

LEGAL ASSISTANCE

SecAF Authority to Provide SVC Legal Assistance to the ARC

The National Guard Bureau asked for the Air Force position on whether the Secretary of the Air Force may lawfully authorize members of the Air Reserve Components (ARC) – and more specifically, Air National Guard (ANG) members in title 32 status – to receive Special Victim’s Counsel (SVC) legal assistance. We conclude that the Secretary may lawfully do so.

Title 10 of the United States Code (USC) Sections 1044e and 1565b authorize the Service Secretaries to provide SVC services to members of the armed forces, or a dependent of a member, who is the victim of a sexual assault “under” and “pursuant to” Section 1044.¹

Section 1044 provides that “[s]ubject to the availability of legal staff resources,” the Secretary may provide legal assistance in connection with personal civil legal affairs “to the following persons:

- (1) Members of the armed forces who are on active duty.⁽²⁾
- (2) Members and former members entitled to retired or retainer pay or equivalent pay.
- (3) Officers of the commissioned corps of the Public Health Service who are on active duty or entitled to retired or equivalent pay.
- (4) Members of reserve components not covered by paragraph (1) or (2) following release from active duty under a call or order to active duty for more than 30 days issued under a mobilization authority (as determined by the Secretary), for a period of time (prescribed by the Secretary) that begins on the date of the release and is not less than twice the length of the period served on active duty under that call or order to active duty.
- (5) Dependents of members and former members described in paragraphs (1), (2), (3), and (4).
- (6) Survivors of a deceased member or former member described in paragraphs (1), (2), (3), and (4) who were dependents of the member or former member at the time of the death of the member or former member, except that the eligibility of such survivors shall be determined pursuant to regulations prescribed by the Secretary concerned.
- (7) Civilian employees of the Federal Government serving in locations where legal assistance from non-military legal assistance providers is not reasonably available, except that the eligibility of civilian employees shall be determined pursuant to regulations prescribed by the Secretary concerned.”

¹ All subsequent statutory references in this memorandum are to title 10 of the USC, unless otherwise stated.

² The Air Force has acknowledged this phrase “includes Air Reserve component members performing Active Guard/Reserve (AGR) tours . . .” *The Military Commander and the Law* (11th ed. 2012) at 328.

Paragraphs 1, 2, and 4 explicitly authorize the provision of SVC services to ARC members in specified duty statuses. The canon of statutory construction *expressio unius est exclusio alterius* might suggest the statute be interpreted as precluding an extension of legal assistance to ARC members in duty statuses that are not listed.³ We caution, however, against such a narrow reading. As the Supreme Court has noted, this canon “expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent when that is not otherwise manifest. In such instances, it is of deciding importance; in others, not.”⁴

An equally important canon of construction is the requirement to construe statutes upon the same subject matter in a manner that allows both statutes can be enforced (*in pari materia*).⁵

In addition to the Secretaries’ express authority to provide legal assistance under Sections 1044, 1044e, and 1565b, the Secretaries are more broadly empowered – indeed required – to organize, equip, train, mobilize and administer (“including the morale and welfare of personnel”) their Departments.⁶ The Secretaries are also responsible for “the functioning and efficiency of the Department”; formulating “policies and programs...that are fully consistent with national security objectives and policies”; and to ensure the “effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense...”⁷

These authorities provided the bases for the Services’ decision to provide legal assistance to various categories of armed forces members for decades prior to the enactment of Section 1044.⁸ The Services, therefore, viewed the bill that eventually became Section 1044 as “formal recognition of the need for and the value of [the existing legal assistance] program.”⁹ Congress apparently did not disagree, stating in the House Conference Report that the enactment of Section 1044 was intended “simply, to clarify the existing status of the [legal assistance] benefit.”¹⁰ Section 1044 was not intended to expand the benefit beyond that which was then being afforded or to justify the expansion of facilities or personnel needed to accomplish the

³ *United States v. Barnes*, 222 U.S. 513, 518 (1912) (the Latin phrase means the expression of certain the express mention of one thing excludes all others).

⁴ *Id.* at 519.

⁵ *United States v. Freeman*, 44 U.S. 556, 564 (1845) (“The correct rule of interpretation is that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing anyone of them, and it is an established rule of law that all acts *in pari materia* are to be taken together, as if they were one law.”).

⁶ 10 USC §§ 8013(b)(2), (4), (5), (7), (9) (Secretary of the Air Force authorities). *See also* 10 USC §§ 3013 & 5013.

⁷ 10 USC §§ 8013(c)(1), (2), (3); 10 USC §§ 3013 & 5013.

⁸ Public Law 98-515, Section 651 (October 19, 1984) (enacting Section 1044); Department of the Army letter to The Honorable Melvin Price, Chairman, Committee on Armed Services, referencing H.R. 3670, 98th Congress drafted in response to The House Armed Services Committee August 1, 1983 request for Executive Comment from DOD (see <http://beta.congress.gov/bill/98th-congress/house-bill/3670/all-actions-with-amendments/>); Major General Hugh R. Overholt letter to All Judge Advocates, February 16, 1984 (establishing legal assistance services for reserve component members on active duty and inactive duty status eight months before Section 1044 was enacted); OpJAGAF 1965/450, June 11, 1965 (extending legal assistance to AFROTC 6-week trainees); Patricia A. Kerns, *The First 50 Years: U.S. Air Force Judge Advocate General’s Department*, at 16 (The Office of The Judge Advocate General was established in 1948, including a Military Affairs and Legal Assistance Branch – 37 years before Section 1044 became law).

⁹ Department of the Army letter to The Honorable Melvin Price, Chairman, Committee on Armed Services, at 1.

¹⁰ H.Conf.Rep. 98-1080, *reprinted in* 1984 U.S.C.C.A.N. 4282

“direct military mission.”¹¹ Importantly, however, Congress did not censure the Services for having providing legal assistance under their inherent authorities before Section 1044 became law, nor did it state any intent to cap, limit, or otherwise change the Services’ historical practice of doing so.¹²

In 2012, the Department of Defense General Counsel (DoD/GC) similarly concluded that Section 1044 cannot and should not be read as a constraint on the scope of legal services that may be provided to victims of sexual assault

Section 1044, therefore, has not historically been and should not now be interpreted as a constraint on Service Secretaries’ inherent authorities. Read *in pari materia* with the Secretaries’ other statutory authorities, therefore, we conclude that the Service Secretaries have always had and still have the inherent authority to formulate policies and programs that define, expand, and/or contract the scope of space-available legal assistance available to members of the armed forces to provide for the morale and welfare of military personnel; to ensure the functioning and efficiency of their Department; and to effectively and timely implement the policies of the President and the Secretary of Defense.¹³

Similarly, Section 1044e should not be viewed as a restriction on the Service Secretaries’ authorities. While Section 1044e expressly authorizes only certain types of legal assistance for victims of an “alleged sex-related offense” and defines the offense to include only attempts to commit and actual violations of articles 120, 120a, 120b, 120c, or 125 of the Uniform Code of Military Justice (UCMJ) – meaning the alleged perpetrator must have been subject to the UCMJ – this does not mean that the Service Secretaries are prohibited from offering other types of legal assistance to victims of sex-related offenses committed by ARC members in title 32 status, ARC members in no duty status at all, or by civilians who have no military affiliation whatsoever. The key to the analysis is whether offering such legal assistance to ARC members and their dependents upholds the Secretary’s statutory responsibility to organize, equip, train, mobilize, administer, and provide for the morale and welfare of a service member. As outlined in this opinion, we conclude that within certain parameters, it does.¹⁴

DoD direction to the Service Secretaries in August 2013 to “establish a special victim’s advocacy program best suited for that Service that provides legal advice and representation to the victim throughout the justice process” similarly did not constrain the Secretaries’ options.¹⁵

¹¹ Id.

¹² Id.

¹³ The Service Secretaries have variously defined the categories of legal assistance available and the list of eligible beneficiaries over time in their regulations, instructions, policy memoranda, etc. to accomplish these goals. See Army Legal Assistance Program Regulation 27-3 (authorizing case-by-case exceptions on providing legal advice outside the scope of the legal assistance program); Air Force Instruction 51-504, May 24, 2012 (authorizing legal assistance to victims of crime, including sexual assault); OpJAGAF 1965/450, June 11, 1965 (extending legal assistance to AFROTC 6-week trainees); Navy-Marine Corps Legal Assistance Program, Navy JAG Inst 5801.2A (“limitations on services may be necessary due to emergent requirements, overall demand for services, personnel shortages, limited resources; or because the expertise required for a complex practice area does not match the competence or experience of the attorneys currently assigned to that office”).

¹⁴ Recently, the DoD Deputy General Counsel agreed, concluding that neither Section 1044 nor Section 1044e precludes the Secretary from authorizing SVCs to provide services that exceed the scope of those statutes.

¹⁵ Secretary of Defense Memorandum, “Sexual Assault Prevention and Response,” August 14, 2013, at 1.

Instead, DoD expressly required all Services to “do all that is possible within limits of available resources to assist victims of crime and harassment.”¹⁶ Importantly, neither the directive nor the subsequent instruction limited the Secretaries’ or Services’ responsibilities on the grounds of the victim’s duty status at the time of the incident.

The Secretaries’ authority to provide SVC legal assistance is consistent with current Air Force policy regarding all other legal assistance services. For several years, the Air Force has provided legal assistance to ARC members, even if they were not on Title 10 status, if those members were subject to federal mobilization.¹⁷ This policy “ensures the legal difficulties of military members do not adversely affect command effectiveness or mission readiness. [Eligibility is] not determined solely by the subject matter, but by the relationship between command readiness and solving the member’s specific legal issue.”¹⁸

Based upon the above, we conclude that the Secretary of the Air Force has inherent authority, consistent with long-standing Air Force practice and subject to the availability of legal staff resources, to formulate policies and programs that extend SVC legal assistance eligibility to members of the ARC who are performing active duty, inactive duty for training, or other inactive duty service at the time of the alleged incident, and to ARC members who were not in a military duty status at the time of the alleged incident if (a) the alleged perpetrator was in a duty status or (b) there is a nexus between the sexual assault and the victim’s readiness to mobilize or deploy.

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¹⁶ DODI 6400.07, *Standards for Victim Assistance Services in the Military Community*, November 24, 1013.

¹⁷ *The Military Commander and the Law* (9th ed. 2008) at 330 (the Air Force provides legal assistance to “Reservists and National Guard not on Title 10 status, but subject to federal mobilization...”); *The Military Commander and the Law* (11th ed. 2012) at 328. Since 2001, the ANG has authorized pre-mobilization legal assistance for title 32 Airmen and has recognized the provision of these services as “within the inherent right of the commander to ensure unit readiness.” ANGI 51-504, *Air National Guard Legal Assistance Program*.

¹⁸ *Id.*