse information, communication, or report, or to decline, in writing, to make such a statement.[42]

Under the 1955 scheme, soldiers were generally entitled to the procedural due process protections of both notice and an opportunity to respond to any adverse information proposed to be filed in their records.[43] Critically, however, reprimands were excluded from those protections.

> The following and references thereto normally will not be referred to the individual concerned for comment prior to filing, and are therefore excluded from consideration under these regulations: . . .
>
> d. Administrative reprimands and admonishments of a nonpunitive nature (will not be forward for inclusion in

---

1965)) (*infra* App. A). Due to its age, this regulation is not maintained in electronic format on any available military or civilian database. The copy attached as App. A was located in the archives of The Judge Advocate General's Legal Center and School, Charlottesville, Virginia. U.S. ARMY LEGAL SERV. AGENCY LIBR., Bound Compilation of Regulations, AR 638-25, AR 670-328 (untitled) (1983). Special thanks to Mr. Fred L. Borch III, Regimental Historian and Archivist, for his assistance in obtaining this regulation.

[40] AR 640-98, *supra* note 39, ¶ 1a. Field-maintained records and those maintained by The Adjutant General's Office (TAGO) were approximately the equivalent of the MPRJ and AMHRR/OMPF in modern Army practice. *See supra* note 6 and accompanying sources (distinguishing the MPRJ and AMHRR/OMPF).

[41] AR 640-98, *supra* note 39, ¶ 1a(1)-(2).

[42] *Id.* ¶ 4.

[43] *Id.* ¶ 1a.

> TAGO 201 file. See DA Form 201a Field 201 file divider).[44]

Recall that AR 640-98 applied to adverse matters filed in any record, whether field-maintained or permanently maintained by The Adjutant General's Office (TAGO) (the TAGO 201 file).[45] Therefore, not only did the regulation bar commanders from submitting reprimands for permanent filing, soldiers had no regulatory right to respond to reprimands prior to their filing at the field or local level.[46]

2. Army Regulation 600-37 (1972)

In 1972, however, the Army's regulatory landscape changed drastically with respect to reprimands.[47] AR 600-37 underwent a major rewrite that incorporated AR 640-98 and updated the "policies and procedures for the resolution of unfavorable information."[48] Initially, AR 600-37-1972 carried forward the stated purpose of AR 640-98, to "insure that unsupported or unresolved unfavorable information, which may prejudice the individual's reputation or future in the military service, is not

---

[44] *Id.* ¶ 5d; *see supra* note 6 and accompanying sources (discussing the elimination of the historical "201" file and the MPRJ).

[45] *Id.* ¶ 4.

[46] Research reveals no regulatory mechanism then in place providing soldiers a right to respond to administrative reprimands prior to local filing. However, whether the exclusion of reprimands from the matters allowed to be retained permanently in The Adjutant General's Office (TAGO) 201 file was entirely due to concerns that such matters would "prejudice the individual's reputation or future in the military service" is unclear. *Id.* ¶ 1a. Many of the other excluded matters plainly resulted from processes that carried their own due process protections: records of court-martial (¶ 5c); actions of boards of officers, "provided that it is clearly indicated in such board proceedings that the individual concerned has been given [an] opportunity to testify in his own behalf" (¶ 5e); completed criminal, IG, or other investigative reports that "resulted in elimination or disciplinary action" (¶ 5f); prisoner-related matters (¶ 5h); FBI reports (¶ 5i); efficiency reports (¶ 5j); and, "[o]ther adverse matter of which the individual concerned had prior knowledge and an adequate opportunity to refute" (¶ 5k).

[47] A.R. 640-98 was updated in 1965, but contained no major changes for the purpose of this discussion. U.S. DEP'T OF ARMY, REG. 640-98, FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION (19 July 1965).

[48] U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION 1 (16 Oct. 1972), *superseded by* U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION 1 (18 May 1977) [hereinafter AR 600-37-1972]. This unofficial naming convention is used throughout this article solely to distinguish and track changes among the multiple versions of AR 600-37 since its 1972 inception through to its current form.

filed in an individual's official personnel files."[49] However, the new regulation expanded on this statement by listing certain additional objectives:

> a. Apply fair and just standards to all military personnel.
>
> b. Protect the rights of individual members of the Army, and, at the same time, protect the right of the Army to consider all available information when selecting individuals for
>
> c. Provide safeguards from adverse personnel action based on unsubstantiated allegations or mistaken identity.
>
> d. Provide a means of correcting injustices if they occur.
>
> e. Insure that individuals of questionable moral character are not continued in the service or elevated to positions of leadership and responsibility.[50]

Clearly, these objectives express an intent to protect both the rights of the individual soldier and—equally importantly from an institutional perspective—the Army's ability to preserve records of incidents of misconduct or poor judgment.[51] Bear in mind that in 1972, computers were not in widespread use and electronic personnel records did not exist. Commanders and promotion boards had no way to preserve adverse information except via a centralized paper record system.[52]

Certain definitions in the regulation further illustrate the intent of the new system. Unfavorable information was defined as "any credible derogatory information that may reflect unfavorably on an individual's character, integrity, trust worthiness, and reliability."[53] Interestingly, positions of "leadership, trust and responsibility" were considered to be limited to those held by an officer, warrant officer, or non-commissioned

---

[49] *Id.* ¶ 1-1b; AR 640-98, *supra* note 39, ¶ 1a(1).
[50] AR 600-37-1972, *supra* note 48, ¶ 1-3a-e.
[51] *Id.*
[52] *See supra* note 10 and accompanying sources (discussing the implementation of iPERMS and the preservation of records of misconduct). The need to preserve such records is a recurring theme throughout this article.
[53] AR 600-37-1972, *supra* note 48, ¶ 1-4a.

officer in the grade of E-7 or above.[54] Favorable personnel actions included any "personnel management or career management decision that enhance[d] the individual's status or position. Included [we]re promotions, Regular Army appointments, selection for schooling, entry or continuation on active duty, awards, decorations, commendations, and sometimes reassignment, retirement, separation, or release from active duty."[55]

The new regulation's policy statement with respect to decisions on favorable personnel actions is also instructive. It required decision-makers to review personnel files, consider both favorable and unfavorable information, and apply their own knowledge and best judgment.[56] It also provided a clear balancing test: "Performance and potential will be weighed against available unfavorable information."[57]

The right to notice and an opportunity to respond in writing prior to the filing of unfavorable information was imported into AR 600-37-1972 directly from AR 640-98.[58] However, significant additional due process protections were added:

> Individuals will be informed when unfavorable information in their files causes an unfavorable personnel

---

[54] *Id.* ¶ 1-4b. This view is inconsistent with modern Army leadership doctrine, which recognizes that leadership and responsibility may be exclusive of position or rank. *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, C1, ARMY LEADERSHIP at v (10 Sept. 2012) ("Everyone in the Army is part of a team and functions in the role of leader and subordinate. . . . All Soldiers and Army Civilians must serve as leaders and followers. . . . Leaders are not always designated by position, rank, or authority.")

[55] *Id.* ¶ 1-4c. The granting of a security clearance was also considered to be a favorable personnel action, although it was addressed under separate regulations. *Id*.

[56] *Id.* ¶ 2-1a.

> Personnel decisions which may result in the selection of individuals to positions of public trust and responsibility or vesting such individuals with authority over others should be based upon a thorough review of the records of such individuals—including appraisal of both favorable and unfavorable information which may be available. The Army selects individuals for promotion or appointment to such positions on a competitive basis and only the best qualified should be promoted or appointed.

Id. ¶ 2-1d.

[57] *Id*. ¶ 2-1a.

[58] *Id.* ¶ 2-1b; AR 640-98, *supra* note 39, ¶ 4.

> action or decision. They will be informed of the basis of such adverse personnel actions and the policies and procedures governing such actions. They have the right to appeal decisions which they believe were based on erroneous information, lack of equal opportunity, prejudice, bias, or other related injustice, or when substantive new evidence is discovered.[59]

Army Regulation 600-37-1972 also highlighted information that should be "identified early," including "[i]ndications of substandard leadership ability, promotion potential, morals, [or] integrity."[60] To that end, the new regulation carried forward, from AR 640-98, the list of matters that could be filed without further referral to the individual.[61]

AR 600-37-1972 then introduced the framework for the modern Army reprimand process. Paragraph 2-4 provided:

> 2-4. Reprimands, admonitions, and censures.
>
> a. Nonpunitive (as outlined in para 128c, UCMJ). Administrative reprimands, admonitions, and censures, etc., of a nonpunitive nature imposed by a commander or supervisor, will be filed in the Military Personnel Records Jacket (MPRJ). Only such items that have been signed by General Officers and specifically designated by him for inclusion in Official Military Personnel Files (OMPF) maintained by The Adjutant General will be forwarded. A written administrative reprimand, admonition, or censure, etc., which is designated for inclusion in an individual's official military personnel file will:
>
> (1) Contain a statement indicating that it has been imposed merely as an administrative measure and not as punishment under Article 15, UCMJ.
>
> (2) Be referred to the individual concerned for comment in accordance with paragraph 2-6. Statements furnished

---

[59] AR 600-37-1972, *supra* note 48, ¶ 2-1c.
[60] *Id.* ¶ 2-2. "Other unfavorable character traits of a permanent nature should be similarly recorded." *Id.*
[61] *Id.* ¶ 2-3.

> by the individual will be reviewed by the official imposing the administrative reprimand, admonition, or censure and will be attached to the basic written comment prior to filing it in the official personnel files.
>
> (3) Be forwarded for inclusion in official military personnel files or the career branch files only after due consideration of the circumstances and alternative nonpunitive measures. It is emphasized that it is not intended that minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts be permanently recorded in the individual's official military personnel file.
>
> b. Non-judicial. Reprimands and admonitions of a non-judicial nature are governed by the provisions of AR 27-10.[62]

The first significant change under this portion of AR 600-37-1972 is perhaps not readily apparent. Under AR 640-98, administrative reprimands were excluded only from being forwarded for filing in a soldier's permanent TAGO 201 file.[63] The regulation made no mention of MPRJ filing, thereby impliedly granting the imposing authority discretion whether to retain reprimands locally. Army Regulation 600-37-1972, on the other hand, eliminated any such implied discretion and expressly required that, at a minimum, reprimands not submitted for TAGO 201 filing would be filed in MPRJs.[64]

The other major change was the specific application of the referral procedure to reprimands.[65] Previously, nothing in AR 640-98 required reprimands to be referred to the recipient for comment; reprimands simply could not be forwarded for TAGO 201 filing.[66] Under AR 600-37-1972,

---

[62] *Id.* ¶ 2-4. Note that the new regulation continues to distinguish between non-punitive, administrative reprimands and those issued as punishment. *Id.*; AR 640-98, *supra* note 39, ¶ 5d.

[63] AR 640-98, *supra* note 39, ¶ 5d.

[64] *See* AR 600-37-1972, *supra* note 48, ¶ 2-4 (directing that administrative reprimands "will" be filed in the MPRJ).

[65] *Id.* ¶ 2-6. The referral requirement was not limited to reprimands, but was required for any unfavorable information for which a specific exception was not provided in ¶ 2-3.

[66] AR 640-98, *supra* note 39, ¶ 5d.

however, soldiers would now be entitled to an opportunity to either submit a written response to a reprimand or decline in writing to do so.[67]

3. Army Regulation 600-37 (1977)

The next step in the evolution of AR 600-37 was a 1977 update.[68] The update first incorporated the requirements of the Privacy Act of 1974: "Unfavorable information filed in official personnel files must meet privacy act standards of accuracy, relevancy, timeliness, and completeness."[69]

Next, the update expanded both filing authority and discretion concerning whether to direct MPRJ (local) filing of reprimands to any "commander, supervisor, officer exercising general court-marital jurisdiction over the individual concerned, or general officer senior to the individual concerned," subject to the referral requirement.[70] Along those lines, any letter filed locally was required to state the length of time it would remain in the MPRJ, and could only be removed before the end of that period by an officer exercising general court-martial jurisdiction over the individual (not necessarily the same person who directed the original filing).[71]

Importantly, the 1977 update introduced a process for mandatory general officer review of reprimands issued by those lacking the authority to direct OMPF filing.[72] Filing authority was expanded from the 1972

---

[67] AR 600-37-1972, *supra* note 48, ¶ 2-6.

[68] U.S. DEP'T. OF ARMY, REG. 600-37, Unfavorable Information (18 May 1977), *superseded by* U.S. DEP'T. OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986), [hereinafter AR 600-37-1977]. *See also supra* note 46 and accompanying sources (discussing the use of this naming convention).

[69] *Id.* ¶ 2-1b; Privacy Act of 1974, 5 U.S.C. § 552a(e)(5) (2015).

[70] *Compare* AR 600-37-1977, *supra* note 68, ¶ 2-4a (stating that appropriate authorities "may" direct the filing of such letters in the MPRJ), *with* AR 600-37-1972, *supra* note 48, ¶ 2-4 (directing that administrative reprimands "will" be filed in the MPRJ).

[71] AR 600-37-1977, *supra* note 68, ¶ 2-4a.

[72] *See id.* ¶ 2-4b.

> Any letter in the nature of an administrative reprimand, admonition, or censure, not imposed by an officer authorized to direct filing in the OMPF . . . will be reviewed by a general officer in the chain of command for the purpose of determining whether the letter should be filed in the individual's OMPF.

version's language, which read: "signed by a General Officer and specifically designated by him for inclusion" in the OMPF, to new language stating that filing was permitted "upon the specific direction of any general officer senior to the individual concerned or by an officer exercising general court-martial jurisdiction over the individual concerned."[73]

Any filing directives issued would now need to be stated in the reprimand itself or an attachment.[74] No substantive changes were made to the required contents of the reprimand. However, the update did contain procedural guidance for circumstances when the recipient or the imposing authority left the chain of command prior to the completion of the reprimand process.[75]

4. Army Regulation 600-37 (1986)

The final revision of AR 600-37, which solidified the familiar modern Army reprimand process, was completed in 1986.[76] The 1986 revision retained the classification of reprimands as unfavorable information subject to the requirements of referral and an opportunity for rebuttal.[77]

Significantly, the 1986 revision removed the mandatory general officer review of reprimands issued by subordinates.[78] However, MPRJ filing authority for enlisted personnel was then restricted to the "recipient's immediate [or a higher] commander . . . school commandants, any general officer . . . or an officer exercising general court-martial jurisdiction over the recipient."[79] Enlisted soldiers' immediate supervisors could impose reprimands, but could only direct MPRJ filing if serving in one of these capacities.[80]

Id.

[73] AR 600-37-1972, *supra* note 48, ¶¶ 2-4a, 2-4c.

[74] AR 600-37-1977, *supra* note 68, ¶ 2-4c.

[75] *Id.* ¶ 2-4d.

[76] U.S. DEP'T. OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION (19 Dec. 1986) [hereinafter AR 600-37-1986]. *See supra* note 48 (discussing the use of this naming convention).

[77] AR 600-37-1986, *supra* note 76, ¶¶ 3-4a, 3-6.

[78] *Id.* ¶ 3-4a ("If filing is intended for the MPRJ, the letter need not be referred to a higher authority for review.").

[79] *Id.* ¶ 3-4a(1).

[80] *Id.* Although authorized, it would be highly unusual in current Army practice for a supervisor who lacked MPRJ (local) filing authority to issue a reprimand.

Under the modern scheme, MPRJ filing authority for commissioned and warrant officers is restricted to the first commander in the recipient's chain of command who is senior to the recipient, or any higher commander.[81] Members of the recipient's rating chain also have MPRJ filing authority, as do any general officer senior to the recipient, and any officer who exercises general court-martial jurisdiction over the recipient.[82] No matter the rank of the recipient, a reprimand may only be filed in a soldier's MPRJ for a maximum of three years, or until the soldier transfers to another general court-martial jurisdiction.[83]

Comparatively, OMPF filing authority is tightly restricted. Regardless of the issuing authority, a reprimand may be filed in a soldier's OMPF only by order of a general officer or an officer having general court-martial jurisdiction over the recipient.[84] "Letters filed in the OMPF will be filed in the performance portion (P-fiche)."[85]

Before a reprimand may be filed in a soldier's OMPF, as with any unfavorable information not specifically exempt, it must first be "referred to the recipient concerned for comment according to paragraph 3-6."[86] Referral is the key component of the reprimand process. It provides the recipient's sole opportunity to rebut or mitigate facts alleged in the

---

[81] *Id.* ¶ 3-4a(2)(a).

[82] *Id.* ¶ 3-4a(2)(b), (c).

[83] *Id.* ¶ 3-4(a)(3). Reprimands filed in the MPRJ must also state the length of time they will be retained therein. *Id.* Any designation of a period shorter than the maximum authorized is atypical in current practice.

[84] *Id.* ¶ 3-4b. This is the reason that the practice of favoring GOMORs over lower-level reprimands evolved. The recipient of a GOMOR is directly exposed to the threat of OMPF filing. Subordinate issuing authorities may only file in the recipient's MPRJ, and must take the extra step of asking a higher authority to make an OMPF filing determination if desired. *See infra* note 93 and accompanying sources for further discussion.

[85] *Id.*; *see* U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT ¶ 3-8, tbl. 3-1 (7 Apr. 2014) (discussing the types of folders authorized for inclusion in the OMPF, including the performance folder). "The performance folder contains performance related information to include evaluations, commendatory documents, specific disciplinary information, and training/education documents. The primary purpose of this folder is to provide necessary information to officials and selection boards tasked with assessing [s]oldiers for promotion, special programs, or tours of duty." *Id.* tbl. 3-1. The terms performance portion and P-fiche are outdated and are no longer used in AR 600-8-104.

[86] AR 600-37-1986, *supra* note 76, ¶ 3-4b(1). "The referral will include reference to the intended [MPRJ or OMPF] filing of the letter." *Id.* Although often overlooked, this reference is important to the soldier. Knowing in advance whether the imposing authority intends MPRJ versus OMPF filing may inform the soldier's decision whether to submit a statement or rebuttal materials.

reprimand.[87] The referral must include any documents or other materials that serve as the factual basis for the reprimand.[88] The OMPF filing authority must review and consider any rebuttal statement and supporting evidence before making a final filing determination.[89]

For the first time, the 1986 revision also distinguished between the factual matters upon which a reprimand is based and the allied documents.[90] Although not defined, AR 600-37-1986 references "statements, previous reprimands, admonitions, or censure" and requires that such documents also be referred for comment if the filing authority intends to file them in the recipient's OMPF along with a reprimand.[91]

In addition, any reprimand intended for OMPF filing must state that it "has been imposed as an administrative measure and not as a punishment under UCMJ, Article 15."[92] It must also be "signed by (or sent under the cover or signature of)" the filing authority.[93]

---

[87] *Id.* ¶ 3-6b(1).

[88] *Id.* ¶ 3-6b(1)(a). Importantly, such documents must be included only if the recipient "was not previously provided an opportunity to respond to information reflected in that documentation." *Id.*; *see also* U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS ¶¶ 1-9c (2 Oct. 2006) [hereinafter AR 15-6] (requiring that reports of administrative investigations be similarly referred for rebuttal prior to any adverse administrative action being taken on such reports). Significantly, AR 15-6 excepts investigations from referral prior to adverse action if the "action contemplated is prescribed in regulations or other directives that provide procedural safeguards, such as notice to the individual and opportunity to respond." *Id.* ¶ 1-9d. However, AR 600-37-1986 requires referral of reprimands for comment independent of whether the recipient had an opportunity to rebut the underlying factual matters. *See* AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(a) (stating that "referral will also include" such matters).

[89] AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(b). If OMPF filing is directed, the underlying evidentiary matters may be attached and filed concurrently. *Id.*

[90] *Id.* ¶ 3-4b(1)(c).

[91] *Id.* Filing authorities should exercise caution when including prior reprimands as allied documents in OMPF filings. If a prior reprimand was filed in a soldier's OMPF, there is no need to file it a second time. If it was previously filed in the soldier's MPRJ, then the soldier is entitled to the full referral of that reprimand and its supporting documentation and an opportunity for rebuttal before it is filed in the soldier's OMPF. "Care must be exercised to ensure additional unfavorable information is not included in the transmittal documentation unless it has been properly referred for comment." *Id.*

[92] *Id.* ¶ 3-4b(2).

[93] *Id.* ¶ 3-4b(3). Reprimands imposed by individuals who lack OMPF filing authority may reach soldiers' OMPFs by referral for comment under the cover or signature of an officer with such authority. A typical scenario would involve a subordinate commander forwarding a reprimand to a superior general officer commander (or general court-martial convening authority (GCMCA)) and requesting referral to the recipient and an OMPF

Finally, consistent with prior versions, AR 600-37-1986 cautions that reprimands should be filed in a soldier's OMPF "only after considering the circumstances and alternative nonpunitive measures."[94] OMPF filing should be reserved for serious misconduct. "Minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts" may be appropriate for MPRJ filing but "will not normally be recorded in a soldier's OMPF."[95]

III. Argument

A. The Dilemma

As the Army's administrative reprimand process evolved, soldiers' procedural due process protections solidified. Soldiers have the right to notification and an opportunity to respond.[96] They may also submit rebuttal statements and evidence, which the imposing authority is required to consider before making a filing determination.[97] Evidently, the Army believes those protections to be adequate, since AR 600-37-1986 has not been updated since its publication thirty years ago.

The static nature of the regulation underscores the central dilemma of today's reprimands. Over the past thirty years, the nonpunitive intent of the reprimand process has all but disappeared from actual Army practice. In fact, there is a widely-held belief—by judge advocates who advise commanders, by soldiers generally, and by civilians—that an OMPF-filed reprimand is a "career-killer."[98] When an ostensibly non-punitive process

---

filing determination. Should the superior commander, or GCMCA, elect not to file the reprimand in the soldier's OMPF but instead retain it in the MPRJ, the reprimand will be returned to the author, who will advise the soldier of the filing determination. *Id.* ¶ 3-4c.

[94] *Id.* ¶ 3-4b(4).

[95] *Id.*

[96] AR 600-37-1986, *supra* note 76, ¶ 3-4.

[97] *Id*.

[98] *See, e.g.*, Lee S. Stockdale, *Reprimands: The Army's Dirty Little Secret*, AVVO.COM (Aug. 24, 2011), http://www.avvo.com/legal-guides/ugc/reprimands-the-armys-dirty-little-secret ("A . . . GOMOR . . . is the kiss of death in a [s]oldier's . . . OMPF . . . . A GOMOR is called, and is often meant to be, a 'Career Killer.'"); Lieutenant Colonel Victor M. Hansen, *Walking on Unfamiliar Ground: A Primer for Defense Counsel Representing Clients in an Inspector General Investigation*, ARMY LAW., Mar. 2005, at 16 ("A GOMOR in a senior officer's OMPF can have a devastating effect on his career. The most obvious impact is a certain end to the officer's upward progression in the Army."); Michelle Tan, *Army Rangers' Wild Partying Contributed To Commander's Reprimand, Report Says*, ARMY TIMES (Jan. 15, 2016), http://www.armytimes.com/story/military/careers/

army/officer/2016/01/14/army-rangers-wild-partying-contributed-commanders-reprimand-report-says/78755074/ (noting that the former commander of the 75th Ranger Regiment had received a GOMOR, which could "often be a career killer"); Jeff Schogol, *Miley Cyrus Song Crashes Air Force Pilots' Careers*, AIR FORCE TIMES (Oct. 19, 2015), http://www.airforcetimes.com/story/military/2015/10/19/texting-can-kill-your-career/73954112/. Tan reported:

> Three instructor pilots at Laughlin Air Force Base, Texas, are facing the end of their Air Force careers after investigators searched their personal cellphones and found mentions of the word "Molly"—a slang term for the illegal drug ecstasy. Importantly, the pilots were punished because the Air Force deemed their texts to be unprofessional. The Air Force Office of Special Investigations found no evidence that they had used drugs. The pilots also passed drug tests. The pilots, who have not been identified publicly, claimed they were referencing club and rap songs that have popularized the word "Molly," such as in Miley Cyrus' 'We Can't Stop,' but their commander . . . issued the three pilots letters of reprimand and stripped them of their wings[.]

Id.; Larry McShane, *Fort Hood Shooting: Nine Army Officers Get Reprimand For Missing Warning Signs Raised By Nidal Hasan*, N.Y. DAILY NEWS (Mar. 11, 2011), http://www.nydailynews.com/news/national/fort-hood-shooting-army-officers-reprimand-missing-warning-signs-raised-nidal-hasan-article-1.121299. McShane reported:

> [N]ine officers—all ranked lieutenant or above—were sanctioned with either oral reprimands or possible career-ending written letters of censure, said Army Secretary John McHugh. The secretary said the officers failed to meet the "high standards" expected of Army officers when they supervised Hasan at the Walter Reed Army Medical Center in Washington. The harsh sanctions "send a clear message to everyone that the Army will not tolerate such negligence and passivity in reaction to clear signs that a soldier is radicalizing to Islamist extremists," said Sen. Joe Lieberman (I-Conn.).

Id.; Dan Lamothe, *2 Officers Reprimanded Over Ganjgal Mistakes*, MARINE CORPS TIMES (Feb. 21, 2011), http://archive.marinecorpstimes.com/article/20110221/ NEWS/102210315/2-officers-reprimanded-over-Ganjgal-mistakes (commenting that "documents indicating two of the three [Army] officers cited last year in a joint Army-Marine Corps investigation were deemed primarily responsible for the [Gangjal] mission's failures and given reprimands, likely career killers"); Nathan Pfau, *DUI Consequences Far-reaching*, ARMY.MIL (Dec. 6, 2012), http://www.army.mil/article/92499/DUI_ consequences_far_reaching/ (quoting Captain Megan Mueller, Special Assistant United States Attorney, Office of the Staff Judge Advocate, Fort Rucker, Alabama, stating that "when a person gets some sort of reprimand on their permanent record, [it is] a career killer"). Even *Wikipedia* acknowledges this reality: "In military contexts, a formal letter of reprimand can be career ending, even without prescribed punishments, because it makes it difficult to secure advancements in rank or to enjoy the respect of one's peers." *Letter of Reprimand*, WIKIPEDIA (13 Aug. 2014, 7:44 PM), https://en.wikipedia.org /wiki/Letter_of_reprimand.

is so widely believed to have punitive effect, how can it be anything else? When do institutional practice and perception overcome stated regulatory intent?

1. Standards

Process and fairness are not necessarily the same. In his 2011 civilian practitioner's note, *Reprimands: The Army's Dirty Little Secret*, retired Army Reserve judge advocate Colonel (COL) Lee Stockdale calls the Army reprimand process "broken and abused."[99] According to COL (Ret.) Stockdale, the core of the "dirty secret" is that GOMORs are the "Army's way of punishing [s]oldiers when the evidence [is not] there."[100]

Significantly, he first notes that AR 600-37-1986 contains no standard of proof or evaluation with respect to the factual information underlying a GOMOR.[101] Colonel (Ret.) Stockdale points out that AR 600-37-1986 "requires only an 'objective decision by competent authority.'"[102]

This is incorrect. "Objective decision by competent authority" is not a standard by which a filing authority either assesses the sufficiency of underlying evidence or determines whether to file a document in the soldier's OMPF. Rather, it is a legal presumption that attaches to OMPF filings when they are appealed to the Department of the Army Suitability Evaluation Board (DASEB), the regulatory appellate authority for removal of unfavorable information from official Army personnel files.[103] "Once an official document has been properly filed in the OMPF, it is

---

[99] Stockdale, *supra* note 98. Colonel (COL) Retired (Ret.) Stockdale served on active duty in Active Guard and Reserve (AGR) status until 2008. His previous assignments include Command Judge Advocate, U.S. Army Human Resources Command.

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] AR 600-37-1986, *supra* note 76, ¶ 7-2a; *see generally id.* ch. 6, 7 (discussing the organization, procedures, and appellate authority of the Department of the Army Suitability Evaluation Board (DASEB)). Soldiers may seek collateral relief from unfair command decisions via petitions under UCMJ Art. 138, complaints to their servicing Inspector General, complaints to their Representative in Congress, or other means. *See, e.g.*, UCMJ, art. 138 (2012) (authorizing soldiers to petition commanders for redress of grievances). However, only the DASEB may direct the alteration or removal of unfavorable information in a soldier's OMPF. AR 600-37-1986, *supra* note 76, ¶ 7-2d.

presumed to be administratively correct and to have been filed pursuant to an objective decision by competent authority."[104]

In fact, there is no express standard of evaluation for making filing determinations in AR 600-37-1986. Since the 1972 inception of AR 600-37, the only standard of evaluation provided in the regulation has applied not to the assessment of unfavorable information, but to favorable personnel decisions.

> Favorable personnel decisions will be based on review of official personnel files and the knowledge and best judgments of the commander, board, or other decision making authority. Both favorable and unfavorable information regarding the individual will be considered. *Performance and potential will be weighed against available unfavorable information.*[105]

Army Regulation 600-37-1977 eliminated even this vague balancing test:

> Favorable personnel decisions will be based on review of official personnel files and the knowledge and best judgments of the commander, board, or other responsible authority. Both favorable and unfavorable information regarding the individual will be considered. *Performance and potential will be assessed based on a review of all pertinent records.*[106]

In 1986, the word "favorable" was removed and this provision morphed to cover the broad category of actions now known as "personnel management decisions":

> Personnel management decisions will be based on the following: (1) Review of official personnel file[,] (2) The knowledge and best judgment of the commander, board, or other responsible authority. (Both favorable and

---

[104] AR 600-37-1986, *supra* note 76, ¶ 7-2a. The word "objective" in paragraph 7-2a is ambiguous in that it might be construed to imply some standard of decision-making that the regulation does not actually provide. Stockdale, *supra* note 98. It would be more precise to replace the word "objective" with "unbiased."

[105] AR 600-37-1972, *supra* note 48, ¶ 2-1a (emphasis added).

[106] AR 600-37-1977, *supra* note 68, ¶ 2-1a (emphasis added).

> unfavorable information regarding the soldier concerned will be considered.)[107]

The filing of a GOMOR in a soldier's OMPF is a personnel management decision within the meaning of this provision, which not coincidentally heads the chapter titled, "Unfavorable Information in Official Personnel Files."[108] This conclusion seems further supported by the fact that AR 600-37-1986 establishes the DASEB, which is the appellate authority for GOMORs, as a "continuing board under the Director of Military Personnel Management (DMPM), [Office of the Deputy Chief of Staff for Personnel] (ODCSPER)."[109] If so, then the only standard applicable to the OMPF filing of GOMORs or any other unfavorable information is the "knowledge and best judgment" of the filing authority.[110]

Given the existence of the DASEB and the GOMOR appeal process, COL (Ret.) Stockdale's statement that a "[g]eneral [o]fficer can determine, unilaterally and without external review, that [a] reprimand be filed in a [s]oldier's permanent records" is somewhat misleading.[111] True, there is no immediate, desk-side external review of filing determinations, but the same could be said of any decision left to a commander's discretion. That the Army relies on such discretion is unsurprising; it is the Army's default position for decision-making and the engine that powers the UCMJ.[112] Too many decisions to list are left to commanders' discretion.[113] Unfortunately, not all commanders exercise their judgment the same way, which may result in disparate treatment of soldiers even within the same command.

More importantly, when we consider discretion as applied to the disciplinary process, a commander's decisions are subject to the whole range of due process protections of the U.S. Constitution and the UCMJ. On the other hand, when a commander exercises that same discretion with respect to a GOMOR and the decision whether to file it permanently in a

---

[107] AR 600-37-1986, *supra* note 76, ¶ 3-1a.

[108] *Id.* ¶ 3-1. The term "personnel management decision" is not separately defined in AR 600-37-1986.

[109] *Id*. ¶ 2-2a.

[110] *Id.* ¶ 3-1.

[111] Stockdale, *supra* note 98.

[112] *See* MCM, *supra* note 3, R.C.M. 306(a) (noting that "[e]ach commander has discretion to dispose of offenses by members of that command").

[113] *E.g.* UCMJ art. 60 (2012) (discussing action by the convening authority after conviction

soldier's OMPF, the soldier's only protection is to be as persuasive as possible in presenting his written rebuttal statement.[114]

Some might say: "But the [s]oldier still has the right to submit a rebuttal and can make his case there."[115] That is little comfort where responses to GOMORs have become formulaic, one-page, "fall-on-my-sword" memos.[116] Even if a soldier provides the expected response, local filings are simply unlikely absent something in the soldier's military record that weighs heavily in his favor, such as a combat deployment or a significant personal decoration. Practically speaking, given the common knowledge of the impact of GOMORs at promotion and other boards, filing a GOMOR in a Soldier's OMPF has the same effect as a general officer saying, "Your career is over."

The GOMOR appellate process is an inadequate failsafe.[117] Importantly, appeals are limited to Soldiers in the grade of E-6 and above, with any other appeal considered only as an exception to policy.[118] The

---

[114] AR 600-37-1986, ¶ 3-4.

[115] *Id.* ¶ 3-4b.

[116] Official (and unofficial) guidance on preparing rebuttals is readily available. *See*, *e.g.*, LEGAL ASSISTANCE OFFICE, OFFICE OF THE STAFF JUDGE ADVOCATE, XVIII AIRBORNE CORPS AND FORT BRAGG, INFORMATION PAPER—LETTERS OF REPRIMAND AND GENERAL OFFICER MEMORANDUMS OF REPRIMAND (Aug. 2012), http://www.bragg.army.mil/directorates/osja/Legal%20Assistance%20Documents/Information%20Papers/LORs%20AND%20GOMORs.pdf; LEGAL ASSISTANCE OFFICE, OFFICE OF THE STAFF JUDGE ADVOCATE, 2D INFANTRY DIV., GOMOR, http://www.2id.korea.army.mil/soldiers/pdf/lgl-svc/Memorandum-of-Reprimand-GOMOR.pdf; *Rebuttals to Letters of Reprimand*, UCMJ-DEFENDER.COM, http://www.ucmj-defender.com/practice-areas/rebuttals-to-letters-of-reprimand/ (last visited Sept. 15, 2016). Rebuttals to Air Force Letters of Reprimand (LORs) follow a similar formula. *LOR Rebuttal*, AIRFORCE WRITER, http://www.airforcewriter.com/LOR-rebuttal.htm (last visited May 20, 2016). The common, unspoken thread in all GOMOR rebuttal guidance is that rebuttals should not exceed a single page whenever possible. This assertion is based on the author's recent professional experiences as the Chief, Military Justice for the 200th Military Police Command from September 12, 2011 to July 17, 2015, and as a Legal Assistance Attorney, 101st Airborne Division and Fort Campbell, Kentucky, from June 25, 2010 to June 24, 2011.

[117] *See supra* note 103 and accompanying sources; *see* AR 600-37-1986, *supra* note 76, chs. 6, 7 (discussing the organization and scope of authority of the DASEB).

[118] AR 600-37-1986, *supra* note 76, ¶ 7-2a.

standards for appeal are also exceedingly high.[119] Potential remedies beyond appeal to DASEB are even more rarified.[120]

Army Regulation 600-37-1986 may provide commanders additional guidance with respect to filing determinations. For example, part of the stated purpose of the regulation is to "[e]nsure that the best interests of both the Army and the soldiers are served by authorizing unfavorable information to be placed in and, when appropriate, removed from official personnel files."[121]

This vague statement is problematic. First, this is necessarily an expression of best interest as viewed from the commanders' perspective. A soldier would hardly concede that it is ever in his own best interests for a GOMOR to be filed in his OMPF. Further, to say that commanders should make filing determinations in the best interests of the Army is redundant. That is the standard for all commanders' decision-making; it

---

[119] *Id.* (noting that the "burden of proof rests with the individual concerned to provide evidence of a clear and convincing nature that the document is untrue or unjust, in whole or in part, thereby warranting its alteration or removal from the OMPF"); *id.* ¶ 7-2b (requiring "substantial evidence" that the "intended purpose [of a reprimand] has been served and that [its] transfer [from the performance portion to the restricted portion of the soldier's OMPF] would be in the best interest of the Army").

[120] *See Appealing Unfavorable Information in Military Records*, PENTAGON.MIL, http://arba.army.pentagon.mil/Unfavorable.cfm (last visited Sept. 15, 2016).

> If, after exhausting your appeal to the DASEB, you still feel that there is an error or injustice in the information in your military file, you can apply to the Army Board for Correction of Military Records on a [Department of Defense] (DD) Form 149 for removal of unfavorable information from your file or transfer from the performance section to the restricted section.

Id. "The Army Board for Correction of Military Records (ABCMR) is the highest level of administrative review within the Department of the Army with the mission to correct errors in or remove injustices from Army military records." *The Army Board for Correction of Military Records*, PENTAGON.MIL, http://arba.army.pentagon.mil/abcmr-overview.cfm (last visited Sept. 15, 2016). Soldiers may appeal decisions of the ABCMR to the federal courts at their own expense as an appeal of a final agency action under the Administrative Procedure Act (APA). The Administrative Procedure Act, 5 U.S.C. §§ 701–708 (2015) Judicial review under the APA is limited to compelling "agency action unlawfully withheld or unreasonably delayed," or overturning action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," unconstitutional, or in violation of an applicable statute or agency procedural requirement. 5 U.S.C. § 706. "Due account shall be taken of the rule of prejudicial error." *Id.*

[121] AR 600-37-1986, *supra* note 76, ¶ 1-1a

is difficult to conceive a situation in which a commander would say, "I will do X, even if the Army suffers as a result."

Along with the best interests of the Army, the statement of objectives in AR 600-37-1986 is relevant.[122] The objectives of AR 600-37-1986 are:

> a. Apply fair and just standards to all soldiers.
>
> b. Protect the rights of individual soldiers and, at the same time, permit the Army to consider all available[,] relevant information when choosing soldiers for positions of leadership, trust, and responsibility.
> c. Prevent adverse personnel action based on unsubstantiated derogatory information or mistaken identity.
>
> d. Provide a means of correcting injustices if they occur.
>
> e. Ensure that soldiers of poor moral character are not continued in the Service or advanced to positions of leadership, trust, and responsibility.[123]

The statement of objectives contains several concepts that bear further discussion. With respect to fair standards and unsubstantiated information, COL (Ret.) Stockdale observes that the "Army requires no standard of proof for a reprimand to be filed, permanently, in a [s]oldier's official military records."[124] However, there is a critical distinction here. We have established that a commander's standard of evaluation in making a filing determination is the exercise of the commander's best judgment, informed by the best needs of the Army and the soldier.[125] What standard of proof or evidentiary standard applies to the factual matter *underlying* a reprimand is a completely separate question.[126]

In fact, AR 600-37-1986 contains an evidentiary standard for underlying factual matters, although it is only partially articulated. Part of

---

[122] *Id.* ¶ 1-4; *see also* AR 600-37-1977, *supra* note 68, ¶ 1-3, *and* AR 600-37-1972, *supra* note 48, ¶ 1-3.
[123] AR 600-37-1986, *supra* note 76, ¶ 1-4.
[124] Stockdale, *supra* note 98.
[125] AR 600-37-1986, ¶ 3-1; *see generally supra* notes 102–10 and accompanying text.
[126] Colonel (Ret.) Stockdale's reference to an "objective decision by competent authority" only clouds the issue. Stockdale, *supra* note 98.

the regulation's stated purpose is to "[e]nsure that unfavorable information that is unsubstantiated, irrelevant, untimely, or incomplete is not filed in individual official personnel files."[127] We may infer, then, that any unfavorable information that is ultimately filed should be substantiated, relevant, timely, and complete. Plainly, this is the case, since AR 600-37-1986 imports the familiar Privacy Act of 1974 standard: "Unfavorable information filed in official personnel files must meet Privacy Act standards of accuracy, relevance, timeliness, and completeness."[128]

Relevance seems intuitively necessary and understandable, as do timeliness and completeness.[129] However, what it means precisely for unfavorable information to be "substantiated" is not readily apparent from the regulation. Accuracy under the Privacy Act and substantiation are not necessarily the same. Substantiation is not defined in AR 600-37-1986, at least not in the sense of the clear criminal standard of beyond a reasonable doubt or the administrative preponderance of the evidence standard.[130] We are left to conclude that the requirement for substantiation of unfavorable information must incorporate by reference whatever

---

[127] AR 600-37-1986, *supra* note 76, ¶ 1-1a(2).

[128] *Id.* ¶ 3-2b; *see* The Privacy Act of 1974, 5 U.S.C. § 552a(d)(2)(B)(i)) (2015) (requiring each agency that maintains a system of records to permit any individual to request amendment of any record pertaining to that individual and to promptly either correct "any portion thereof which the individual believes is not accurate, relevant, timely, or complete" or explain the agency's reasons for refusing the request for amendment). The Privacy Act standard was first adopted in AR 600-37-1977. *See* AR 600-37-1977, *supra* note 68, ¶ 2-1b ("Unfavorable information filed in official personnel files must meet privacy act standards of accuracy, relevancy, timeliness, and completeness.").

[129] AR 600-37-1986, *supra* note 76, ¶ 3-4b(1)(a) (allowing referral to the recipient of only the "applicable portions of investigations, reports, and other documents" underlying a reprimand, "providing the recipient was not previously provided an opportunity to respond to information reflected in that documentation"). This may generate friction, as soldiers may argue that the imposing authority is attempting to "hide the ball." The better practice is to provide the recipient with complete supporting documents that have been appropriately redacted for personal information of third parties. *See*, *e.g.*, U.S. DEP'T OF ARMY, REG. 340-21, THE ARMY PRIVACY PROGRAM para. 2-6 (5 July 1985) (noting that "personal data such as [social security number] and home address of a third party in the data subject's record normally do not pertain to the data subject and therefore may be withheld").

[130] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 918(c) (2015) (requiring proof beyond a reasonable doubt to support a finding of guilty at a court-martial); *see* AR 15-6, *supra* note 88 (requiring findings of administrative investigations and boards of inquiry to be "supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion." This is commonly referred to as the "preponderance of the evidence" standard.

evidentiary standard applied to the underlying factual information at the time it was acquired.[131]

This is simple enough where the facts at issue are acquired in an administrative investigation. Such facts must be established by a preponderance of the evidence in order to be approved by the appointing authority, and so may be deemed substantiated for purposes of AR 600-37-1986.[132] Unfortunately, this model tends to collapse when applied to evidence acquired in the course of a criminal investigation. If evidence is used in a prosecution (whether military or civilian) that results in a finding of guilt, it has been tested against the reasonable doubt standard with all of the due process protections of the criminal justice system. It would be difficult to argue that such evidence is not substantiated for purposes of a reprimand.[133]

However, an evidentiary problem arises when criminal evidence is gathered but not used to prosecute, or there is a prosecution but the soldier is acquitted. As it stands, subject to the substantiation requirement, 600-37-1986 does not restrict the source of information upon which reprimands may be predicated. It therefore allows for the imposition of administrative reprimands based on evidence used in a criminal prosecution in which a soldier has been acquitted.[134]

Acquittal raises a unique issue. Army Regulation 600-37-1986 allows imposing authorities to use information acquired in criminal investigations—which would not independently satisfy and has not been tested against the beyond a reasonable doubt standard—as the basis for

---

[131] Anonymous tips illustrate this point. "Anonymous communications will not be filed in a soldier's MPRJ . . . [or] OMPF . . . unless, after investigation or inquiry, they are found to be true, relevant, and fully proven or supported." AR 600-37-1986, *supra* note 76, ¶ 3-5. The applicable evidentiary standard must necessarily be that of the investigation or inquiry. For administrative investigations, this is the preponderance standard. AR 15-6, *supra* note 88, ¶ 3-10b.

[132] AR 15-6, *supra* note 88, ¶ 3-10b.

[133] Whether an administrative reprimand is necessary in the event of a criminal conviction is a larger issue. Evidence of criminal convictions is expressly excepted from the referral requirement, and OMPF filing is authorized without additional notification to the soldier. *See* AR 600-37-1986, *supra* note 76, ¶ 3-3a, d (authorizing OMPF filing without further referral of "[r]ecords of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice" and "[r]ecords of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities"). Under such circumstances, a reprimand not only smacks of piling on, it is plainly unnecessary in order to document misconduct.

[134] Such prosecution may be civilian or military.

potentially career-ending reprimands.[135] Indeed, in the absence of an available evidentiary standard to import, it seems the only applicable standard in that situation is the imposing authority's best judgment.[136] This may be a difficult pill for a soldier to swallow, considering that the prosecution has failed to establish guilt beyond a reasonable doubt in a formal judicial proceeding.[137] That is not to say that it is impossible to substantiate such evidence; sworn statements, certified records, and authenticated laboratory reports, for example, may all fairly be deemed "substantiated."

Significantly, however, the Army uniformly prohibits the administrative separation of soldiers based on "conduct that has been the subject of judicial proceedings that resulted in an acquittal."[138] The

---

[135] Stockdale, *supra* note 98. It is disingenuous to claim that such evidence must have at least been supported by a finding of probable cause. Even if probable cause was found in a particular case, probable cause does not rise to the level of a preponderance of the evidence and so does not represent a degree of reliability equivalent to that provided by evidence assessed in an administrative investigation. Instead, it is the lesser "reasonable belief" standard. *Compare* AR 15-6, *supra* note 88, ¶ 3-10b (describing the administrative preponderance standard) *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 315(f)(2) (2015) (discussing the probable cause standard in the context of search authorizations). *See also United States v. $242,484.00*, 351 F.3d 499, 504 (11th Cir. 2003) (observing that the "probable-cause standard demands less evidence than the preponderance-of-the-evidence standard").

[136] AR 600-37-1986, *supra* note 76, ¶ 2-2a.

[137] *See, e.g.*, MCM, *supra* note 3, R.C.M. 917(d) (authorizing a finding of not guilty only "in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses").

[138] U.S. DEP'T OF ARMY, REG. 600-8-24, OFFICER TRANSFERS AND DISCHARGES ¶ 4-4a (12 Apr. 2006) (RAR 13 Sept. 2011).

> An [Active Army] officer [or an officer of the Army National Guard of the United States or the U.S. Army Reserve serving on active duty or on active duty for training for a period in excess of 90 days] will not be considered for involuntary separation because of conduct that has been the subject of judicial proceedings that resulted in an acquittal.

Id. See also U.S. DEP'T OF ARMY, REG. 135-175, OFFICER TRANSFERS AND DISCHARGES ¶ 2-5a (28 Feb. 1987) (RAR 4 Aug. 2011).

> No [Troop Program Unit] (TPU) officer [of the Army National Guard of the United States or the U.S. Army Reserve] will be considered for involuntary separation . . . because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect.

consequences of administrative separation are severe, and may include loss of benefits, reduction in grade, and a characterization of discharge of other than honorable (OTH) upon discharge or separation.[139] However, those consequences are balanced against significant due process protections. Chief among those protections is that evidence used in administrative separations must meet the preponderance of the evidence standard.[140]

Thus, the Army prohibits evidence of conduct that results in an acquittal in its more severe administrative separation proceedings, with all of their attendant due process protections. How, then, could the use of such evidence to support reprimands, which have much more limited due

---

Id.; U.S. DEP'T OF ARMY, REG. 635-200, ACTIVE DUTY ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 1-17b(1) (6 June 2006) (RAR 6 Sept. 2011) ("No Soldier will be considered for administrative separation because of conduct that . . . [h]as been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof."). *Cf.* U.S. DEP'T OF ARMY, REG. 135-178, ENLISTED ADMINISTRATIVE SEPARATIONS ¶ 2-3a(1) (18 Mar. 2014) [hereinafter AR 135-178]. The regulation prohibits administrative separation of TPU Reserve Component enlisted soldiers based on:

> Conduct that has been the subject of judicial proceedings resulting in an acquittal or action having the effect thereof, unless: (a) "such action is based on a judicial determination not going to the guilt or innocence of the respondent;" or (b) "[w]hen the judicial proceeding was conducted in a State or foreign court and the separation is approved by HQDA, ARNGUS, NGR–ARP/OCAR, DAAR (para[.] 1–12, of this regulation);" or (c) "[w]hen acquittal from the judicial proceedings was based on a finding of not guilty only by reason of lack of mental responsibility. A [s]oldier in this category normally shall be separated under Secretarial plenary authority (chap[.] 14, of this regulation) unless separation for disability is appropriate.

Id.

[139] An extensive discussion of the administrative separation process is beyond the scope of this article. *See supra* note 138 and accompanying sources (identifying the four primary Army administrative separation regulations).

[140] *See* AR 600-8-24, *supra* note 138, ¶ 4-6a (requiring the Government "to establish, by preponderance of the evidence, that the officer has failed to maintain the standards desired for their grade and branch or that the officer's Secret-level security clearance has been permanently denied or revoked by appropriate authorities"); AR 135-175, *supra* note 138, ¶ 2-20a(1) (requiring the Government "to establish by a preponderance of evidence that officers have failed to maintain established standards for grade and branch or that their conduct has been prejudicial to National security"); AR 635-200, *supra* note 138, ¶ 2-12a(1) (requiring boards of inquiry to determine "whether each allegation in the notice of proposed separation is supported by a preponderance of the evidence"); AR 135-178, *supra* note 138, ¶ 3-18h(2) (applying the same as to TPU Reserve Component enlisted soldiers).

process protections and lack a clear evidentiary standard, possibly be justified?[141]

The greater question is not whether a reprimand may be imposed based on such evidence, but whether it is fair to the soldier to do so. "Ironically, these reprimands state the crime, and the article from the Uniform Code of Military Justice, but the soldier is afforded virtually none of the safeguards of the Uniform Code of Military Justice (UCMJ) they ostensibly violated."[142] This is a persuasive argument, particularly where, as we shall see, a GOMOR is not necessary in order to file information (even information as detrimental as this) in a soldier's OMPF.

2. Mechanisms

Another of the stated objectives of AR 600-37-1986 is to ""[p]rotect the rights of individual soldiers and, at the same time, permit the Army to consider all available relevant information when choosing soldiers for positions of leadership, trust, and responsibility."[143] How is relevant information contained in the OMPF made available to Army leaders in order to guide these choices? In modern Army practice, that is the purpose of the Interactive Personnel Electronic Records Management System (iPERMS).[144] Before computerized recordkeeping, the Army's only centralized record system was maintained entirely on paper.[145] At that time—which includes the first sixteen of the thirty years since the inception of AR 600-37-1986, as iPERMS did not go into general operation until October 1, 2002—the filing of a GOMOR in a soldier's OMPF served the incidental secondary purpose of preserving records of soldier misconduct.

However, it is critically important to understand that, although the issuance and filing of GOMORs have become matters of routine Army practice, GOMORs themselves have never actually been necessary in order to preserve such records or to allow permanent filings. On the

---

[141] Unfortunately, nothing restricts a Department of the Army promotion board from examining a GOMOR filed in a soldier's OMPF based on conduct that could not serve as the predicate for administrative separation.

[142] Stockdale, *supra* note 98.

[143] AR 600-37-1986, *supra* note 76, ¶ 1-4b.

[144] *See supra* note 10 and accompanying sources (discussing the implementation of iPERMS).

[145] *Id.*

contrary, every applicable regulation since 1955 has authorized permanent filing of *any* unfavorable information *so long as* it is first referred to the soldier and the soldier is provided an opportunity to comment.[146] In a telephonic interview, Mr. Jan Serene, Senior Legal Advisor to the Army Review Boards Agency (ARBA), observed that although OMPF filing authority for unfavorable information certainly does exist as described, it is rarely used.[147] According to Mr. Serene, despite this express authority and for no discernable reason, GOMORs have become the default mechanism for transmittal of unfavorable information for OMPF filing.[148]

Army regulation 600-37-1986 goes a step further and exempts certain unfavorable information from the referral process:

> a. Records of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15. (See AR 27–10 and AR 640–10.)
>
> b. Proceedings of boards of officers, if it is clear that the recipient has been given a chance to present evidence and cross-examine witnesses in his or her own behalf.
>
> c. Completed investigative reports. These include criminal investigation reports (or authenticated extracts) that have resulted in elimination or disciplinary action against the person concerned. When it is not practical to include the entire report (or an extract), the investigative report will be referenced.
>
> d. Records of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities. However, records consisting solely of minor traffic convictions are not to be filed in the OMPF.

---

[146] *See* AR 640-98, *supra* note 39, ¶¶ 4, 5d (allowing permanent filing of unfavorable information subject to referral requirement, except administrative reprimands themselves); AR 600-37-1972, *supra* note 48, ¶ 2-6 (allowing permanent filing of unfavorable information subject to referral requirement,); AR 600-37-1977, *supra* note 68, ¶ 2-6 (same); AR 600-37-1986, *supra* note 76, ¶ 3-6 (same).

[147] Telephone interview with Mr. Jan Serene, Senior Legal Advisor, Army Review Boards Agency, Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs) (Nov. 10, 2015).

[148] *Id*.

> e. Officer and enlisted evaluation reports. Administrative processing and the appeal of evaluation instruments are governed by AR 623–1, AR 623–105, and AR 623–205. Filing of evaluation instruments is governed by AR 640–10.
>
> f. Other unfavorable information of which the recipient had prior official knowledge (as prescribed by para 3–6) and an adequate chance to refute. The notation "AR 600–37 complied with" will be entered below the filing authority on such unfavorable information.[149]

Each category of exempt information shares the common characteristic of being the result of an underlying procedure with its own inherent due process protections. Even the catch-all provision in paragraph 3-3f requires prior notification and an opportunity for rebuttal.[150]

Authority to direct OMPF filing of matters other than reprimands is governed by AR 600-8-104, Army Military Human Resource Records Management.[151] Significantly, this regulation grants iPERMS access to "Commanders at all levels (includ[ing] brigade and battalion S1s, [unit administrators], Reserve personnel action center[s], and [human resource] providers)" as well as "G–1s and G–1 sergeants major" for purposes of "[p]ersonnel management, personnel operation, and administration requiring referral to the OMPF."[152]

Plainly, numerous personnel within every Army command structure are authorized to upload unfavorable information to iPERMS after referral. Uploads are still subject to the requirements of AR 600-37-1986,

---

[149] AR 600-37-1986, *supra* note 76, ¶¶ 3-3a-f. "Internal staff actions and working papers within and among personnel management offices and personnel decision makers at HQDA" are also exempted from referral. *Id.* ¶ 3-3g. Although commanders have no direct control over such documents, whether they might include mention of an OMPF-filed GOMOR is an open question.

[150] *Id.* ¶ 3-3f.

[151] *See* U.S. DEP'T OF ARMY, REG. 600-8-104, ARMY MILITARY HUMAN RESOURCE RECORDS MANAGEMENT tbl. 2-1 (7 Apr. 2014) (identifying both personnel authorized to access iPerms and authorized purposes for access).

[152] *Id.* Access for the personnel identified includes the performance folder without evaluations, as well as the service, deployment/mobilization, and administrative folders for all "units within unit identification code [UIC] Structure." *Id.* This is broad access, but does not include, for example, the evaluation or health/dental folders. *Id.*

however, and should be limited to "indications of substandard leadership ability, promotion potential, morals, and integrity" or "[o]ther unfavorable character traits of a permanent nature."[153] Such filings are expressly intended to be available to "personnel managers and selection board members for use in making such personnel decisions as described in paragraph 3–1b," which include "selecting soldiers for positions of public trust and responsibility, or vesting such persons with authority over others."[154]

Given how readily unfavorable information upon which GOMORs are based may be filed in a soldier's OMPF, the role of the GOMOR itself becomes even less clear. Further, despite its title, AR 600-37-1986 is not the sole mechanism for the preservation and transmittal of unfavorable information to Army decision-making authorities. Evaluations are an ideal medium for preserving unfavorable information. The Army recently moved to a consolidated online personnel performance evaluation application, the Evaluation Entry System (EES), making this forum even more accessible.[155]

Adverse comments on an evaluation report fulfill the same function as the directed filing of a reprimand. They preserve a record of soldier misconduct for later review by promotion and selection authorities.[156] Indeed, Army regulations specifically require that misconduct be recorded in evaluations.[157] Like reprimands, evaluations also preserve the rating chain's opinions about the effect of misconduct on the soldier's potential

---

[153] AR 600-37-1986, *supra* note 76, ¶ 3-2c.

[154] *Id.* ¶¶ 3-1b, 3-2c.

[155] U.S. ARMY HUMAN RESOURCES COMMAND EVALUATION ENTRY SYSTEM, https://evaluations.hrc.army.mil/ (last visited May 18, 2016) [hereinafter EES]; *see* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM para. 3-33b(1) (4 Nov. 2015, eff. 1 Jan 2016) [hereinafter AR 623-3] (directing use of the EES for the processing of all evaluation reports).

[156] *See* AR 623-3, *supra* note 155, ¶ 1-14b ("Evaluation reports will serve as the primary source of information for officer and NCO personnel management decisions and will serve as a guide for the Soldier's performance and development, enhance the accomplishment of the organization's mission, and provide additional information to the rating chain."); *see also* U.S. DEP'T OF ARMY, PAM. 623-3, ARMY EVALUATION SYSTEM para 2-2a (10 Nov. 2015) [hereinafter DA PAM 623-3] ("The DA Form 67-10 series allows rating officials to provide HQDA with performance and potential assessments of each rated officer for HQDA selection board processes. It also provides valuable information for use by successive members of the rating chain, [and] emphasizes and reinforces professionalism.").

[157] *See* AR 623-3, *supra* note 155, ¶ 3-2f (directing that "evaluations will cover failures as well as achievements").

for future service, with more immediate impact and without the artificial imprimatur of a general officer's signature.

Honesty in evaluations is a recurring theme throughout Army Regulation 623-3, which governs the Evaluation Reporting System.[158] Removal of GOMORs from the equation—particularly in the case of sex-based offenses, where adverse comments on evaluations are now mandatory—would serve as an additional forcing function for candor in the evaluation process.[159] This would have the significant benefit of counteracting over-inflated ratings generally.[160]

---

[158] *See, e.g.*, *id.* ¶ 2-12f (directing the rater to "[p]rovide an honest assessment of the rated [s]oldier's performance and potential"); AR 623-3, *supra* note 155, ¶ 3-2f.

> Rating officials will prepare evaluation reports that are forthright, accurate, and as complete as possible within the space limitations of the form. This responsibility is vital to the long-range success of the Army's mission. With due regard for the rated [s]oldier's current rank or grade, experience, and military schooling, evaluations will cover failures as well as achievements. Evaluations normally will not be based on a few isolated minor incidents. Rating officials have a responsibility to balance their obligations to the rated Soldier with their obligations to the Army. Rating officials will make honest and fair evaluations of [s]oldiers under their supervision. On the one hand, this evaluation will give full credit to the rated [s]oldier for their achievements and potential. On the other hand, rating officials are obligated to the Army to be honest and discriminating in their evaluations so Army leaders, [Headquarters, Department of the Army] selection boards, and career managers can make intelligent decisions.

Id.

[159] *See* AR 623-3, *supra* note 155, ¶¶ 2-12j, k (requiring raters to "[a]ssess the rated [s]oldier's performance in fostering a climate of dignity and respect and adhering to the requirements of the Sexual Harassment/Assault Response and Prevention (SHARP) Program" and "[d]ocument any substantiated finding, in an Army or DOD investigation or inquiry" that a rated soldier either committed, failed to report, failed to respond to, or retaliated against any person "making a complaint or report of sexual harassment or sexual assault."); *see also* U.S. DEP'T OF ARMY, DIR. 2013-20, ASSESSING OFFICERS AND NONCOMMISSIONED OFFICERS ON FOSTERING CLIMATES OF DIGNITY AND RESPECT AND ON ADHERING TO THE SEXUAL HARASSMENT/ASSAULT RESPONSE AND PREVENTION PROGRAM (27 Sept. 2013) (directing changes to the Army Evaluation System).

[160] *See, e.g.*, Jim Tice, *View the Army's Tough, New NCOER*, ARMY TIMES (Oct. 9, 2014), http://www.armytimes.com/story/military/careers/army/2014/10/09/view-the-armys-tough-new-ncoer/16985971/ (observing that when "everyone is supposedly doing a fantastic job, [it is] difficult for selection boards to determine who the true standouts are for promotion").

Another recent Army mechanism for the preservation and transmittal of unfavorable information is the Adverse Information Pilot Program (AIPP) database. Then-Secretary of the Army John M. McHugh established the AIPP to conform Army practice to existing law with respect to promotion selection boards for grades above colonel (O-6).[161] The purpose of the AIPP is to identify "'credible information of an adverse nature' documented in command-directed investigations or inquiries related to field grade officers, centrally maintain summaries of this adverse information and provide access to these adverse summaries prior to convening brigadier general and major general promotion selection boards (PSBs)."[162] Qualifying adverse information will be added to the AIPP database for all field-grade officers, major (O-4) through colonel (O-6), not only for those officers eligible for general officer (GO) PSBs.[163]

Importantly, Department of Defense Instruction (DoDI) 1320.04 defines adverse information to include:

> [A]ny substantiated adverse finding or conclusion from an officially documented investigation or inquiry or any other credible information of an adverse nature. *To be credible, the information must be resolved and supported by a preponderance of the evidence.* To be adverse, the information must be derogatory, unfavorable, or of a nature that reflects clearly unacceptable conduct, integrity, or judgment on the part of the individual."[164]

The DoD's adoption of the preponderance of the evidence standard as the foundation for evidentiary credibility in the AIPP highlights the thirty-year absence of such a standard from the GOMOR process.

Commanders are directed to work with their servicing staff judge advocates (SJAs) to identify credible adverse information documented in

---

[161] Memorandum from Sec'y of Army to Principal Officials of Headquarters, Dep't of Army et al., subject: Pilot Program for Providing Adverse Information to Brigadier General and Major General Promotion Selection Boards (21 July 2015) [hereinafter AIPP Memorandum].

[162] *Id*. ¶ 2.

[163] *Id.* Encl., ¶ 4c.

[164] U.S. DEP'T OF DEF., INSTR. 1320.04, MILITARY OFFICER ACTIONS REQUIRING PRESIDENTIAL, SECRETARY OF DEFENSE, OR UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS APPROVAL OR SENATE CONFIRMATION encl. 4, para. 1.a (3 Jan. 2014) [hereinafter DODI 1320.04] (emphasis added).

command investigations and inquiries.[165] This requires confirmation of the credibility of the underlying adverse information.[166] Unlike GOMORs, substantiation of credibility is much cleaner in the AIPP, given DoD's adoption of the preponderance of the evidence standard.[167]

Equally importantly, entry of adverse information into the AIPP triggers an additional legal review of the command's summary of the documented adverse information.

> If an officer is identified as having adverse information in this new application, the Office of the Judge Advocate General (OTJAG) and the Office of the General Counsel (OGC) will provide a legal review of the summary submitted by the command. GOMO [the General Officer Management Office] will then refer the summary to the officer. The summary of adverse information and the officer's response, if any, will then be provided to the BG and MG PSBs.[168]

This high-level, independent legal review stands in stark contrast to the absence of a legal review requirement for GOMORs in AR 600-37-1986.[169] The AIPP provides significantly greater due process protection to soldiers than the single referral for comment authorized for GOMORs, for which no legal review is required.

---

[165] AIPP Memorandum, *supra* note 161, Encl., ¶ 3.

[166] *See* 10 U.S.C. § 615(a)(3) (2006) (requiring "any credible information of an adverse nature, including any substantiated adverse finding or conclusion from an officially documented investigation or inquiry" to be provided to the selection board).

[167] DOD INSTRUCTION 1320.04, *supra* note 164.

[168] AIPP Memorandum, *supra* note 161, Encl., ¶ 3.

[169] AR 600-37-1986, *supra* note 76, ¶ 3-4; AIPP Memorandum, *supra* note 161, Encl., ¶ 3. The scope of the required legal review is not entirely clear from the pilot program's description. Commanders must "ensure that 'credible adverse information' documented in an official investigation or inquiry is properly recorded." *Id.* ¶ 4c. The Office of the General Counsel (OGC) has the lead in conducting the legal reviews, with assistance from the Office of The Judge Advocate General (OTJAG) as required. *Id.* ¶¶ 4d, g. Guidance from OTJAG's Administrative Law Division indicates that the legal review will determine whether the "adverse summary accurately reflects the findings of the investigation and meets the definition of adverse information." ADMINISTRATIVE LAW DIVISION, OFFICE OF THE JUDGE ADVOCATE GENERAL, U.S. ARMY, INFORMATION PAPER: ADVERSE INFORMATION PILOT PROGRAM, para. 4d (6 Aug. 2015) [hereinafter AIPP Information Paper]. Department of Defense Instruction 1320.04 defines adverse information. DODI 1320.04, *supra* note 164.

The Adverse Information Summary is based on the responsible commander's input into the AIPP database and is then generated by the same database. The resulting summary must be referred to the subject officer for review and an opportunity for rebuttal.[170] The summary is identical to a GOMOR in the sense that it consolidates adverse information into a brief "deliverable." Army practitioners will observe that the system-generated summary not only *looks* like a GOMOR, it even contains some of the same structural elements, including substantiated findings, a synopsis of misconduct, and the imposing commander's comments.[171] This evinces that GOMORs have become redundant for field-grade officers following the implementation of the AIPP.

Although still in its formative stages, the ultimate expansion of the AIPP to encompass PSBs (as opposed to merely recording adverse information) for all field-grade officers—or even for junior officers and senior noncommissioned officers—would be unsurprising. Even if it is not expanded, the AIPP will still document adverse information that arises in the field-grade ranks with the express purpose of making that information available to general officer PSBs. This makes GOMORs based on such information redundant for field-grade officers, particularly in light of the AIPP's clear evidentiary standard and heightened procedural due process protections.

B. The Way Ahead

1. Criticisms

Colonel (Ret.) Stockdale suggests multiple fixes for the problem of runaway GOMORs, some of which are clearly appropriate and defensible.[172] However, by no means does this article endorse wholesale adoption of all of COL (Ret.) Stockdale's recommendations. To the contrary, he includes at least two suggestions that are clearly unworkable, one of which is radically divergent from settled principles of military justice.

---

[170] A sample AIPP Database Summary is attached as app. B. Colonel Karen Carlisle, Adverse Information, at slide 12 (WWCLE 2015) (unpublished PowerPoint presentation) (on file with author).

[171] *See infra* app. B.

[172] Stockdale, *supra* note 98.

First, he recommends that if a soldier receives a reprimand intended for OMPF filing, an alternative offer of nonjudicial punishment under UCMJ Article 15 should be required of the command.[173] His stated goal is for the recipient to "turn down" the nonjudicial punishment and force a court-martial in order to access due process in a confrontational forum.[174] However, this conflates acceptance of nonjudicial punishment with the collateral abandonment of the opportunity to challenge the evidence. To the contrary, soldiers who accept nonjudicial punishment are fully entitled to "[p]resent matters in defense, extenuation, and mitigation orally, or in writing, or both," and to have favorable (or even adverse) witnesses present if their statements would be relevant and they are reasonably available.[175]

In any case, it would be paradoxical to require the government to prove beyond a reasonable doubt facts upon which it does not intend to predicate criminal liability. It would also elevate proof of fact far above the preponderance standard, which applies in even the most contentious administrative separation actions before boards of inquiry with opposing counsel present. Most importantly, this proposal would impermissibly invade commanders' discretion with respect to the disposition of offenses under the UCMJ.[176]

Next, COL (Ret.) Stockdale recommends that all reprimands "directed for [OMPF] filing" should be reviewed by The Judge Advocate General (TJAG) and, when "questionable, inappropriate, or legally insufficient reprimands come to TJAG's attention, TJAG should personally contact [the imposing] General Officer."[177] Although no statistics are available to determine the number of GOMORs directed for OMPF filing annually, the GOMOR process is so ubiquitous that actual filings must conservatively number in the hundreds, if not more. Automatic legal review at TJAG's level of every GOMOR directed for OMPF filing throughout the Army

---

[173] *Id*.

[174] *Id.* Demanding trial by court-martial is colloquially known as turning down an Article 15, and is a soldier's right; however, if the solider is subsequently found guilty, he will not only have a conviction on his record, but also face a wide range of potential punitive actions, including elimination from the service.

[175] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. V, ¶¶ 4c(1)(E), (F) (2012) [hereinafter MCM].

[176] Stockdale, *supra* note 98; MCM, *supra* note 175, R.C.M. 306.

[177] Stockdale, *supra* note 98.

would be a practical impossibility.[178] In any event, because significant misconduct will often result in a GOMOR under the current Army mindset, the OGC-level legal review required by the AIPP should lay to rest most concerns about legal insufficiency, at least with respect to field-grade officers.[179]

Finally, COL (Ret.) Stockdale suggests that the "entire 'reprimand mill' needs revamping":

> Typically, an investigating officer is appointed to look into alleged misconduct. After a few weeks or months, he produces a report with "findings and recommendations." The vast majority of these investigating officers have never conducted an investigation in their lives. Rarely do they have any investigative training whatsoever. They are first instructed to meet with the servicing Staff Judge Advocate (SJA) (or, actually, a junior Judge Advocate in the SJA office). The JA instructs them how to take "sworn statements"; "what evidence to look for"; "who to interview"; etc. Note: the SJA works for the commander, who appointed this investigating officer. The commander, his SJA, and now the investigating officer are all on the same prosecutorial team. Is this fair to the [s]oldier? No. Add to that, the investigating officer is typically in the commander's chain of command and is going to receive his [e]valuation [r]eport either from that commander directly, or from the commander's chain of command. Everyone wants to please the commander and get a good [e]valuation and get promoted. Often, the investigating officer simply looks for, and finds, whatever evidence will justify his having been appointed to look into the matter in the first place. Ask yourself, under these dynamics, what are the chances for a fair and impartial

---

[178] However, this article does support amending AR 600-37-1986 to require legal review of proposed GOMORs and their supporting evidence at the local SJA level before they are imposed. *See infra* sect. B2 for further discussion.

[179] *See supra* note 169 and accompanying sources. The existing GOMOR appellate process via DASEB remains in place. *See supra* note 101 and accompanying sources. That process, in tandem with the proposed mandatory local legal review, should sufficiently address concerns about questionable or inappropriate reprimands. *See infra* app. C (describing the proposed legal review process).

> investigation? The answer should be clear: slim to none.[180]

It is unreasonable to suggest that commanders do not take their duty to appoint investigating officers (IOs) seriously.[181] It is also unreasonable to imply universal collusion among IOs, SJAs, and their staffs to ensure that commanders receive only pleasing reports of investigation, thereby ensuring good evaluations all around. To the contrary, judge advocates take their roles as honest brokers—who maintain the integrity of the investigative process—as seriously as commanders do.[182]

Ensuring the competence and independence of IOs and eliminating conflicts of interest are laudable goals.[183] However, a supportive command climate, scrupulous IO selection, and proactive legal support from the servicing SJA's office will do more to meet those goals than arbitrarily designating IOs from outside the appointing authority's chain of command.[184] Nor would it be possible to appoint officers detailed as Inspectors General (IGs) to serve as IOs.[185] IGs are exempt by regulation from additional duty appointment as IOs.[186]

2. Proposal

A general overhaul of AR 600-37-1986, which has not been updated in thirty years, is essential.[187] However, as we have seen, COL (Ret.) Stockdale's approach is unpalatable, if not unworkable. This section

---

[180] Stockdale, *supra* note 98.

[181] *See* AR 15-6, *supra* note 88, ¶ 2-1c (directing that investigating officers (IOs) "shall be those persons who, in the opinion of the appointing authority, are best qualified for the duty by reason of their education, training, experience, length of service and temperament").

[182] *Id.* ¶ 2-3b (discussing the legal review process for administrative investigations).

[183] Stockdale, *supra* note 98.

[184] *Id*. It may be proper in certain cases for an IO to be appointed from outside the chain of command, but only if such a step is required in the best judgment of the appointing authority based on the facts and circumstances at hand. *See* AR 15-6, *supra* note 88 (describing the requirements for appointment of an IO).

[185] Stockdale, *supra* note 98.

[186] *See* U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES para. 2-7a(2) (29 Nov. 2010) (RAR 3 July 2012) (prohibiting appointment of IG personnel as IOs under "AR 15-6, or any other regulation providing for the appointment of investigating officers or members of administrative separation boards"). Inspector General personnel "must not perform duties that might interfere with their status as fair, impartial fact-finders and confidants within the command." *Id.* ¶ 2-7a.

[187] *See infra* app. C for a proposed update to AR 600-37-1986.

proposes a more balanced and accessible solution, which involves a fundamental shift away from reprimands as part of routine Army practice.

Given the well-known and severe consequences of permanent filing, the Army should require that *all* unfavorable information intended for OMPF filing at any level be supported by a preponderance of the evidence, even if a reprimand is not attached.[188] The Air Force has already adopted the preponderance standard for its letters of reprimand, but requires only substantiation for any other adverse information.[189] For the Army, merely to do the same would be insufficient. It would not significantly curb the overuse of GOMORs, which is the Army's main challenge.

The Army should require a written legal review, at the local level, of any reprimand or other unfavorable information proposed for OMPF filing. In the legal review, the servicing judge advocate should confirm that the underlying factual matter has been proven by a preponderance of the evidence.[190] There is nothing novel or particularly resource-intensive about this requirement. It is actually much less rigorous than the in-depth legal reviews the Army has required for years for administrative investigations.[191]

---

[188] *See infra* app. C. Self-authenticating unfavorable information, such as matters exempt from the referral process in AR 600-37-1986 would be deemed to satisfy the preponderance standard unless the servicing judge advocate finds otherwise. AR 600-37-1986, *supra* note 76, ¶ 3-3.

[189] *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2907, UNFAVORABLE INFORMATION FILE (UIF) PROGRAM, ¶ 4.1.3 (26 Nov. 2014) (AIR FORCE INSTR. 36-2907) (requiring commanders to apply the preponderance standard to the evidence supporting letters of reprimand (LORs) "when evaluating the evidence and every element of the offenses committed"); *but see* AIR FORCE INSTR. 36-2907, ¶ 2.4.2 (requiring commanders to ensure that airmen's unfavorable information files (UIFs) contain "only substantiated unfavorable information about events that occurred"), and paragraph 4.1.3 (acknowledging that "no specific standard of proof applies to administrative action proceedings").

[190] The legal review should confirm the nature of matters exempt from referral. AR 600-37-1986, *supra* note 76, ¶ 3-3.

[191] *See* AR 15-6, *supra* note 88, ¶ 2-3b. Legal reviews of certain administrative investigations are required to determine:

> [W]hether the proceedings comply with legal requirements . . . [w]hat effects any errors would have . . . [w]hether sufficient evidence supports the findings of the investigation or board or those substituted or added by the appointing authority . . . [and] [w]hether the recommendations are consistent with the findings.

Id. Judge advocates typically assist in the preparation of GOMORs and advise senior commanders with respect to filing determinations. A written legal review requirement

Absent a conviction, references to crimes or violations of specific articles of the UCMJ should be eliminated from reprimands.[192] GOMORs typically give a brief summary of the soldier's misconduct in the first paragraph, often followed by a statement that the soldier has violated some punitive article of the UCMJ or other criminal statute.[193] Yet, how can that be the case if the soldier has never received non-judicial punishment or been convicted at a court-martial? Nothing in AR 600-37-1986 authorizes such references, yet they have become part of the GOMOR rubric. This is patently unfair. If a reprimand is to be given at all, the imposing authority should cite to specific conduct but be prohibited from making conclusory statements about unproven criminal violations.

There is little question that the Army reprimand process is overused, if not abused. An updated AR 600-37-1986 should strongly urge imposing authorities to adhere to long-standing guidance to "[forward reprimands] for inclusion in the performance portion of the OMPF only after considering the circumstances and alternative nonpunitive measures."[194] A permanently filed reprimand should be a last resort, short of administrative separation, and not a reflexive response. Candid comments in evaluations, to include relief for cause, may be sufficient to address many instances of misconduct or excessively poor judgment and will have greater immediate corrective impact.[195]

In parallel with this admonition, the updated regulation should emphasize that the regular referral process in AR 600-37-1986, ¶ 3-6 is strongly preferred for "indications of substandard leadership ability, promotion potential, morals, [or] integrity."[196] Under this process,

---

would not be excessive, as many SJAs conduct (or require their staffs to conduct) such reviews as a matter of regular office practice.

[192] Stockdale, *supra* note 98. It is interesting to note that the sample AIPP database summary also considers an ostensible—and unproven—UCMJ violation to be a "substantiated finding." *See infra* app. B (noting that the fictional colonel "did knowingly and willfully commit adultery, in violation of Art. 134, UCMJ"). This is just as inappropriate as referencing an unproven criminal offense in a reprimand, and for the same reasons. Such references should be eliminated from the AIPP.

[193] *Id.*

[194] AR 600-37-1986, *supra* note 76, ¶ 3-4b(4).

[195] *See generally* AR 623-3, *supra* note 155, ¶¶ 3-54, 3-55 (discussing relief for cause OERs and NCOERs, respectively).

[196] AR 600-37-1986, *supra* note 76, ¶¶ 3-2c, 3-6. Note that paragraph 3-6b erroneously uses the term "reprimanding official," which implies that the referral process in this paragraph is limited to reprimands. However, no such limitation exists. Reprimands are plainly governed by the separate referral provisions in paragraph 3-4. *Id.* ¶ 3-4. Any update

soldiers receive the same right to submit a written rebuttal as they would with a reprimand.[197] It bears repeating that no reprimand is required in order for adverse information to reach a soldier's OMPF. Reprimands are, and always have been, unnecessary for that purpose.

That is not to say that GOMORs should be eliminated entirely. Rather, they should be used judiciously in simple, factual scenarios with relatively straightforward evidence. The automatic reprimand requirement for driving under the influence of alcohol (DUI) under the motor vehicle regulation is one such instance.[198] Retaining the use of GOMORs for DUIs is justified: DUIs are contrary to the Army Values, particularly the cornerstone principle of doing what is right, legally and morally.[199] They also demonstrate a significant defect of character, which is a building block of the Army Ethic.[200] Equally importantly, knowledge of a soldier's DUI erodes the public's trust in the Army and is harmful to the Army's relationship with civilians.[201] A relatively severe consequence is appropriate for such a significant lapse in personal judgment. The filing of any such reprimand would be subject to the remaining provisions of AR

---

to AR 600-37-1986 should correct this error and substitute the phrase "referring official." *See infra* app. C.

[197] *Id.* ¶ 3-2a.

> [U]nfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information.

Id.

[198] *See* U.S. DEP'T OF ARMY, REG. 190-5, MOTOR VEHICLE TRAFFIC SUPERVISION para. 2-7 (22 May 2006) [hereinafter AR 190-5] (requiring a written, general officer reprimand of active duty soldiers who are: convicted by civilian court or court-martial or receive non-judicial punishment for driving under the influence (DUI); refuse to take a blood alcohol (BAC) test; drive on post with a BAC in excess of 0.08% or off post with a BAC in violation of state law; or, operate a vehicle while having tested positive for illegal drugs).

[199] ARMY.MIL, *The Army Values*, http://www.army.mil/values/ (last visited Sept. 21, 2016) (discussing the Army value of integrity).

[200] U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 1, THE ARMY PROFESSION para. 2-3 (14 June 2013). The Army Ethic comprises competence, character, and commitment. *Id.* Character is defined as an "Army professional's dedication and adherence to the Army Values and the profession's ethic as consistently and faithfully demonstrated in decisions and actions." *Id.*

[201] *Id.* ¶ 2-1 ("Trust is the bedrock upon which the United States Army grounds its relationship with the American people.").

600-37-1986, in which case the proposed legal review requirement should apply if OMPF filing is intended.[202]

At the opposite end of the complexity spectrum, the Army routinely conducts administrative investigations that involve multiple witnesses and voluminous documents. It is difficult to adequately summarize the facts of a complex investigation in the first paragraph of a one-page reprimand. There is a great risk of oversimplifying the facts, which unfairly forces the Soldier to use part of his precious rebuttal space to tell the whole story.

It might be fairly argued that GOMORs are an intermediate disciplinary measure for situations that do not lend themselves to easy classification. True, they are used for this purpose. Again, this article does not advocate eliminating GOMORs entirely. However, as we have seen, even a GOMOR for poor judgment—let alone one for misconduct—must be supported by credible, substantiated evidence. Such evidence may be referred to a Soldier and filed in the Soldier's OMPF in the absence of a reprimand of any kind. In most circumstances, when combined with the referral of unfavorable information and honest evaluations, the GOMOR becomes merely an unnecessary and destructive cover letter.[203]

True, GOMORs are efficient and much less resource-intensive than administrative separation boards. However, fairness and justice should not be our goals, not merely efficiency. When efficiency outpaces due process, we have gone too far. If separation is justified, then instead of issuing a GOMOR, commanders should take action under the appropriate administrative separation regulations. Soldiers should be allowed to make their case for retention in person before the members of a board of inquiry. Boards are the appropriate venue in which to litigate complex facts, not a one-page response to a one-page letter.[204]

---

[202] AR 190-5, *supra* note 197, ¶ 2-7.

[203] There are certainly exceptional circumstances. *See* Military Personnel Message, 14-365, U.S. Army Human Res. Command, subject: Inclusion and Command Review of Information on Sex-Related Offenses in the Army Military Human Resource Record para. 4 (24 Dec. 2014) (removing discretion with respect to filing determinations and requiring that all reprimands for sex-related offenses be filed in a soldiers' OMPF).

[204] It both proves the point that GOMORs are punitive and stands reality on its head to argue that GOMORs are so prejudicial at boards of inquiry that the reprimand and board processes should be considered mutually exclusive. While GOMORs are certainly prejudicial, they are not evidence of underlying misconduct. A GOMOR proves only that a soldier received a GOMOR.

IV. Conclusion

The Army finds itself in a situation where a process intended to be non-punitive has taken on such punitive character that it is universally assumed to end careers. That is not only unacceptable, it is contrary to the stated purpose of reprimands.

Advances in recordkeeping, particularly worldwide access to electronic personnel records, have obviated the need to separately preserve adverse information via GOMORs. The EES, iPerms, the AIPP Database, and other electronic systems have rendered moot the need to preserve records of misconduct by sending hard copies to offsite file maintenance facilities. The GOMOR has largely become an unnecessarily weighty general officer cover letter. Further, formulaic GOMOR rebuttals combined with a difficult-to-access appellate process with extraordinarily burdensome standards make obtaining timely relief unlikely.

Reprimands also have a disproportionate impact on soldiers, when compared to members of the other services.[205] The Navy and Marine Corps have no such administrative process.[206] The Air Force already requires proof by a preponderance of the evidence to support its reprimands.[207]

Reform is necessary. Army Regulation 600-37-1986 should be reviewed and updated.[208] Significant updates should include: (1) a requirement for legal review by the servicing judge advocate and affirmation that any unfavorable information intended for OMPF filing is supported at minimum by a preponderance of the evidence; (2) a prohibition on the mention of unproven criminal offenses in administrative reprimands; (3) a policy statement that filing authorities must carefully consider all other options before directing OMPF filing, including actions taken at subordinate levels; and, (4) a policy statement that the regular adverse information referral process is strongly preferred as the primary means of transmitting adverse information to a soldiers' OMPF. The intent is to ensure that GOMORs will be used much more sparingly.

---

[205] *See* Schogol, *supra* note 98 (noting that "[a]t the request of the Air Force Chief of Staff, the Air Force Inspector General has begun an inquiry of the investigative process and the procedures used to administer any adverse personnel actions").
[206] *See supra* note 19 and accompanying sources.
[207] *See supra* note 189 and accompanying sources.
[208] *See infra* app. C for a proposed update to AR 600-37-1986.

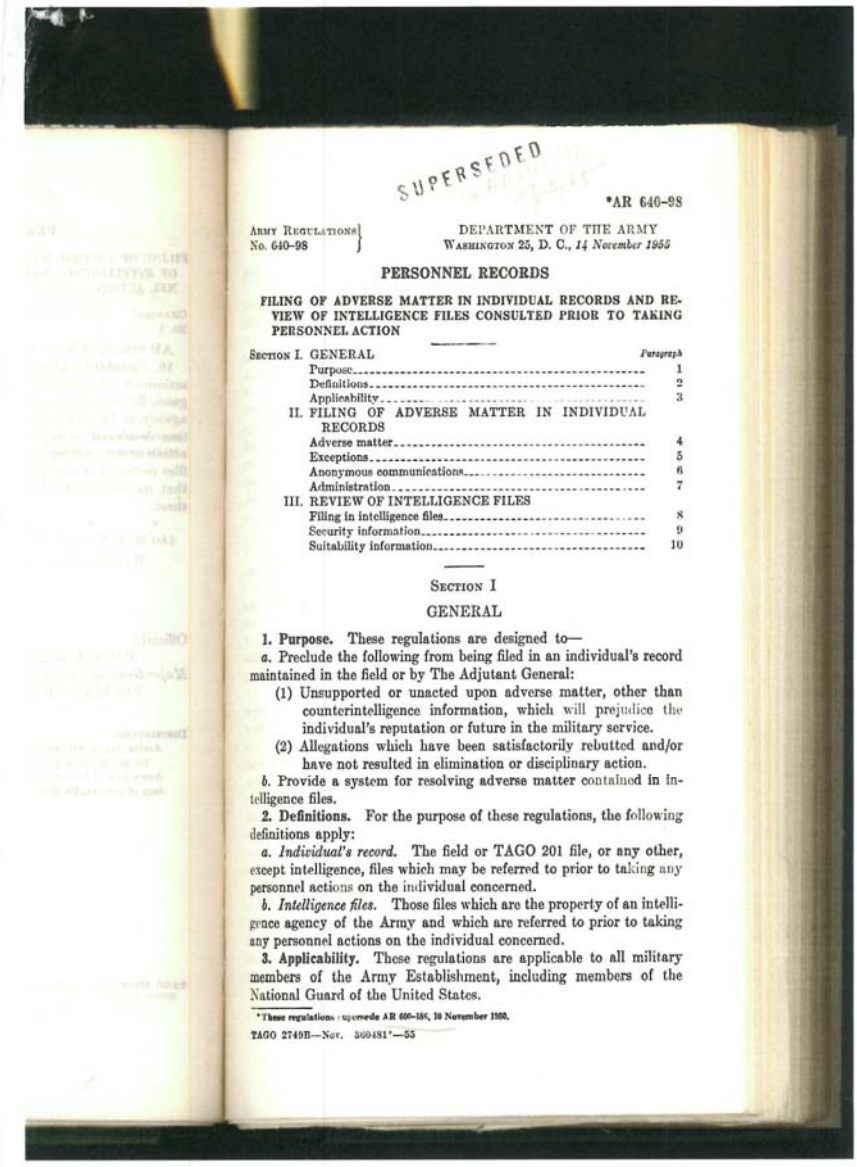
Commanders like GOMORs; GOMORs are comfortable and familiar. Unfortunately, many commanders have come to view GOMORs as a necessary end-state in cases of poor judgment or misconduct. They have become a reflexive, one-size-fits-all solution. Section 1745 of NDAA 2014 and the service secretaries' categorization of administrative reprimands as punitive actions may be fairly viewed as acknowledgements of institutional inertia. The Army has simply gone so far in this direction over the last thirty years that regulatory intent has fallen by the wayside. In the same sense that the prejudicial effect of evidence may outweigh its probative value under Military Rule of Evidence 403, so has the punitive effect of a reprimand come to outweigh its positive disciplinary value.[209]

Ironically, the more bureaucratic and layered with ostensible protections for soldiers the reprimand process became since its 1972 inception, the more punitive character it acquired in its execution. However, when it comes to good order and discipline, sometimes less is more. Consistent use of unfavorable information referral procedures already in place will ensure that soldiers who commit misconduct will be called to answer for it before show-cause and separation boards, particularly when combined with honest evaluations. Yes, those boards, can be resource-intensive, but those resources are a worthwhile tradeoff to protect soldiers from being forced to gamble their careers on the bare-bones minimum due process allowed in one-page, formulaic GOMOR rebuttals. The Army owes its soldiers no less.

[209] MCM, *supra* note 2, MIL. R. EVID. 403 (2015).

Appendix A: Army Regulation 640-98

U.S. DEP'T OF ARMY, REG. 640-98, Filing of Adverse Matter in Individual Records and Review of Intelligence Files Consulted Prior to Taking Personnel Action (14 Nov. 1955) (TAGO 2749B—Nov. 360481—55).



SUPERSEDED

*AR 640-98

ARMY REGULATIONS No. 640-98

DEPARTMENT OF THE ARMY
WASHINGTON 25, D. C., *14 November 1955*

PERSONNEL RECORDS

FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS AND REVIEW OF INTELLIGENCE FILES CONSULTED PRIOR TO TAKING PERSONNEL ACTION

SECTION I
GENERAL

1. Purpose. These regulations are designed to—

a. Preclude the following from being filed in an individual's record maintained in the field or by The Adjutant General:

(1) Unsupported or unacted upon adverse matter, other than counterintelligence information, which will prejudice the individual's reputation or future in the military service.

(2) Allegations which have been satisfactorily rebutted and/or have not resulted in elimination or disciplinary action.

b. Provide a system for resolving adverse matter contained in intelligence files.

2. Definitions. For the purpose of these regulations, the following definitions apply:

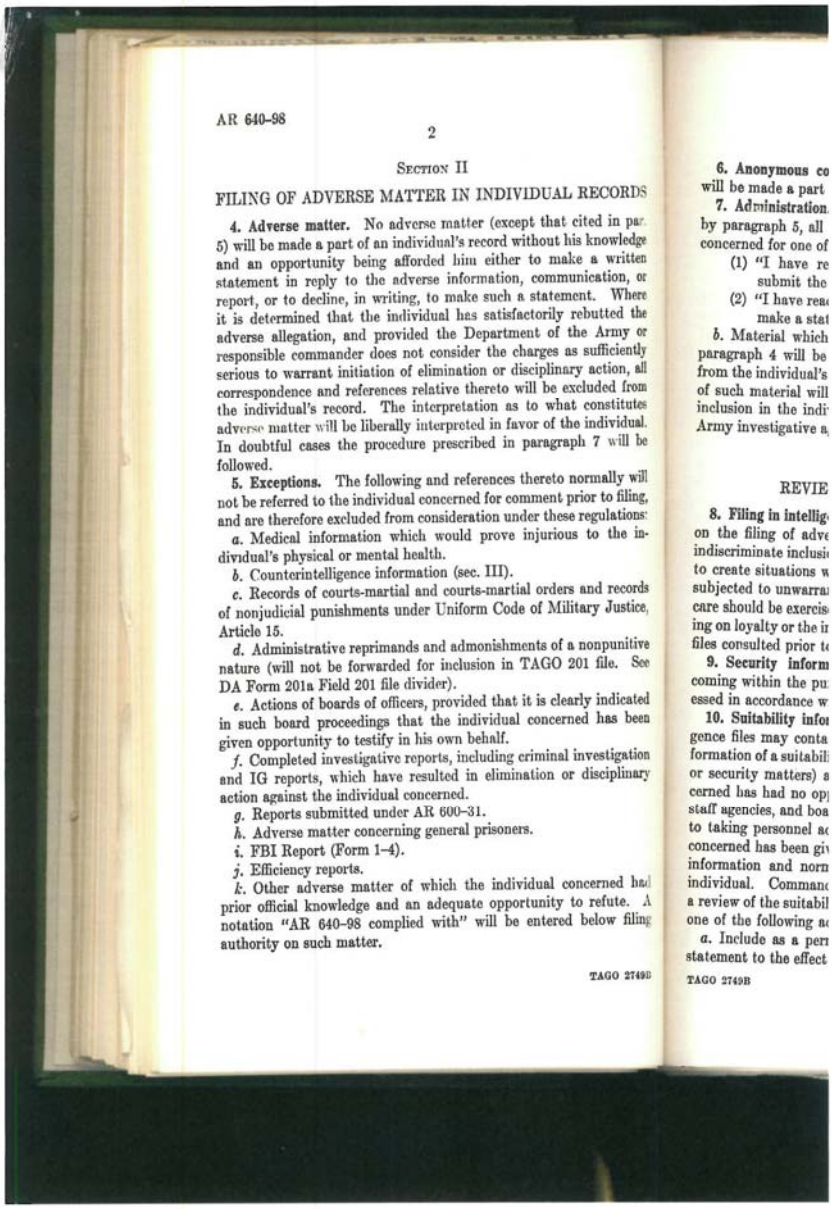
a. Individual's record. The field or TAGO 201 file, or any other, except intelligence, files which may be referred to prior to taking any personnel actions on the individual concerned.

b. Intelligence files. Those files which are the property of an intelligence agency of the Army and which are referred to prior to taking any personnel actions on the individual concerned.

3. Applicability. These regulations are applicable to all military members of the Army Establishment, including members of the National Guard of the United States.

*These regulations supersede AR 600-185, 10 November 1950.

TAGO 2749B—Nov. 360481*—55



AR 640-98

2

SECTION II

FILING OF ADVERSE MATTER IN INDIVIDUAL RECORDS

4. Adverse matter. No adverse matter (except that cited in par. 5) will be made a part of an individual's record without his knowledge and an opportunity being afforded him either to make a written statement in reply to the adverse information, communication, or report, or to decline, in writing, to make such a statement. Where it is determined that the individual has satisfactorily rebutted the adverse allegation, and provided the Department of the Army or responsible commander does not consider the charges as sufficiently serious to warrant initiation of elimination or disciplinary action, all correspondence and references relative thereto will be excluded from the individual's record. The interpretation as to what constitutes adverse matter will be liberally interpreted in favor of the individual. In doubtful cases the procedure prescribed in paragraph 7 will be followed.

5. Exceptions. The following and references thereto normally will not be referred to the individual concerned for comment prior to filing, and are therefore excluded from consideration under these regulations:

a. Medical information which would prove injurious to the individual's physical or mental health.

b. Counterintelligence information (sec. III).

c. Records of courts-martial and courts-martial orders and records of nonjudicial punishments under Uniform Code of Military Justice, Article 15.

d. Administrative reprimands and admonishments of a nonpunitive nature (will not be forwarded for inclusion in TAGO 201 file. See DA Form 201a Field 201 file divider).

e. Actions of boards of officers, provided that it is clearly indicated in such board proceedings that the individual concerned has been given opportunity to testify in his own behalf.

f. Completed investigative reports, including criminal investigation and IG reports, which have resulted in elimination or disciplinary action against the individual concerned.

g. Reports submitted under AR 600-31.

h. Adverse matter concerning general prisoners.

i. FBI Report (Form 1-4).

j. Efficiency reports.

k. Other adverse matter of which the individual concerned had prior official knowledge and an adequate opportunity to refute. A notation "AR 640-98 complied with" will be entered below filing authority on such matter.

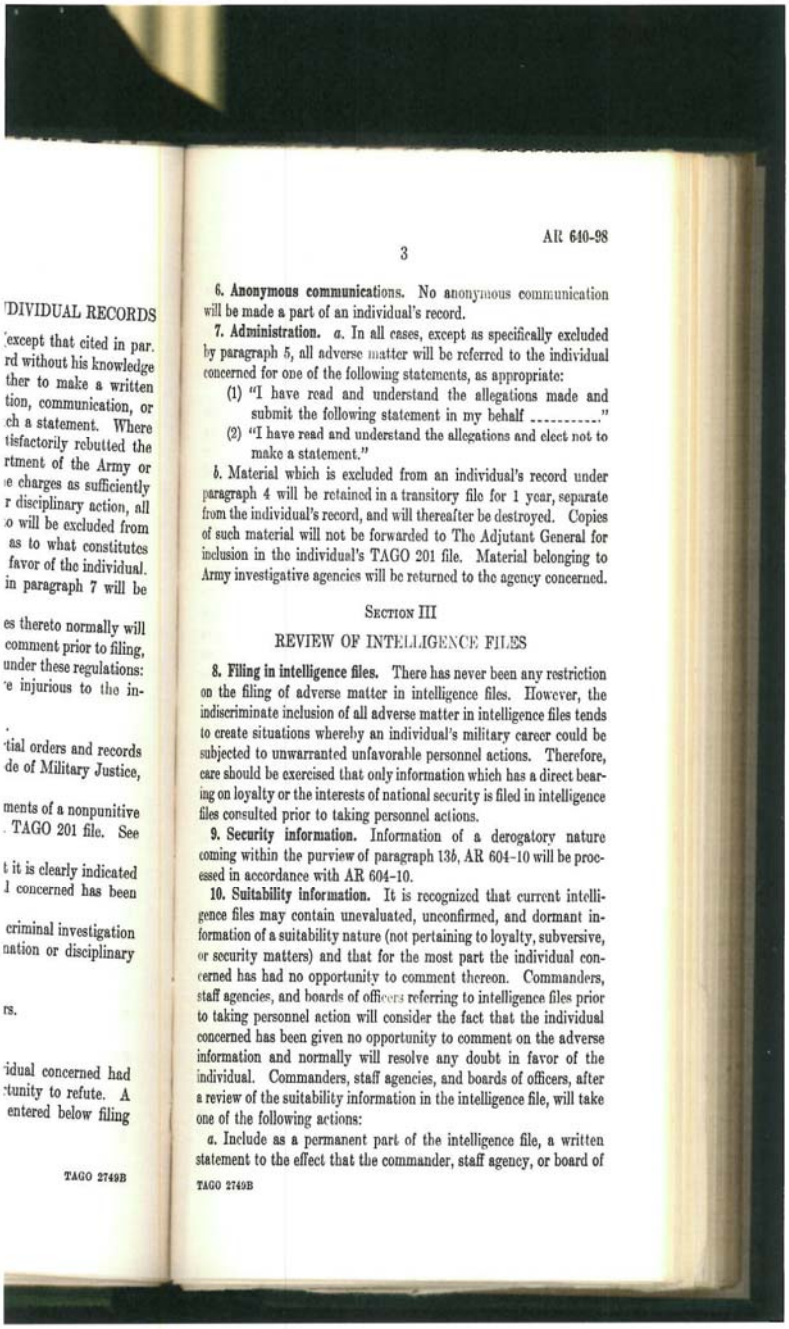
TAGO 2749B

6. Anonymous co
will be made a part
7. Administration
by paragraph 5, all
concerned for one of
(1) "I have re
submit the
(2) "I have rea
make a stat
b. Material which
paragraph 4 will be
from the individual's
of such material will
inclusion in the indi
Army investigative a

REVIE

8. Filing in intellig
on the filing of adv
indiscriminate inclusi
to create situations w
subjected to unwarra
care should be exercis
ing on loyalty or the i
files consulted prior t
9. Security inform
coming within the pu
essed in accordance w
10. Suitability infor
gence files may conta
formation of a suitabil
or security matters) a
cerned has had no op
staff agencies, and boa
to taking personnel ac
concerned has been gi
information and norm
individual. Comman
a review of the suitabil
one of the following a
a. Include as a per
statement to the effect

TAGO 2749B



'DIVIDUAL RECORDS

'except that cited in par.
rd without his knowledge
ther to make a written
tion, communication, or
ch a statement. Where
tisfactorily rebutted the
rtment of the Army or
e charges as sufficiently
r disciplinary action, all
o will be excluded from
as to what constitutes
favor of the individual.
in paragraph 7 will be

es thereto normally will
comment prior to filing,
under these regulations:
'e injurious to the in-

'tial orders and records
de of Military Justice,

ments of a nonpunitive
TAGO 201 file. See

t it is clearly indicated
l concerned has been

criminal investigation
nation or disciplinary

rs.

'idual concerned had
'tunity to refute. A
entered below filing

TAGO 2749B

AR 640-98

3

6. Anonymous communications. No anonymous communication will be made a part of an individual's record.

7. Administration. *a.* In all cases, except as specifically excluded by paragraph 5, all adverse matter will be referred to the individual concerned for one of the following statements, as appropriate:

(1) "I have read and understand the allegations made and submit the following statement in my behalf ----------"

(2) "I have read and understand the allegations and elect not to make a statement."

b. Material which is excluded from an individual's record under paragraph 4 will be retained in a transitory file for 1 year, separate from the individual's record, and will thereafter be destroyed. Copies of such material will not be forwarded to The Adjutant General for inclusion in the individual's TAGO 201 file. Material belonging to Army investigative agencies will be returned to the agency concerned.

SECTION III

REVIEW OF INTELLIGENCE FILES

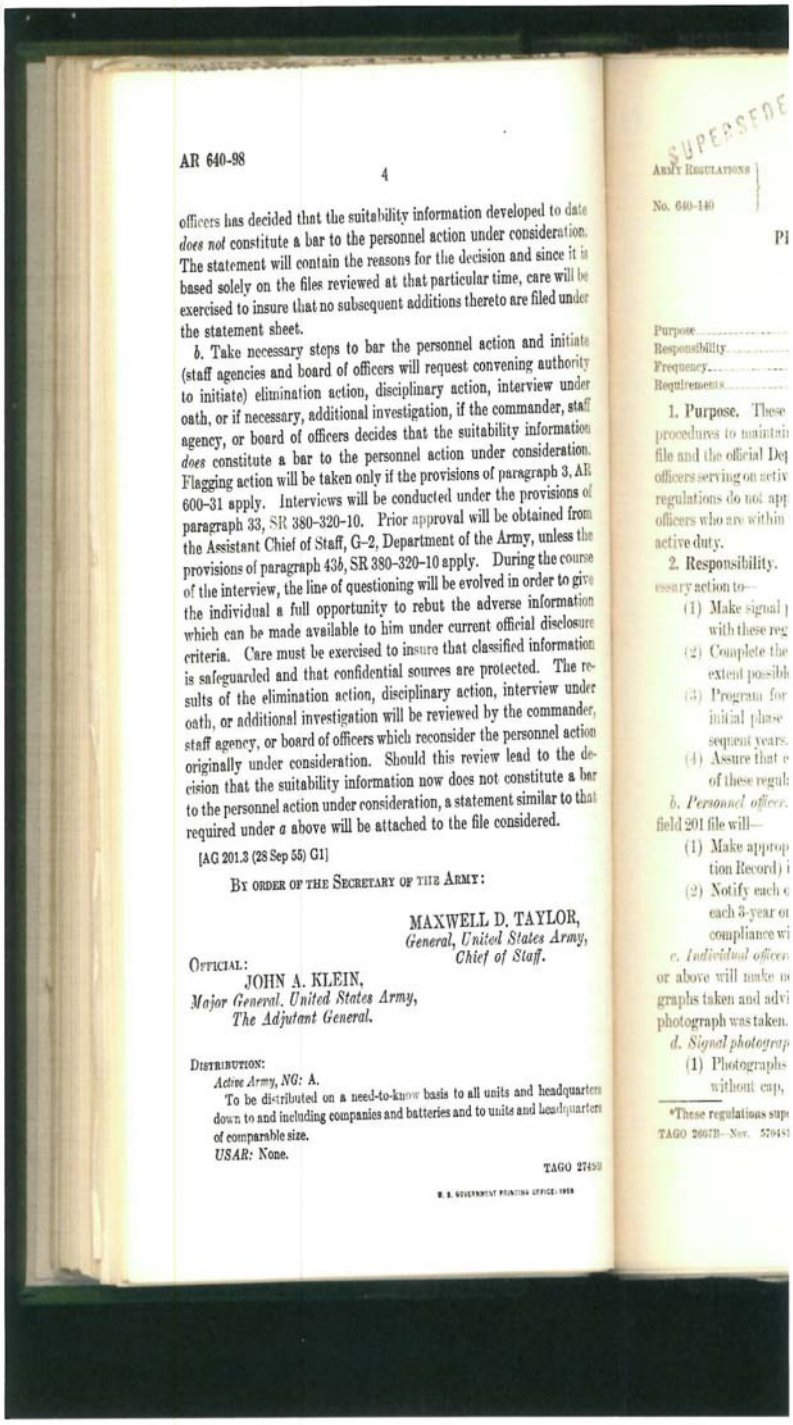
8. Filing in intelligence files. There has never been any restriction on the filing of adverse matter in intelligence files. However, the indiscriminate inclusion of all adverse matter in intelligence files tends to create situations whereby an individual's military career could be subjected to unwarranted unfavorable personnel actions. Therefore, care should be exercised that only information which has a direct bearing on loyalty or the interests of national security is filed in intelligence files consulted prior to taking personnel actions.

9. Security information. Information of a derogatory nature coming within the purview of paragraph 13*b*, AR 604-10 will be processed in accordance with AR 604-10.

10. Suitability information. It is recognized that current intelligence files may contain unevaluated, unconfirmed, and dormant information of a suitability nature (not pertaining to loyalty, subversive, or security matters) and that for the most part the individual concerned has had no opportunity to comment thereon. Commanders, staff agencies, and boards of officers referring to intelligence files prior to taking personnel action will consider the fact that the individual concerned has been given no opportunity to comment on the adverse information and normally will resolve any doubt in favor of the individual. Commanders, staff agencies, and boards of officers, after a review of the suitability information in the intelligence file, will take one of the following actions:

a. Include as a permanent part of the intelligence file, a written statement to the effect that the commander, staff agency, or board of

TAGO 2749B



AR 640-98

4

officers has decided that the suitability information developed to date *does not* constitute a bar to the personnel action under consideration. The statement will contain the reasons for the decision and since it is based solely on the files reviewed at that particular time, care will be exercised to insure that no subsequent additions thereto are filed under the statement sheet.

b. Take necessary steps to bar the personnel action and initiate (staff agencies and board of officers will request convening authority to initiate) elimination action, disciplinary action, interview under oath, or if necessary, additional investigation, if the commander, staff agency, or board of officers decides that the suitability information *does* constitute a bar to the personnel action under consideration. Flagging action will be taken only if the provisions of paragraph 3, AR 600-31 apply. Interviews will be conducted under the provisions of paragraph 33, SR 380-320-10. Prior approval will be obtained from the Assistant Chief of Staff, G-2, Department of the Army, unless the provisions of paragraph 43*b*, SR 380-320-10 apply. During the course of the interview, the line of questioning will be evolved in order to give the individual a full opportunity to rebut the adverse information which can be made available to him under current official disclosure criteria. Care must be exercised to insure that classified information is safeguarded and that confidential sources are protected. The results of the elimination action, disciplinary action, interview under oath, or additional investigation will be reviewed by the commander, staff agency, or board of officers which reconsider the personnel action originally under consideration. Should this review lead to the decision that the suitability information now does not constitute a bar to the personnel action under consideration, a statement similar to that required under *a* above will be attached to the file considered.

[AG 201.3 (28 Sep 55) G1]

BY ORDER OF THE SECRETARY OF THE ARMY:

MAXWELL D. TAYLOR,
General, United States Army,
Chief of Staff.

OFFICIAL:
JOHN A. KLEIN,
Major General, United States Army,
The Adjutant General.

DISTRIBUTION:
Active Army, NG: A.
To be distributed on a need-to-know basis to all units and headquarters down to and including companies and batteries and to units and headquarters of comparable size.
USAR: None.

TAGO 27459

U. S. GOVERNMENT PRINTING OFFICE: 1958

SUPERSEDE

ARMY REGULATIONS

No. 640-140

PI

Purpose
Responsibility
Frequency
Requirements

1. Purpose. These
procedures to maintain
file and the official Dep
officers serving on activ
regulations do not app
officers who are within
active duty.

2. Responsibility.
essary action to—

(1) Make signal
with these reg
(2) Complete the
extent possibl
(3) Program for
initial phase
sequent years.
(4) Assure that e
of these regul

b. Personnel officer.
field 201 file will—

(1) Make approp
tion Record)
(2) Notify each c
each 3-year o
compliance wi

c. Individual officers
or above will make n
graphs taken and advi
photograph was taken.

d. Signal photograp

(1) Photographs
without cap,

*These regulations supe

TAGO 2667B—Nov. 570481

Appendix B: Sample AIPP Database Summary

SUMMARY OF CREDIBLE ADVERSE

INFORMATION

NAME: COL Alexander Hamilton

CURRENT UNIT: United States Army Forces Command

A U THORITY: 10 United States Code § 615 (a)(3)

SOURCE: Investigation appointed by the Commanding General, Fort Bragg, and conducted pursuant to Army Regulation 15-6, *Procedures for Investigating Officers and Boards of Officers*, 2 October 2006.

SUBSTANTIATED FINDING: That COL Hamilton did knowingly and willfully commit adultery, in violation of Article 134, UCMJ.

SYNOPSIS: COL Hamilton admitted that he engaged in adultery with another Soldier in April 2009, while he was still married. He was legally separated in September 2010 and divorced in 2011. The relationship stopped in 2014 when the other Soldier ended it because her husband became aware of the relationship. Case was substantiated on 19 March 2014.

ACTION TAKEN: COL Hamilton was issued a general officer memorandum of reprimand, which was filed locally.

COMMANDER COMMENT: COL Hamilton made a terrible error in judgment in 2009. However, I believe he still has potential for service at the highest ranks.

Appendix C: Proposed Update: Army Regulation 600-37

U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION ch. 3 (19 Dec. 1986).

***** ~~Lined through~~ text indicates proposed deletions. ***Italic, bold*** **text** indicates additions.

Chapter 3
Unfavorable Information in Official Personnel Files
3–1. General

a. Personnel management decisions will be based on the following:

(1) Review of official personnel files.

(2) The knowledge and best judgment of the commander, board, or other responsible authority. (Both favorable and unfavorable information regarding the soldier concerned will be considered.)

b. Personnel decisions that may result in selecting soldiers for positions of public trust and responsibility, or vesting such persons with authority over others, should be based on a thorough review of their records. This review will include an appraisal of both favorable and unfavorable information available.

3–2. Policies

a. Except as indicated in paragraph 3–3, unfavorable information will not be filed in an official personnel file unless the recipient has been given the chance to review the documentation that serves as the basis for the proposed filing and make a written statement, or to decline, in writing, to make such a statement. This statement may include evidence that rebuts, explains, or mitigates the unfavorable information. (See para 3–6.) The issuing authority should fully affirm and document unfavorable information to be considered for inclusion in official personnel files. ***The referral process in paragraph 3-6 is the primary means of transmitting unfavorable information to official personnel files (MPRJ and OMPF). Administrative letters of reprimand, admonition or censure under this chapter (collectively, reprimands) are not required in order to transmit unfavorable information to official personnel files.***

Note. The privileged and confidential nature of information in inspector general IG records requires special attention. Provisions for requesting access and use of IG reports are addressed in AR 20–1.)

b. Unfavorable information filed in official personnel files must meet Privacy Act standards of accuracy, relevance, timeliness, and

completeness. (See AR 340–21.) Access to official personnel files will be granted to the person concerned under AR 340–21.

c. In addition to the Privacy Act standards in paragraph 3-2b, unfavorable information filed in the OMPF must be supported by a greater weight of evidence than supports a contrary conclusion, that is, evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion (the preponderance of the evidence). (See AR 15–6.)

d. The servicing Judge Advocate (JA) will conduct a written legal review of any unfavorable information intended for OMPF filing under this chapter). cornersThe JA's review will determine whether such information has been established by a preponderance of the evidence. Legal review is required for information exempt from the referral procedure pursuant to paragraph 3-3 of this regulation. Such information may be deemed to be established by a preponderance of the evidence unless the servicing JA determines otherwise.

e. A copy of the JA's legal review will be provided to the appropriate filing authority prior to OMPF filing. If the JA determines that any unfavorable information intended for OMPF filing has not been established by a preponderance of the evidence, OMPF filing of such information is not authorized.

~~*c.*~~ *f.* Unfavorable information that should be filed in official personnel files includes indications of substandard leadership ability, promotion potential, morals, and integrity. These must be identified early and shown in those permanent official personnel records that are available to personnel managers and selection board members for use in making such personnel decisions as described in paragraph 3–1*b*. Other unfavorable character traits of a permanent nature should be similarly recorded.

~~*d.*~~ *g.* Unfavorable information that has been directed for filing in the restricted portion of the OMPF may be considered in making determinations under this regulation.

~~*e.*~~ *h.* Refusal to consent to a polygraph examination will not be recorded in official personnel files.

3–3. Filing of information exempt from the referral procedure

The following information may be filed in the performance portion of the OMPF without further referral to the recipient:

a. Records of courts-martial, court-martial orders, and records of nonjudicial punishment under the Uniform Code of Military Justice (UCMJ), Article 15. (See AR 27–10 and AR 640–10.)

b. Proceedings of boards of officers, if it is clear that the recipient has been given a chance to present evidence and cross-examine witnesses in his or her own behalf.

c. Completed investigative reports. These include criminal investigation reports (or authenticated extracts) that have resulted in elimination or disciplinary action against the person concerned. When it is not practical to include the entire report (or an extract), the investigative report will be referenced.

d. Records of civilian convictions (to include the record of arrest), or extracts thereof, authenticated by civilian authorities. However, records consisting solely of minor traffic convictions are not to be filed in the OMPF.

e. Officer and enlisted evaluation reports. Administrative processing and the appeal of evaluation instruments are governed by AR 623–1, AR 623–105, and AR 623–205. Filing of evaluation instruments is governed by AR 640–10.

f. Other unfavorable information of which the recipient had prior official knowledge (as prescribed by para 3–6) and an adequate chance to refute. The notation "AR 600–37 complied with" will be entered below the filing authority on such unfavorable information.

g. Internal staff actions and working papers within and among personnel management offices and personnel decision makers at HQDA. (Applies to the Career management individual file (CMIF) only according to AR 640–10.)

3–4. Filing of nonpunitive administrative letters of reprimand, admonition, or censure in official personnel files

a. Prohibition on mention of unproved criminal conduct. No administrative letter of reprimand, admonition, or censure (collectively, reprimands) may reference any criminal offense or violation of the Uniform Code of Military Justice or other criminal code unless the recipient has received nonjudicial punishment for such a violation or been duly convicted in a court-martial or appropriate court of law. The reprimand requirement in the Army Motor Vehicle Traffic Supervision regulation remains in effect, subject to the remaining procedures and limitations in this chapter. (See AR 190–5.)

~~*a.*~~ *b. Filing in the military personnel records jacket (MPRJ).* Authority to issue and direct the filing of letters of reprimand, admonition, and censure in the MPRJ (after referral to the person concerned according to para 3–6) is outlined in (1) and (2) below. If filing is intended for the MPRJ, the letter need not be referred to a higher authority for review.

(1) Authority to issue and direct the filing of such letters in the MPRJs of enlisted personnel is restricted to the recipient's immediate commander (or a higher commander in his or her chain of command), school commandants, any general officer (to include those frocked to the rank of brigadier general) or an officer exercising general court-martial jurisdiction over the recipient. Immediate supervisors of enlisted personnel also have authority to issue letters of reprimand; but only if serving in one of the capacities listed above may they also direct filing in the MPRJ.

(2) Authority to issue and direct the filing of such letters in the MPRJ of commissioned officers and warrant officers is restricted to—

(a) The recipient's immediate commander or a higher level commander in the chain of command (if such commander is senior in grade or date of rank to the recipient).

(b) The designated rater, intermediate rater, or senior rater under the officer evaluation reporting system (AR 623–105).

(c) Any general officer (to include one frocked to the rank of brigadier general) who is senior to the recipient or an officer who exercises general court-martial jurisdiction over the recipient.

(3) A letter designated for filing in the MPRJ only may be filed for a period not to exceed 3 years or until reassignment of the recipient to another general court-martial jurisdiction, whichever is sooner. Such a letter will state the length of time it is to remain in the MPRJ.

(4) Statements furnished by the recipient following referral under paragraph 3–6 will be attached to the letter for filing in the MPRJ.

~~*b.*~~ *c. Filing in OMPF.* A letter, regardless of the issuing authority, may be filed in the OMPF kept by MILPERCEN, ARPERCEN, or the proper State Adjutant General (for Army National Guard personnel) only upon the order of a general officer (to include one frocked to the rank of brigadier general) senior to the recipient or by direction of an officer having general court-martial jurisdiction over the individual. Letters filed in the OMPF will be filed on the performance portion (P-fiche). The direction for filing in the OMPF will be contained in an endorsement or addendum to the letter. A letter to be included in a soldier's OMPF will—

(1) Be referred to the recipient concerned for comment according to paragraph 3–6. The referral will include reference to the intended filing of the letter.

(a) This referral will also include and list applicable portions of investigations, reports, and other documents that serve, in part or in whole, as the basis for the letter, providing the recipient was not previously provided an opportunity to respond to information reflected in that

documentation. Additionally, documents, the release of which requires approval of officials or agencies other than the official issuing the letter, will not be released to the recipient until such approval is obtained.

(b) Statements and other evidence furnished by the recipient will be reviewed and considered by the officer authorized to direct filing in the OMPF. This will be done before a final determination is made to file the letter.

(c) The servicing JA shall conduct a written legal review pursuant to paragraph 3-2 of this regulation of all reprimands intended for OMPF filing. Legal review will take place following the exercise or affirmative waiver of the recipient's opportunity for rebuttal under this chapter, and shall include all statements and other evidence furnished by the recipient. A copy of the JA's legal review will be provided to the filing authority prior to the filing determination. Should filing in the OMPF be directed, the statements and evidence ***the recipient provides***, or facsimiles thereof, ~~may~~ ***will*** be attached as enclosures to the basic letter.

~~(c)~~ (d) If it is desired to file allied documents with the letter, these documents must also be referred to the recipient for comment. This includes statements, previous reprimands, admonitions, or censure. Allied documents must also be specifically referenced in the letter or referral document. Care must be exercised to ensure additional unfavorable information is not included in the transmittal documentation unless it has been properly referred for comment.

(2) Contain a statement that indicates it has been imposed as an administrative measure and not as a punishment under UCMJ, Article 15.

(3) Be signed by (or sent under the cover or signature of) an officer authorized to direct such filing.

(4) Be forwarded for inclusion in the performance portion of the OMPF only after considering the circumstances and alternative nonpunitive measures***, including measures taken at subordinate levels. An official reprimand is a weighty matter with potential long-term adverse consequences for the recipient's military and even subsequent civilian careers. Imposing authorities are discouraged from directing OMPF filing of reprimands where other administrative processes (including but not limited to relief for cause, adverse evaluation under the EES, a record review under the AIPP, or some combination of processes) adequately capture the conduct at issue for review by promotion or other authorities.***

(5) Minor behavior infractions or honest mistakes chargeable to sincere but misguided efforts will not normally be recorded in a soldier's OMPF. Once placed in the OMPF, however, such correspondence will be

permanently filed unless removed through the appeal process. (See chap 7.)

~~(5)~~ (6) Also be filed in the MPRJ. Such copy will remain in the MPRJ so long as the letter remains filed in the performance fiche of the OMPF.

~~*c.*~~ *d. Decisions against filing letters in the OMPF.* If the general officer (or general court-martial authority) elects not to place the letter in the OMPF, the correspondence will be returned to the person writing the letter. That soldier will advise the recipient of the letter of the decision not to file the letter in the OMPF. The letter may, however, still be directed for filing (by proper authority) in the recipient's MPRJ. (See *a* above.) The specific period of time for which the letter will remain in the MPRJ will be specified.

~~*d.*~~ *e. Circumstances affecting the imposition or processing of administrative letters of reprimand.*

(1) When a soldier leaves the chain of command or supervision after a commander or supervisor has announced the intent to impose a reprimand, but before the reprimand has been imposed, the action may be processed to completion by the losing command.

(2) When the reprimanding official leaves the chain of command or supervision after stating in writing the intent to impose a reprimand, his or her successor may complete appropriate action on the reprimand. In such cases, the successor should be familiar with relevant information about the proposed reprimand.

(3) When a former commander or supervisor discovers misconduct warranting a reprimand, an admonition, or censure, he or she may—

(a) Send pertinent information to the individual's current commander for action.

(b) Personally initiate and process a letter of reprimand, admonition, or censure as if the former command or supervisory relationship continued. In such cases, further review (if needed) will be accomplished in the recipient's current chain of command. Officials should consider the timeliness and relevance of the adverse information before taking administrative action at the later date.

~~*e.*~~ *f. Reprimands and admonitions imposed as nonjudicial punishment (UCMJ, Article 15).* These are governed by AR 27–10, chapter 3.

~~*f.*~~ *g. Change from enlisted to officer status.*

(1) If a status change from enlisted to commissioned or warrant officer was approved *on or after* 16 December 1980—

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(2) If a status change from enlisted to commissioned or warrant officer was approved *on or before* 15 December 1980 *and the individual so requests—*

(a) Letters of reprimand, admonition, or censure received while in an enlisted status which are filed in the performance portion of the OMPF will be moved to the restricted portion of the OMPF.

(b) Letters filed in the MPRJ will be removed.

(3) Requests under (2) above will not be a basis for reconsideration by a special selection board.

3–5. Anonymous communications

Anonymous communications will not be filed in a soldier's MPRJ, OMPF, or CMIF unless, after investigation or inquiry, they are found to be true, relevant, and fully proven or supported. If not exempted under paragraph 3–3, the information must be referred to the soldier according to paragraph 3–6 before such information is filed in the MPRJ, OMPF, or CMIF.

3–6. Referral of information

a. Except as provided in paragraph 3–3, unfavorable information will be referred to the recipient for information and acknowledgment of his or her rebuttal opportunity. Acknowledgement and rebuttal comments or documents will be submitted generally in the following form:

(1) "I have read and understand the unfavorable information presented against me and submit the following statement or documents in my behalf:"

(2) "I have read and understand the unfavorable information presented against me and elect not to make a statement."

b. If a recipient refuses to acknowledge the referral of unfavorable information, the ~~reprimanding~~ ***referring*** official will prepare the following statement: "On (date), (name) has been presented with the unfavorable information and refuses to acknowledge by signature." The letter can then be directed for filing per paragraph 3–4.