RESERVES

Allowing Reserve Component (RC) Members to Provide Force Support Squadron (FSS) Services to Active Component (AC) Members

This responds to your request for our legal opinion about allowing reserve component (RC) Force Support Squadrons (FSSs) to cut contingency, exercise, and deployment (CED) orders and provide other support services to active component (AC) members. As explained in more detail below, we conclude that **under current law** there are **four circumstances** in which RC members **may provide** FSS services to the AC:

(1) Drill-status, full-time National Guard duty (FTNGD) and full-time support (FTS) RC members in duty status under Title 32 of the United States Code (USC):
(a) may perform FSS services for training, even if doing so **incidentally benefits** AC members and
(b) may perform a **de mimimis** amount of FSS services to AC members;
(2) If the FSS mission is formally assigned to the RC, FTS RC members in duty status under Title 10 of the USC[1] may provide the full spectrum of FSS services to AC members, as long as those services **do not interfere** with the FTS members' primary duties;
(3) RC members in a total force integration (TFI) unit may provide **proportionate services** to AC members; **and,**
(4) RC members in **active duty** operational support (ADOS) status **under Title 10** of the USC (ADOS-AC) may provide the full spectrum of FSS services to AC members.

This opinion has been coordinated with the offices of the National Guard Bureau (NGB) Judge Advocate (JA) and Secretary of the Air Force, Deputy General Counsel for Intelligence, International and Military Affairs (SAF/GCI).

**Background and Question Presented**

As we understand it, AF/A1 offices are currently working to consolidate three personnel computer systems into one to improve customer service, streamline work effort, and save money (the initiative is known as the "3-to-1 project"). In addition, as the AC and RC integrate and combine efforts toward a shared mission through TFI associations and other less formal constructs, component-specific offices are redundant and cumbersome. Ideally, through this 3-to-1 project, AF/A1 will establish a single, customer-focused FSS providing support to Total Force Airmen. Another way to describe the objective is to establish FSS "One-Stop-Shopping" for every Airman, in any component, anywhere in the world.

Assuming all technological barriers to this effort could be overcome, you have asked whether there are any legal barriers to attaining this objective. More specifically, you would like to know

[1] For purposes of this memo, this category will only include Air Force Reserve members, because ANG AGRs who work at the unit level are only in Title 32 duty status. Title 10 ANG AGRs work at headquarters, the Air National Guard Readiness Center (ANGRC) and the Pentagon.

whether the law will allow Air National Guard (ANG) and Air Force Reserve (AFR) members to provide the full spectrum of services (MILPDS, DCAPES,[2] etc.) to AC members.

At the outset, we note that Air Force Instruction (AFI) 36-3802, *Personnel Readiness Operations*, 23 Feb 09, currently states that installation personnel readiness (IPR) offices "can not issue CED orders on personnel the servicing MPF does not have administrative control over (e.g., active duty IPRs cannot issue CED orders on ARC personnel)."[3] This restriction, however, is not contained in federal statutes or DOD guidance. It is purely a matter of Air Force policy. We also note that during past discussions, some stakeholders have been concerned about providing unlimited authority in DCAPES to RC members. Some feared that mistakes might be made or orders for AC members might be cut to fill RC deployment requirements. These concerns, again, do not raise legal considerations, but rather matters of technology and policy. We express no opinion regarding the advisability of having RC members provide full FSS services, we only opine on the legal authorities and restrictions to doing so.

We also note, however, that requests for CED orders and some other FSS functions are made and fulfilled electronically, such that the customer does not observe the FSS member performing the service. For these services, it would be possible to provide an AC customer "One-Stop-Shopping" by accepting requests for CED orders in any FSS and then passing that request to an FSS of the customer's component. The like-component FSS could then prepare and return the orders (or other document) to the servicing FSS for delivery to the customer. The customer would not know – and likely would not care – who actually prepared the documents. Coordination between the FSS offices should not notably slow the process, and the cost of modifying DCAPES and ensuring cross-component services remain within current legal limits would be avoided entirely.

Assuming such coordinated services are either infeasible or unpalatable, the following analysis outlines the various legal limitations, as they exist today, which apply to cross-component FSS services and provides proposed legislative changes to lift some of those limitations.

**Legal Concepts – Three Component Construct**

There are several legal limitations to a combined, cohesive, "total force" approach to Air Force operations. Many of them have very deep roots in the United States' republican form of government and its tri-partite governing structure (legislative, executive, and judicial branches). This section briefly reviews that history.

The origins of the Air Force lie in the Army Air Corps. The Army was founded in June 1775, when the Continental Congress created the first Continental Army. The National Guard predates both, tracing its history back to militia regiments formed by the Massachusetts Bay Colony in 1636.[4]

After the Revolutionary War, the Continental Congress disbanded the Continental Army out of a distrust of large, standing armies that could be used at will by a tyrannical leader and a

[2] Deliberate and Crisis Action Planning and Execution System (DCAPES).
[3] Paragraph 7.2.1.
[4] DoD 1215.15-H, *Reserve Components of the Armed Forces*, Jun 96, at 6, accessed at http://www.dtic.mil/dtic/tr/fulltext/u2/a315871.pdf on 11 Jul 13 (hereinafter DOD 1215.15H).

preference for a small standing army, supplemented by citizen-soldiers in times of a national emergency.[5]

The Founding Fathers codified this perspective in the Constitution by dividing power among the executive, legislative, and judicial branches; designating the President as the commander-in-chief;[6] and granting Congress the power to control the military through its authority to tax, spend, provide for the common defense, raise and support armies, and declare war.[7]

In addition to these intra-federal limitations, the Founding Fathers also limited federal power by guaranteeing the States a right to a republican form of government.[8] They viewed this as the most workable way to prevent federal tyranny and over-reaching while avoiding the unwieldy, disorganized, chaos that can result from a pure democracy. In 1791, the States' powers were expanded by the Second Amendment which granted all people the right to keep and bear arms, because "a well-regulated militia [is] necessary to the security of a free State[.]"[9] Congress's power "to provide for organizing, arming and disciplining the militia" and to govern them was limited to only those militia members who were called into federal service.[10]

Through these constitutional provisions, therefore, the Founding Fathers intentionally designed the United States' governing and military structure to allow cooperative Federalism while also preventing tyranny through institutionalized friction points: the executive branch's military might is limited by Congress' legal and financial powers and the federal armed forces are counter-balanced by the States' militia – which can only be federally controlled when called into federal service.

While the early-United States relied solely upon State militias for its ground defense,[11] continuing conflict with Native Americans led the nation to realize it needed a trained standing army. The Legion of the United States was established in 1791 and it eventually evolved into the US Army.[12]

Meanwhile, between 1881 and 1892 most states changed the name of their organized militia to the National Guard.[13] In 1903, National Guard became formally recognized as the nation's organized militia and a federally-funded RC. These laws were later moved to Titles 10 and 32 of the US Code.[14]

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[5] Id.; US Army Center of Military History, "The Formative Years, 1783-1812" (an extract from *American Military History, Volume 1*), available at http://www.history.army.mil/books/AMH-V1/ch05.htm , accessed on 11 Jul 13 (hereinafter "The Formative Years").
[6] US Constitution, Article 2, Section2.
[7] US Constitution, Article 1, Section 8; "The Formative Years" at 112.
[8] US Constitution, Article IV, Section 4.
[9] US Constitution, Second Amendment.
[10] US Constitution, Article 1, Section 8.
[11] "The Formative Years" at 107-109.
[12] "The Formative Years" at 119.
[13] There are two branches of militia: the organized militia (men and women in the National Guard) and the unorganized militia, which includes all able-bodied males between the ages of 17 and 45. 10 USC § 311.
[14] The Militia Act of 1903. In 1956 the US Code was reorganized, moving the laws governing military departments to Title 10 and the National Guard provisions to Title 32. Act of August 10, 1956, 70A Stat. 676

After German U-boats sunk the Lusitania on 7 May 1915 and Pancho Villa crossed the New Mexican border in March 1916, concerns about American preparedness and ability to fight in World War I gained momentum.[15] Consequently, Congress passed the National Security Act of 1916 which quadrupled the National Guard; directed the creation of an Officers Reserve Corps, an Enlisted Reserve Corps and the nation's Air Reserve Program; and consolidated and formalized the Reserve Officers' Training Corps in colleges and universities.[16] These Reserve Corps were clearly federal reserve, not militia, and the official Reserve Corps was established in March 1917.[17] About 11,300 of the Army Air Service pilots who served in World War I were reserve officers.[18]

In 1933, the Army force structure formally combined into three components: the active, reserve, and National Guard forces, all of which included aviation.[19] In 1947, the Air Force became a separate service, with an Air National Guard and Air Reserve component, mirroring the Army's three component structure.[20]

But the precarious balance between the components continued. Some viewed "the Air Reserve as a stew-pot, composed of leftovers not included in either the Regulars or Air National Guard."[21] The National Guard was designated as the Army's first line reserve component while the reserve mission was merely to bring the Active and National Guard to a mobilized strength.[22] Members of the Organized Reserve would be mobilized as individuals while the National Guard would be mobilized by units.[23] Subsequently, the War Department, the Army Air Forces, and after September 1947, the Air Force, failed to develop set war and mobilization plans. Legislation in the 1950s and early 1960s slowly changed the role of the Organized Reserves to include providing trained units in addition to individual members.[24]

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[15] Airpower against Mexico and Pancho Villa did not include reserve volunteers as Congress had not enacted legislation or called for volunteers. Juliette Hennessy, *The United States Army Air Arm: April 1861 to April 1917*, U.S. Air Force Historical Study No. 98, Office of Air Force History, USAF: Washington DC, 1985, available at http://www.dtic.mil/cgi-bin/GetTRDoc?Location=U2&doc=GetTRDoc.pdf&AD=ADA439945, accessed on 15 Jul 13.

[16] Hennessey.

[17] Gerald T. Cantwell, *Citizen Airman: A History of the Air Force Reserve, 1946-1994, (*Air Force History and Museums Program: Washington DC) 1997, p. 5; Pub.L. 64–85, 39 Stat. 166, Section 9, 3 Jun16, available at http://books.google.com/books?id=CGj_5WJx_ToC&printsec=titlepage#v=snippet&q=reserve%20&f=false at 37-40, accessed on 11 Jul 13. See also Center for Army Lessons Learned, *National Defense Act of 1916*, available at http://usacac.army.mil/cac2/call/thesaurus/toc.asp?id=33493, accessed on 11 Jul 13; US Army Cadet Command, *History of Army ROTC*, available at http://www.cadetcommand.army.mil/history.aspx, accessed on 11 Jul 13.

[18] "Final Report of the Chief of Air Service, American Expeditionary Forces" in *United States Army in the World War 1917-1919.*

[19] In 1933, the National Guard formally became a component of the Army. 48 Stat. 149, 155.

[20] Pub.L. 80–253, *National Security Act of 1947*, 61 Stat 495, 502, 26 Jul 47, accessed at http://www.webcitation.org/5Xi9eEYG9 on 11 Jul 13.

[21] Major General Earle E Partridge, cited in Cantwell, p. 23.

[22] Cantwell, p. 33.

[23] Annual Report of the Chief of Air Corp, WDAR, 1934, p. 29.

[24] Library of Congress, *Historical Attempts to Reorganize the Reserve Components*, Oct 07, at 2-3, 8, and 14, accessed at http://www.loc.gov/rr/frd/pdf-files/CNGR_Reorganization-Reserve-Components.pdf on 11 Jul 13 (hereinafter *Historical Attempts to Reorganize*).

Following the experience of fighting an unpopular war in Vietnam, the 1973 Total Force Policy intertwined the RC and AC forces in an effort to limit the President's ability to conduct extended operations without calling up the RC.[25] This policy echoed the original intent of the Founding Fathers to have a small standing army, supplemented by citizen-soldiers in times of national emergency.[26]

Since World War II, RC forces have routinely been underfunded and ill-equipped by the executive branch.[27] Consequently, Congress passed laws to directly fund, equip, and designate leadership of RC forces separately from the AC. Thus, while the laws described below may seem obstreperous and inefficient, and they might appear to impinge upon a collective effort to move the RC from a strategic to an operational reserve without calling those forces to active duty – this result is not an accident. It is an intentional exercise of congressional powers to restrict the executive branch and to protect the representative form of government. These laws will not be easily changed because they are the product of a 200-year-old (and still raging) power-struggle between the legislative and executive branches and the federal and state governments.[28]

Potential legal limitations to TFI FSS efforts include: financial requirements, duty status limitations, and end strength caps.

**Legal Concepts – Financial Requirements**

The Purpose Statute requires federal employees and military members to expend funds only for the purposes established by Congress – or reasonably related and necessary to carry out those purposes.[29] Violations of the Purpose Statute can result in violations of a criminal statute called the Antideficiency Act (ADA), which prohibits federal employees and military members from authorizing or expending funds in excess of the amounts appropriated by Congress or permitted by agency regulations.[30] Generally, this means RC personnel cannot perform missions assigned to the AC for which the AC has received congressional appropriations (i.e. money or personnel).

In situations where the AC needs to obtain services beyond their capabilities, there are statutory authorities which can be availed to meet these needs. For example, under the Economy Act, a federal agency, or military component, may obtain goods and services from an outside source if it reimburses the other agency, or military component, for those goods and services according to a signed agreement or order.[31]

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[25] Doubler, Michael and Renfroe, Vance. "The National Guard and the Total Force Policy". *The Modern National Guard*. Tampa, Fl.: Faircount LLC, 2003. 42-47, available at http://www.minutemaninstitute.org/publications/National%20Guard%20and%20Total%20Force.pdf, accessed on 11 Jul 13.

[26] DoD 1215.15-H at 6.

[27] DoD 1215.15-H at 7; *Historical Attempts* at 2-3, 8, and 14.

[28] See also *Historical Attempts.*

[29] 13 USC § 1301.

[30] 32 USC § 1341, 1517.

[31] 31 USC § 1535

**Legal Concepts – Reserve Component Duty Statuses**

In addition to financial limitations, Congress has established a variety of duty statuses for RC members and listed the types of work members can perform in those statuses. Traditional reserve (TR) and drill-status guardsmen (DSG) are required to serve in military status at least one weekend a month and two weeks during each year.[32] For purposes of this memo, full-time support (FTS) guard and reserve members include Active Guard and Reserve (AGR) (military FTS) or dual-status military technicians (civilian FTS who are required by law to also be members of a guard or reserve unit).[33] The scope of duties that FTS members can be assigned is limited by the financial matters outlined above and by express duty limitations established in a variety of statutes. For example, Title 10 and Title 32 AGRs' primary duties are organizing, administering, recruiting, instructing or training (OARIT) the RC.[34] Technicians' primary duties include organizing, administering, instructing or training (OAIT) the RC, and maintaining or repairing supplies and equipment (including aircraft) of the armed forces.[35]

In addition to these primary duties, FTS members can support various operations or missions specified in statutes, as long as those additional duties "do not interfere" with the FTS members' primary duties of OARIT/OAIT for the RC and maintenance/repair of armed forces aircraft and equipment.[36] The list of permissible additional duties under Title 32 is much shorter than the list under Title 10.[37] The extent to which these additional duties can be performed is not clear because the phrase "do not interfere" is not defined in the statutes.

In addition to DSG and FTS duty status, ANG members may also be serving in FTNGD status which might include training or other duty (not inactive duty), annual tour (AT), operational support funded by the RC for any mission assigned to the unit,[38] and homeland defense activities authorized by the Secretary of Defense.[39] The duty performed by these ANG members is restricted by the statutes under which they are serving, as discussed below.

Finally, the law allows an RC member who is on active duty other than for training under Title 10 to be detailed or assigned to any duty authorized by law for members of the regular component.[40] This statute applies to ANG and AFR members who are in ADOS funded by the AC.[41] We caution the reader not to interpret this statute (10 USC § 12314) too broadly, because

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[32] 10 USC § 12301; 32 USC § 502.

[33] AFI 36-2132, *Full-Time Support (FTS) to the Air Force Reserve*, 23 Mar 12, para 1.1.1. The Air Force also employs a small number of non-dual status technicians who are not required to be members of a guard or reserve unit. 10 USC § 10217. Because these non-dual-status technicians are also bound by 10 USC § 10216 (see 10 USC §10217(b)(1)), the distinction is irrelevant here and non-dual-status technicians will not be addressed separately in this memo.

[34] 10 USC §§ 101(d)(6)(A) and 12310(a); 32 USC § 328.

[35] 10 USC § 10216(a); 32 USC § 709(a).

[36] 10 USC §§ 12310(b), 10216; 32 USC §§ 328, 709.

[37] *Compare* 10 USC §§ 10216(a) and 12310(b) *with* 32 USC §§ 328(b), 502(f)(2), and 709(a).

[38] 32 USC § 502(f)(2)(A)

[39] 32 USC § 901.

[40] 10 USC § 12314.

[41] AFI 36-2254 volume 1, *Reserve Personnel Participation*, 26 May 10 ("AFI 36-2254V1"), Chapter 4 and paras.6.3.3.1.

it cannot be used to relieve a Title 10 AGR from the legal requirement to perform OARIT for the RC as a primary duty.

**Legal Concepts – End Strength Caps**

Each year, Congress establishes the maximum numbers of people that can be in the Air Force, AFR and ANG.[42] Congress allows the AC to exceed these numbers by two to ten percent and allows certain RC members who are performing duties for the AC in Title 10 active duty status to do so without being counted against AC end strength for up to 1095 days in any 1460 day period (i.e. three out of four consecutive years).[43] If the AC commits through an original set of orders to bring an RC member on active duty status for more than 1095 days, then that person counts toward AC end strength for the total number of days covered by the orders. If, however, the 1096th day is reached through a series of orders, collected over time, then that person counts toward AC end strength only for the number of days on active duty that exceed 1095.[44]

Congress also sets the total number of RC members who may perform duty in AGR and technician statuses, each year.[45]

**Applying Statutes to the Performance of FSS Duties by Members of the RC for AC**

Applying these legal concepts to A1's 3-to-1 project outlined above, we find that RC members can legally provide FSS services to AC personnel in all duty statuses, to a varying degree.

**TR and DSG:** TR and DSG are required to serve in a federal status a minimum of one weekend a month and two AT weeks of the year.[46] Because these RC unit members do not work during the typical AC work week (Monday-Friday, 0730-1630), they could not provide full-time support to the AC. Nevertheless, if an AC member required FSS services during a drill weekend or an RC member's AT and that RC member could perform those services as part of his/her training for his/her federal mission, then the incidental benefit received by the AC member would not violate the Purpose Statute or ADA. In other words, if the RC member was going to perform the services as part of his/her training anyway, the fact that an AC member incidentally benefited would be inconsequential.

Unfortunately, there is no bright line rule to determine when the benefits to the AC exceed the "incidental" threshold and are no longer justified by the training provided to RC personnel. In evaluating these cases, we generally consider the following factors:

a. **Whether performance of the federal operational mission is consistent with the unit's formalized training program.** If the services the FSS member will be asked to perform are the same as the services the FSS member will be performing when in active duty status for a federal mission, then there is a demonstable training benefit.

[42] 10 USC §§ 115(a-c) and 523.
[43] 10 USC § 115(b)(2), (f), and (g).
[44] Id.
[45] 10 USC § 115(a) and (d).
[46] 10 USC § 10147; 32 USC § 502(a).

If, however, the RC unit does not use DCAPES, for example, or would not perform the specifically requested FSS service when activated, then there is no training benefit from the FSS services provided and the performance of such a service by RC personnel for AC personnel would not be justified as an incidental benefit.

b. **Whether the federal mission can be performed without the RC unit.** If the RC unit stopped providing FSS services, would the AC forces still be able to accomplish their federal mission? If there are only a few AC forces that would need assistance and the AC could service them elsewhere without much difficulty, then this supports the argument that the purpose of the task was merely for training. If the level of effort is more onerous than that, or no one in the AC can assist if the RC forces no longer provide assistance, then it is fairly clear the primary purpose of the task was to accomplish the federal mission, not to simply train the RC.[47]
c. **Whether the use of FTS or FTNGD RC members is disproportionate.** If the RC unit needs to place additional members on FTS or FTNGD status in order to accomplish the AC FSS services, then it is pretty clear those additional FTS and FTNGD members are not being utilized for training or their statutory OARIT purpose. Those additional FTS and FTNGD members are being brought into or maintained in a full-time status, to service AC clients – which is a federal, AC, mission and should be funded through AC appropriations.

It helps to consider an example of incidental benefit: A RC Red Horse team needs to conduct training on drilling a fresh water well in a remote or austere location (one of their specific Mission Essential Task Listing (METL) responsibilities). If that Red Horse team deploys to Haiti, or another non-developed or minimally-developed nation to conduct training in an austere environment, it does not matter that at the end of their required training, the Haitian people incidentally benefitted by the well left behind by the performance of the Red Horse team's training. The purpose of this training was for the Red Horse team to gain the experience of operating in an austere environment—i.e., to train to a METL. It is perfectly legal for the Red Horse team to perform this labor. Of course, the materials necessary to construct the well would require an independent funding source (e.g., World Bank, United Nations, or foreign aide could be used to procure the necessary well materials).

The same is true here. If RC FSS members will need to provide DCAPES and other FSS services to AC personnel when they are performing their Title 10 active duty mission and the RC FSS members need to train to perform those duties, then it does not matter that an AC member might incidentally benefit from that training by having their actual DCAPES orders cut by an RC member.

At some point, of course, this theory can be stretched beyond credulity where the RC members are no longer receiving a training benefit and the services are simply being provided to support AC forces. At that point, other legal alternatives need to exist which support the performance of these duties.

[47] This factor considers the volume of demand in a non-mobilized state. It would be acceptable for the RC unit to be mobilized to meet peak demand.

A second legal theory available to support the use of TR or DSG members to perform FSS duties for AC members is called "the de minimis doctrine." Using this legal theory, TR or DSG members may also provide FSS services to AC members in such a small amount that the effort required to research, substantiate, and reconcile records to account for those services would grossly outweigh any potential benefit to the taxpayer. The function of "the de minimis doctrine" is "to place 'outside the scope of legal relief the sorts of intangible injuries, normally small and invariably difficult to measure, that must be accepted as the price of living in society.'"[48] This legal theory would allow the RC to occasionally provide FSS services to an AC member in such a small amount that it would not be worth the effort required to pursue reimbursement/accountability. Similarly, if an RC member on duty had an hour or two of excess time, such that assisting an AC member would not cause any incremental cost increase to the RC, then it is likely outside the scope of legal relief. This theory, though, would not allow RC members to perform FSS services to AC members on a regular basis or when it amounted to a more substantial workload.

**FTS and FTNGD:** FTS RC members (including AGRs and technicians in Title 10 and Title 32 duty statuses) and FTNGD are in federal duty status during the typical AC work week and like TR and DSG, may provide incidental and de minimis FSS services to AC members as described above.

In addition, AGRs and technicians ***in Title 10 status*** (which, at the unit level will only be AFR members)[49] may provide services to the AC on a more regular basis if (1) the mission is assigned to the RC (for technicians the assignment must be directly to their unit); to a composite AC/RC Air Force unit; or a joint unit; and, (2) the services provided to the AC do not interfere with the AFR members' primary duties of performing OARIT for the RC.[50] For purposes of this memo, therefore, if providing FSS services to AC squadron "X" is assigned as a mission in whole or in part to an RC member's unit, Title 10 AGRs and technicians assigned to that unit may provide services to squadron "X" members to the extent those services do not interfere with the AGRs' and technicians' primary OARIT/OAIT duties.[51]

***Title 32*** (ANG) AGRs and technicians may also provide FSS services to the AC as an additional duty that "does not interfere" with their primary duties if the mission is undertaken by their unit at the request of the President or Secretary of Defense.[52] The statutes that govern ANG FTS members do not include the ability to perform missions assigned to the ANG member's unit by a

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[48] James Nemerofsky, "What is a 'Trifle' Anyway?" Gonzaga L. Rev., 2001/02, 315-341, 323 quoting 27A AM. JUR. 2D Equity § 118, at 599 (1996) (citations omitted). Available at http://blogs.gonzaga.edu/gulawreview/files/2011/02/Nemerofsky.pdf, accessed on 11 Jun 13.

[49] ANG AGRs at the unit level are in Title 32 duty status. See footnote 1 above.

[50] 10 USC §§ 10216(a)(3)(A), 12310(b)(1). Title 10 AGRs may also advise the Secretary of Defense, military secretaries, the Joint Chiefs of Staff and combatant commanders regarding RC matters. 10 USC §§ 10216(a), 12301(b).

[51] If providing FSS services to squadron "X" is assigned to the RC, Title 10 AGRs may provide those services regardless of the unit to which the mission was assigned as long as the services do not interfere with the AGR's primary OARIT duties. 10 USC § 12310(b)(1). Or, if the mission is assigned to a unit composed of elements from more than one component, one or more RC units, or a joint forces unit, then Title 10 AGRs and technicians assigned to that unit may provide FSS services to AC members as long as doing so does not interfere with their primary OARIT/OAIT and/or maintenance duties. 10 USC §§ 10216(a)(3)(B)(i), 12310( b)(2)(A).

[52] 32 USC §§ 502(f)(2)(A) and 709(a)(3)(A) & (B).

lower level of authority, to the RC generally, to a unit comprised of elements from more than one RC, or to a joint forces unit; these options are reserved for Title 10 status.[53]

You have asked that we explain why this office has recently found a proposal for ANG technicians (in Title 32 status) to perform maintenance on AC aircraft to be legally sufficient and why the analysis in that opinion does not apply to FSS services. We recently concluded that a proposal to use ANG technicians to maintain and repair ANG aircraft in support of an AC mission was legally sufficient because: (a) the law explicitly allows ANG technicians to maintain and repair supplies and equipment issued to the National Guard **or the armed forces** as a primary duty[54] and (b) the ANG would be reimbursed by the AC for all incremental costs associated with the increased personnel and use of the aircraft caused by the AC mission, in compliance with the Economy Act.[55] In the case of staffing an FSS, the statute does not expressly allow Title 32 FTS personnel to perform FSS services benefitting the AC.

***Both Title 10 and Title 32*** FTS and FTNGD personnel in a TFI unit (whether formally or informally associated) may also serve AC customers without limitation, as long as the AC/RC mix within the FSS matches or closely resembles the AC/RC mix of the FSS customers. In other words, if the FSS is 70% AC/30% RC and the FSS customers are 70% AC/30% RC, then it does not matter which FSS member serves which client. The benefits to each component are proportionate.

**ADOS:** In ADOS status funded by the AC, there are no limits to the amount or kind of support RC personnel provide to AC members. As stated above, an RC member in ADOS status can be assigned any duty that could lawfully be assigned to an AC member.[56] It is important to note, however, that if a particular RC member is on ADOS status for more than 1095 days in any 1460-day period (or more than three out of four years), then s/he is counted against AC end strength, as discussed in the Legal Concepts – End Strength Caps section above.

**Legislative Proposals**

You have asked us to identify elements of the law that would have to change to lift the limitations to RC members' duties outlined above. The first limitations are found in statutes (such as 32 USC § 102) and in the Constitution which establish the proper use of ANG personnel and resources when not in federal status. Constitutional amendments are rare and very difficult to achieve. Moreover, political will is currently too fractured to obtain a simple majority on most votes, let alone the two-thirds majority required for a constitutional amendment.[57] Added to that, the National Guard has significant political power in Congress and recently acquired a seat on the Joint Chiefs of Staff.[58] The National Guard is unlikely to cede that power to the Department of the Army and Department of the Air Force by allowing Guard troops to be used for federal missions without compensation or limitation.

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[53] Compare 32 USC §§ 502(f)(2) and 709(a) with 10 USC §§ 12310(b) and 10216(a)(3).
[54] 10 USC §§ 101(13)(defining supplies), 709(a)(2).
[55] DoD 7000.14-R, *Financial Management Regulation*, vol 11A, Ch1, § 010203 provides guidance on reimbursable labor costs for the Economy Act orders.
[56] 10 USC § 12314.
[57] U.S. Constitution, Art. V.
[58] 10 USC § 10502(d).

A second set of limitations are financial: namely the Purpose Statute, ADA, and Economy Act. Congress is unlikely to change these statutes as they do not want executive departments or agencies to obligate taxpayer funds without regard to congressional limitations or for purposes other than those specifically approved by Congress. Doing so would significantly undermine Congress' "Power of the Purse." Furthermore, Congress will argue the components can purchase goods and services from each other as authorized by the Economy Act, so financial restrictions are already sufficiently flexible to accommodate the desire to use the various components in various roles.

The FSS could avoid Purpose Statute and ADA violations, however, by seeking amendments to statutes addressing the third set of limitations: RC duty statuses. For example, current laws allow Title 32 technicians to perform maintenance on AC aircraft and equipment as a primary duty, so there would be no duty status or Purpose Statute /ADA violation if a technician were to perform this work.

Similarly, if Congress specified FSS services to the AC as a permissible primary duty of AGRs and technicians,[59] there would be no Purpose Statute, ADA, or duty status violation if an RC member were to perform this work. Alternatively, the same result could be accomplished if laws requiring AGRs and technicians to perform only OARIT/OAIT for only "the reserve components" were amended to remove the phrase "the reserve components."[60] Then, AGRs and technicians could organize, administer, (recruit), instruct, and train all forces without limitation. This would be similar to the ability already permitted by Congress for technicians to maintain all armed forces equipment/supplies without regard to "ownership/possession."

These efforts, however, would likely meet with resistance. Statutes governing AGRs and technicians generally apply to both the Army and the Air Force. Any legislative proposals would either need to be coordinated with and approved by the Army, or drafted in such a manner that they would only apply to the Air Force.[61]

Additionally, these statutory duty limitations (non-interference with OARIT/OAIT) were created in FY07, when (after coordinating with the Army) the Air Force asked Congress to allow AGRs and technicians to train AC forces and to perform other missions assigned by the President, Secretary of Defense, or Secretary of the Air Force to the RC unit. Congress granted the Air Force's request, but limited RC forces' ability to perform these additional duties to a level that does not interfere with their primary OARIT/OAIT duties to the RC.[62] Further attempts to revise this statutory language will be perceived as further attempts to diminish congressional control of the armed forces and increase the potential for federal over-reaching/abuse of the state militia.

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[59] 10 USC §§ 10216(a), 12310(b); 32 USC §§ 328(b), 502(f)(2), 709(a).

[60] 10 USC § 12310(d) and 32 USC § 328(b).

[61] See, for example, Section 345 of the Ike Skelton Fiscal Year 2011 National Defense Authorization Act (which now resides in the notes to 10 USC § 8062), which requires all three Air Force component leaders to sign a written agreement for all aircraft transfers from the RC to the AC. No other service is required to sign agreements before transferring equipment between components.

[62] John Warner National Defense Authorization Act for Fiscal Year 2007, P.L. 109-364, Section 525, "Authority for Active Guard and Reserve Duties to include Support of Operational Missions Assigned to the Reserve Components and Instruction and Training of Active Duty Personnel," 17 Oct 06.

That being said, the political climate has changed significantly over the past few years. In 2012, Congress perceived that the AC wanted to marginalize and remove missions, aircraft, and personnel from the RC, particularly the ANG. Consequently, Congress formed the National Commission on the Structure of the Air Force (the Commission) and charged it with determining how the AC and RC should be configured, organized, and structured.

If the AC and RC were to jointly approach Congress and the Commission in the near term with a proposal to move RC-compatible mission sets – namely those that are enduring, predictable, repeatable, and experience-demanding – to the ANG (such as pilot training and potentially FSS services) in a way that respects congressional authority and States'/governors' rights, Congress and the Commission might be amenable to making these statutory amendments than they were in 2006.

Moreover, these changes would likely help stem the loss of highly trained and experienced AC airmen to the private sector. The AFR Recruiting Service reports that between 2005 and 2012, the number of non-prior service (NPS) recruits needed to meet recruiting goals nearly doubled, because AC members simply are not joining the RC at their previously high historic levels. They are quitting military service altogether.

Consequently, in 2012, more than 44 percent of AFR recruits had never served in any branch of the military before joining the reserves.[63] This means RC training costs will have to be significantly increased. If this trend is not corrected, the historically deep trough of experience in the RC may be in jeopardy. If Congress were to allow the Air Force to move enduring, predicable, repeatable, and experience-demanding mission sets to the RC, AC members who prefer a lower operational tempo and no more PCS moves, but who would still like to fly or otherwise participate in a fulfilling Air Force career, might be inspired to transfer to the RC rather than leave military service altogether.

To that end, a more conservative legislative proposal than those discussed above would be to allow Title 32 AGRs and technicians to perform duties in support of operations or missions assigned in whole or in part to the member's unit or the reserve components – similar to the language that applies to Title 10 technicians and AGRs, respectively.[64] This language, though, was considered and rejected by Congress in 2006 as being overly-broad. Even with recent political changes, therefore, this language may have difficulty garnering enough support.

An even-more-narrow approach would be to identify FSS services specifically as an additional duty for FTS members in Title 32 status. This would allow Title 32 RC members to provide FSS service to AC personnel on more than a de minimis or incidental benefit basis, but only to the point of not interfering with current congressionally-mandated OARIT/OAIT primary duties. Draft legislation to accomplish this more narrow approach was previously provided to AF/A8 and is attached to this memorandum.

Finally, a fourth set of limitations to TFI FSS services is imposed by the congressionally-mandated active duty end strength caps. These caps limit the number of RC members that can be

[63] Unofficial reports from the ANG report a similar trend with NPS now constituting 54 percent of ANG recruits.
[64] 10 USC §§ 10216(a)(3)(A), 12310(b)(1).

placed in AGR and technician duty status and the number of RC members that can be brought to active duty status to perform AC missions. Lifting the AGR/technician end strength caps, however, would not provide any relief in this situation because even if more AGRs and technicians could provide support, the financial and duty status limitations described above would still apply.

Lifting the end strength limit for the number of RC forces that can be brought on Title 10 man-days in active duty status would provide relief. The AC, however, would also have to reapportion its man-days to support such an endeavor or ask Congress to increase its man-day budget. Given the historical desire of Congress to control military action and the current austere fiscal environment, it may prove difficult to gain support from Congress for either request.

Based on the above analysis and legislative options, if you anticipate that FSS support to AC members will be needed on more than a de minimis, incidental, or proportionate basis, we recommend providing man-days to RC forces to provide periodic support and/or seeking legislative change to allow FSS services to be provided as a primary duty of AGRs and technicians in both Title 10 and Title 32 status.

OpJAGAF 2013/10 19 July 2013