

## Opinion No. 71-75

June 14, 1971

**BY:** OPINION OF DAVID L. NORVELL, Attorney General

**TO:** The Honorable Raymond G. Sanchez New Mexico State Representative 806 Bank of New Mexico Building 320 Gold S.W. Albuquerque, N.M. 87101

### QUESTIONS

#### QUESTIONS

Must courts-martial of the New Mexico National Guard, when not in the service of the United States, follow the procedures established in the Uniform Code of Military Justice, 10 USC § 801, **et seq.**, for their courts-martial proceedings?

#### CONCLUSION

Yes.

### OPINION

#### {\*109} ANALYSIS

Sections 9-5-1 through 9-5-17, NMSA 1953 Comp. enacted in 1925, provide authority for the New Mexico National Guard to discipline its members by courts-martial when the Guard is not in service of the United States; prescribes offenses; and provides punishments therefor.

Chapter 32 USCA § 326 provides that:

In the National Guard not in Federal service, there are general, special, and summary courts-martial constituted like similar courts of the Army and the Air Force. **They have the jurisdiction and powers, except as to punishments, and shall follow the forms and procedures, provided for those courts.** (Emphasis added).

Thus, courts-martial of the New Mexico National Guard are clearly required to follow the "forms and procedures" established for courts-martial of the Army and the Air Force. The question presented, then, is the meaning of the term "forms and procedures" as used in 32 USCA § 326.

It is well established that, as a general rule, "substantive law" is that which creates duties, rights and obligations. **Bagsarian v. Parker Metal Co.**, 282 F. Supp. 766 (D.C. Ohio 1968). "Procedure," on the other hand, is the machinery for carrying on a law suit, including pleading, process, evidence, and practice. **Heberle v. P.R.O. Liquidating**

**Co.**, 186 So.2d 280, (Fla. 1966). See also **Dauer's Estate v. Zabel**, 156 N.W.2d 34 (1967) and **State v. Augustin**, 197 Kan. 207, 416 P.2d 281 (1966). In **Jones v. Garrett**, 192 Kan. 109, 386 P.2d 194 (1963), the Kansas Supreme Court commented at length on the distinction between "procedure" and "substantive law." The Court said:

Procedure has been defined as the mode or proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding, the court is to administer -- the machinery, as distinguished from its product; that which regulates the formal steps in an action or other judicial proceeding -- a form, manner, and order of conducting suits or prosecutions. It is the machinery for carrying on the suit, including pleading, process, evidence, and practice, whether in the trial court or the appellate court, or in the processes by which causes are carried to the appellate court for review, or in laying the foundation for such review. (386 P.2d at 199)

We believe that it was this well-known distinction between "procedure" and substantive law" which was intended when Congress used the term "forms and procedures" in 32 USCA {*\*110*} § 326. Accordingly, it is our opinion that under this section the New Mexico Legislature may prescribe those acts which are punishable by courts-martial for the New Mexico National Guard not in the federal service. It may not, however, prescribe punishments for those offenses in excess of those set forth in 32 USCA §§ 327, 328 and 329 for general, special and summary courts-martial, nor may it provide procedures for courts-martial which conflict with those provided in the Uniform Code of Military Justice, 10 USCA § 801, **et seq.** Thus, to the extent that pre-trial, trial and appellate procedures established by the 1925 New Mexico Act are different from or conflict with those prescribed in the Uniform Code of Military Justice, **supra**, it is our opinion that Congress intended that the provisions of the Uniform Code of Military Justice control.

Our opinion is based not only on our view as to the legal meaning of the term "procedures," but also on our view of what Congress must reasonably have intended by that term. If Congress meant, by the term "forms and procedures," not the entire method and procedure set out in the Code by which Army and Air Force courts-martial operate, but instead only the unimportant and trivial matters of procedure followed by those courts, it would be difficult to understand the reason for passage of 32 USCA § 326 by Congress. In other words, the very fact that Congress interested itself in the "forms and procedures" to be followed in courts-martial of National Guard units while not in the service of the United States means to us that by the term "forms and procedures" Congress intended that **all** procedural aspects of Army and Air Force courts-martial were to be followed by courts-martial of the National Guard not in federal service.

For the foregoing reasons, it is our opinion that if any conflict exists between the procedural provisions of the Uniform Code of Military Justice, **supra**, and the provisions set forth in §§ 9-5-1 through 9-5-17, NMSA, 1953 Comp. establishing the method and procedures by which courts-martial of the National Guard not in federal service are to be conducted, the provisions of the Uniform Code of Military Justice are controlling.

Further, as is apparent from the clear language of 32 USCA § 326, the punishments imposed by courts-martial of the New Mexico National Guard not in federal service may not exceed those prescribed in 32 USCA §§ 327, 328, and 329.

By: Frank N. Chavez

Assistant Attorney General

and Anne K. Bingaman

Assistant Attorney General